State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CONCORD SCHOOL DISTRICT Complainant	:	
v.	:	CASE NO. T-0220:28
CONCORD EDUCATION ASSOCIATION NEA-NEW HAMPSHIRE Respondent	:	DECISION NO. 96-023

APPEARANCES

Representing Concord School District:

Edward Kaplan, Esq.

Representing Concord Education Assoc., NEA-NH:

Wally Cumings, UniServ Director

Also appearing:

Robert Silva, Assistant Superintendent
Kerry L. Clock, Concord Education Association

BACKGROUND

The Concord School District (District) filed unfair labor practice (ULP) charges against the Concord Education Association, NEA-New Hampshire (Association) on January 1, 1996 alleging a violation of RSA 273-A:5 II (f) relating to a wrongful demand to arbitrate a matter asserted to be outside the definition of a grievance as defined in the CBA. The Association answered by oral opening argument when this matter was heard by the PELRB on March 12, 1996.

FINDINGS OF FACT

1. The Concord School District is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Concord Education Association is the duly certified bargaining agent for teachers, nurses and others employed by the District.

3. The District and the Association are parties to a collective bargaining agreement (CBA) for the period September 1, 1993 to August 31, 1996. Article IV (A) of that agreement defines "grievance" as "a claim based on the interpretation, meaning or application of any of the provisions of this Agreement. Only claims based upon the interpretation, meaning or application of any of the provisions of this Agreement shall constitute grievances under this Article." The grievance process ends with final and binding arbitration whereby "the arbitrator is limited in his/her authority to interpret the contract in the resolution of the issue submitted to him/her by the parties and has no authority to alter, change or modify any provisions of this Agreement." Teachers and "degreed nurses" are covered by salaries set forth in Appendix C to the CBA while non-degreed nurses are covered by salaries set forth in Appendix I.

4. Article VI (G) of the CBA contains a layoff procedure which provides, in pertinent part:

> "Whenever it is necessary for the District to layoff certified personnel, the layoff procedure will assure all such personnel rights of seniority in the area of certification for which they are employed within the District and rights to reemployment should positions open for which the laid-off employees are qualified....The District shall layoff personnel in inverse order of their year of full-time service in the District...and must reinstate them in inverse order of their being laid off...."

5. The CBA also contains language which sets forth economic benefits (e.g. wages, early retirement, and certain types of leave) for bargaining unit employees, including nurses. In particular,

Appendix C sets forth salaries for bargaining unit members other than administrators. Appendix D addresses co-curricular activities while Appendix I speaks to "non-degreed nurses" who are paid on the non-degreed nurse salary schedule which is part of the CBA. The CBA also contains language involving non-economic benefits for members of the bargaining unit, including nurses. By way of example and not in limitation, such benefits include lunch periods, preparation time, grievance procedure, procedures involving discharge and discipline, transfers, notice of vacancies and rights associated with reduction in force (RIF).

6. Notwithstanding the language of Article VI (G), there is no provision in the CBA which specifically prevents the District from subcontracting for services with outside providers.

7. During the second half of the 1994-95 school year, the District devised a plan to reorganize health care services through the school department. Part of this plan involved subcontracting nursing duties to the Concord Visiting Nurses Association (VNA) as school nurses (degreed and non-degreed) resigned, retired or transferred to teaching positions. This matter was not discussed or negotiated with the certified bargaining agent nor did the District make any attempt to change the composition of the bargaining unit on file with the PELRB or as recited in the "Recognition Clause" of the CBA. Since its involvement with the VNA, the District has ceased its practice of maintaining a substitute list to cover nurse absences within the school department on a day-to-day, or longer, basis.

8. The duties expected to be performed by nurses providing services under the District's contract with VNA do not differ from services performed by nurses in the direct employ of the District. Both types of nurses attend staff and faculty meetings. VNA obtained nurses, unlike direct employ nurses, will receive over-time compensation if they are required to work beyond the number of contracted hours agreed to between the District and VNA.

9. On July 14, 1995, K. L. Clock, Grievance Chair for the Association, filed a grievance alleging multiple

violations of the CBA, namely, the preamble, the recognition clause, negotiations procedures, salaries and other economic benefits and other [presumably non-economic] benefits. [This is to be distinguished from Clock's grievance filed on June 7, 1995 on layoff procedures which is discussed at Finding No. 8 of Decision No. 95-95.] The July 14, 1995 grievance alleged:

> The District unilaterally modified the bargaining unit by removing one of six nurse positions from the certified unit and filled the position with a contracted nurse employed by the Visiting Nurse Association. In so doing the District refused a demand to negotiate the change, has unilaterally assigned bargaining unit work to an employee outside the certified unit, has employed a school nurse under a private contract intended to defeat negotiated terms and conditions set forth in the collective bargaining agreement, and has established a dual employer relationship with a bargaining unit position.

The foregoing grievance alleges a violation of the CBA by referencing "negotiated terms and conditions" and thus falls within the definition of a grievance as found in Article IV of the CBA.

10. According to testimony from Assistant Superintendent Robert Silva, and to be distinguished from the Conant School vacancy in Decision No. 95-95, a "fragile student" nurse vacancy occurred in the Broken Ground School in Concord. No RIFed or laid-off nurse, if there were any, under Article VI (G) was offered the vacancy or recalled thereto.

11. On December 6, 1995, the Association filed a demand for arbitration with the American Arbitration Association claiming that the actions taken by the District, more particularly enumerated in Finding No. 9, above, violated various provisions of the CBA. The District then filed the pending ULP on January 16, 1996 seeking a cease and desist order directing the Association to refrain from further processing of the instance grievance and other relief.

12. The Association believes the District's actions violate the contract and seeks redress through the grievance procedure of the CBA. The District believes the pending grievance is outside the definition of "grievance" in the contract and infringes on its management prerogatives found in RSA 273-A:1 XI.

DECISION AND ORDER

As was the case in the earlier version of this ULP complaint involving the same parties which was heard and adjudicated by this Board in Decision No. 95-95, our role, again, is only to determine if the Association's conduct constitutes an unfair labor practice under RSA 273-A:5 II (f) as alleged by the District. Likewise, it is not our function to determine the Association's grievance on the merits, only if it is grievable under the standards and cases referenced below.

The scope of the complaint in this case is much broader than the prior case which asserted only a violation of the layoff and recall procedures of the CBA. Notwithstanding that the Association's complaint in this case covers multiple portions of the CBA and notwithstanding that it may or may not prevail on each of the contract sections cited, the alleged violations do have a nexus with various provisions of the CBA as cited and benefits to be derived thereunder. (Finding No. 5, above.) Unlike the more specific complaint concerning the lay-off and recall provisions discussed in Decision 95-95, this case involves the more general contracting out of unit work for which the parties have negotiated wage rates and benefits. The logical extension of the complained of practice is to create a situation where two employees performing exactly the same tasks are compensated differently, both as to economic and non-economic benefits, for bargaining unit work. This is inconsistent with fair, meaningful and good faith negotiations. Thus, while management may reorganize or make decisions as to what services it may elect to provide in the school department, once it makes those decisions, the employees performing those duties must be compensated in accordance with the CBA duly negotiated between the parties. Likewise, once a change is made and employees eliminated or reassigned, the impact on remaining bargaining unit employees must be bargained.

As to the status of the Association's grievance, there must be "positive assurance" that the conduct which it is grieving was not intended to be grieved under the CBA. In Westmoreland School District, 132 NH 103 (1989), the test was that there must be "positive assurance" that the CBA is not susceptible of being

read to cover the dispute. Likewise, in Appeal of the City of Nashua, 132 NH 699 (1990), courts will not set aside an order to arbitrate unless there is "positive assurance" that the arbitration clause cannot be read to cover the dispute. See also Kearsarge Regional School District, Decision No. 95-57 (June 29, 1995). It is clear that the Article IV of the CBA defines "grievance" sufficiently broadly to encompass alleged violations of wage and benefit provisions relating to bargaining unit work, if, indeed, those violations can be established and proved.

Upon review of the facts presented and the contract language, we conclude that the actions being grieved by the Association may fall within the broad definition of "grievance" contained in the contract, depending on how they are presented. This being the case, we cannot say with the requisite "positive assurance" that the grievance definitions of the contract can be read to exclude the subject matter from the contract grievance procedure. See Concord School District, Decision No. 95-95, p. 5 (October 19, 1995). Thus, there is neither cause for us to find that the Association committed an unfair labor practice under RSA 273-A:5 II, (f) nor to issue a cease and desist order or orders as sought by the District. We direct that the unfair labor practice charges be DISMISSED and, having so ruled, further direct the parties to proceed with the grievance arbitration procedure contemplated by the contract.

So ordered.

Signed this 22nd day of April, 1996.

JACK BUCKLEY
Alternate Chairman

Alternate Chairman Buckley and Member Molan voting in the majority; Member Kidder voting in the minority.