State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

MASCENIC EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE Complainant v. MASCENIC SCHOOL DISTRICT Respondent	CASE NO. T-0341:11 CASE NO. T-0341:12 (DECLARATORY JUDGMENT) DECISION NO. 96-057
MASCENIC SCHOOL DISTRICT Complainant v. MASCENIC EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE Respondent	

APPEARANCES

Representing Mascenic Education Association:

Steven Sacks, Esq.

Representing Mascenic School District:

Douglas Hatfield, Esq.

Also appearing:

Marc Benson, UniServ Director
Susan Evon, Mascenic Education Assoc.
Penny Culliton, Self

Francine Fullam, Mascenic Regional School Dist., Supt.
Karen McDonogh, Mascenic Education Association
Dana McKenney, Mascenic Regional High School, Principal

BACKGROUND

The Mascenic Education, NEA-New Hampshire (Association) filed unfair labor practice (ULP) charges against the Mascenic School District (District) on April 18, 1996 alleging violations of RSA 273-A:5 I (g) and (h) relating to a breach of contract and failure to implement a final and binding arbitrator's award. The District then filed its answer on April 26, 1996 and also filed a Petition for Declaratory Judgment and Stay of Arbitration Decision on May 2, 1996. The Association filed objections thereto on May 17, 1996. Thereafter these matters were consolidated and heard by the PELRB on June 20, 1996. The record was held open until July 3, 1996 to permit the parties to file post hearing memoranda.

FINDINGS OF FACT

1. The Mascenic School District is a "public employer" of teachers and other personnel within the meaning of RSA 273-A:1 X.

2. The Mascenic Education Association, NEA-New Hampshire is the duly certified bargaining agent for teachers and certain other personnel employed by the District.

3. The Association and the District have a history of collective bargaining agreements, including but not limited to a CBA for July 1, 1994 through June 30, 1995 (Joint Exhibit No. 1) and one from July 1, 1995 through June 30, 1998 (Joint Exhibit No. 2). The CBA prior in time to Joint Exhibit No. 1 had been amended by a side letter dated October 22, 1992, to provide that any grievance commenced between July 1, 1993 through June 30, 1994 would be subject to binding arbitration. (Union Exhibit No. 1). This arrangement was extended by Item No. 4 of a side letter signed by the District on January 31, 1994 and by the Association on February 4, 1994 for the July 1, 1994 through June 30, 1995 school year. (Union Exhibit No. 2).

4. This case involves the disciplinary termination of a tenured teacher, Penny Culliton, who taught English for the District from 1990 to 1995. On May 15, 1995,

Acting Superintendent Francine Fullam advised Culliton that she would seek to terminate her employment for insubordination, failure to conform to rules and regulations of the District, and incompetency. The School Board heard this matter in a grievance hearing which also served as the RSA 189:13 hearing by agreement of the parties on September 7 and 11, 1995. The Board then dismissed Culliton on September 25, 1995. See School Board Decision with Findings, 9 pages (District Exhibit No. 2)

5. Culliton appealed her dismissal under Article V of the CBA which contains a four step grievance procedure. After being denied relief by the School Board, she appealed to Step 4, binding grievance arbitration, as described in Finding No. 3. Her grievance claimed that she was dismissed without just cause in violation of Article VI, Section 3 of the CBA. It provides that "an employee shall not be disciplined up to and including non-renewal and dismissal except for just cause. Just cause, for the purpose of this agreement, shall mean the evidence supports the disciplinary action."

6. This matter was heard by Arbitrator Gary Altman on January 9 and 12, 1996. At the commencement of those proceedings, the parties stipulated the following issues to be heard by him:

> "Whether the Mascenic Regional School District had just cause to dismiss Penny Culliton, as required under Article 6.3 of the Collective Bargaining Agreement? If not, what shall the remedy be?"

7. Arbitrator Altman issued his award on April 2, 1996. It reiterated how Culliton, English Department head Corriveau and Principal Dana McKenney collaborated on a grant from the Greater Piscataqua Charitable Foundation to obtain certain books for faculty sensitization and awareness on "issues surrounding homophobia and heterosexism." Ultimately four books were purchased: The Education of Harriett Hatfield by May Sarton, Maurice by E. M. Forster, The Drowning of Stephen Jones by May Sarton and Walt Whitman The Complete Poems by Walt Whitman. According to the invoice, these books were obtained in June of 1994. After other intervening events, McKenney told Culliton on January 24, 1995 that the School Board wanted these

books purchased with grant funds taken off the shelves of the English Department and that she was not to use the books in her curriculum. Altman reported that in May of 1995, McKenney noticed a student with one of the foregoing books which was to have been removed from circulation and was told by the student that it was being used for an assignment in Culliton's class. She then was directed to retrieve the books from the students and return them to McKenney. Twelve students personally returned their books to McKenney; Culliton returned the remainder. Fullam testified before Altman that, based on Culliton's conduct in the totality of the matter (which was detailed in the arbitration report in considerably more detail), she should be dismissed.

8. In his decision Altman concluded, in pertinent part, that "there can be no doubt that Ms. Culliton clearly understood what was asked of her by Principal McKenney....Ms. Culliton's actions were clearly insubordinate....Discipline for her actions was certainly appropriate." (Emphasis added.) In discussing what he called "the appropriateness of the penalty," Altman said, "the standard of just cause has long been held to embrace not only a finding of whether the alleged actions have occurred but also whether the discipline imposed by the employer was appropriate to the offense," citing to Elkouri and Elkouri, How Arbitration Works, Vol. 4, p. 668 and to Fogel, "Court Review of Discharge and Arbitration Awards," 37 Arb. J. No. 2, p. 22 (1982). Before directing a remedy, Altman held:

> There can be no question that Ms. Culliton's inappropriate behavior all revolved around the same fact pattern; the administration of the grant and the use of the grant books. The record demonstrates that Ms. Culliton was in her fifth year of employment with the School District and had never been disciplined for insubordination or any other acts that would show a pattern of her having difficulties with supervisory authority. The record cannot support the conclusion that Ms. Culliton, as a result of this incident, could no longer be an effective teacher in the School District. Considering the totality of all the circumstances, discharge is not an appropriate penalty

for her actions. Discharge is not supported by the totality of all the evidence.

Thereafter, he directed that Culliton's dismissal be reduced to a one year disciplinary suspension for which she would receive no back pay or be credited with any seniority. She was to have been reinstated to her teaching position at the start of the 1996-97 school year.

9. The arbitrator's award stated that the parties stipulated that Culliton "was an excellent English Teacher at Mascenic [r]egional High School, and an extremely valuable asset to the English Department." In testimony before the PELRB, both McKenney and Fullam confirmed the arbitrator's observations that Culliton had no prior record of disciplinary events or warnings in her file. McKinley explained that both his memo to Culliton after their meeting of September 13, 1994 (as referenced on page 4 of the arbitration award, and separately identified as Union Exhibit No. 3) and an earlier memo from former Superintendent Lates were instructive or informational and not intended to be disciplinary in nature. See also letter from Douglas Hatfield, Esquire to Marc Benson dated April 28, 1995 (Union Exhibit No. 4).

10. On April 15, 1996, the Mascenic Regional School Board voted to instruct its counsel to appeal the arbitrator's decision. On April 18, 1996 the Association filed the instant complaint seeking implementation of the arbitrator's award and a finding of unfair labor practice. The District filed its Petition for Declaratory Judgment on May 2, 1996 claiming that the arbitrator had exceeded his authority, that the decision contained a plain mistake of fact and that the decision was unsupported by a factual determination.

DECISION AND ORDER

By stipulation of the parties, we are called upon to examine two aspects of this case: (1) whether we will entertain a review of the arbitrator's award and (2) if so, whether the District will prevail in its declaratory judgment petition. The first issue is easily disposed of by our practice as well as by case law. Were the arbitration to have been an advisory one, we would have had authority, or even a mandate, to conduct a hearing to assure finality to the process. "When the parties to a

collective bargaining contract have not agreed to be bound by an arbitrator's decision, the PELRB, in the context of an unfair labor practice charge, must conduct a *de novo* evidentiary hearing." Appeal of Campton School District, 138 N.H. 287 at 270 (1994). In this case, the Association, which had binding arbitration, filed a charge for breach of contract for not following the CBA relative to the final and binding nature of the arbitration. We believe we have a basis to review based on that complaint.

The Association cited Appeal of International Association of Firefighters, 123 NH 404 (1983) in its brief for the proposition that where the working agreement between...[the parties] made no reference to the statute governing arbitration and did not provide for an appeal to the...[PELRB], but instead expressly stated that the arbitrator's award was to be binding upon both the union and the city, the...[PELRB] correctly ruled that the arbitrator's decision was not subject to review by the [PELRB] board." We believe that such a reservation did exist. The last sentence of the third paragraph of Union Ex. No. 1 provides that "the parties agree that enforcement of this agreement shall be pursuant to RSA 273-A before the Public Employee Labor Relations Board." Additionally, the RSA 542 review did not enter the CBA until it became part of Article 5.2 of the 1995-98 agreement. (Joint Ex. No. 2) This concept has further support in Board of Trustees v. Keene State College Educ. Assn., 126 NH 339 at 342 (1985) which provided that the PELRB "has no general authority to review an arbitration award, absent some indication that the parties intended to reserve a right to administrative review of the award." Again, we believe these cases support our authority to review.

As to compliance with a negotiated grievance procedure, binding arbitration in this case, followed by the Association's ULP filed April 18,1996, we again believe there is a basis for our review. "The jurisdiction of the arbitrator over the parties and the subject matter depends entirely upon the voluntary agreement of the parties." Appeal of the Board of Trustees for Keene State College, 129 NH 632 at 635 (1987). "The extent of an arbitrator's jurisdiction depends on the extent of the parties' agreement to arbitrate." City of Nashua v. Murray, 128 NH 417 at 420 (1986). This was followed four years later by Appeal of City of Nashua, 132 NH 699 at 703 (1990) holding that the agreement of the parties determines the jurisdiction of the arbitrator over the subject matter of the dispute. Here, there was an agreement to arbitrate, a stipulated issue and a binding arbitration process followed by a ULP complaint seeking enforcement. We

believe our review of the award is timely, warranted and within the contemplation of RSA 273-A.

With this in mind, we turn our attention to the pleadings, noting that the District's Declaratory Judgment Petition, by itself is, in our opinion, sufficient to trigger our review of the case as it has progressed to date. Initially, we must note that the District's petition is, at least partially, flawed in paragraphs 11, 12 and 13 relating to an alleged mistake of fact. According to testimony we heard and Union Ex. No. 4, the prior instances of District contact with Culliton did not involve disciplinary events. Finding No. 9.

The District's petition at paragraphs 10 and 17, also asserts that the arbitrator exceeded or abused his authority. We disagree. The parties stipulated an issue to be heard and decided by the arbitrator. Finding No. 6. They chose the issue and the words they wanted. In particular, the issue posed the question of whether the District had just cause to dismiss Culliton. (Emphasis added.) The issue could have been worded to address the issue of authority to discipline Culliton; it was not. Given the circumstances, the arbitrator found that Culliton's conduct was such as to warrant discipline, but not dismissal. Having so found, he then proceeded to direct a remedy under the "If not, what shall the remedy be" portion of the stipulated issue. He acted within the authority conferred in the crafting of the issue and, in doing so, discharged his duties and responsibilities as arbitrator. Under Nashua v. Murray, supra, the 1987 Keene State case, supra, and Appeal of City of Nashua, supra, the arbitrator did no more than the parties agreed that he could do in their grievance procedure and requested him to do by the wording of the issue submitted for determination. He acted within the scope of the parties' agreement to arbitrate. His decision should not now be reversed or modified because one of the parties did not like the decision he rendered. The parties have had the "benefit of their bargain" to arbitrate. There is no cause to intrude into the benefit of that bargain or to invalidate the arbitration decision.

We have also considered those elements of the District's petition which allege the arbitrator's decision to have been unjust and unsupported by factual determination and find them to be wanting because the District failed to present sufficient clear and convincing evidence that this was the case. Having so found and having already discussed the mistake of fact and abuse of authority arguments as well as cases on the subject, we DENY relief requested in the District's Petition for Declaratory Judgment and we DENY the District's request to stay the

implementation of the arbitrator's decision. By so doing, the arbitrator's award is validated and is to be implemented forthwith. Having so provided, no further remedy on the Association's ULP is required.

So ordered.

Signed this 22nd day of August, 1996.

EDWARD J. HASELTINE
CHAIRMAN

By unanimous vote. Chairman Edward J. Haseltine presiding. Members Richard E. Molan, Esq. and Richard W. Roulx present and voting.