State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CONCORD SCHOOL DISTRICT Complainant	:	
v.	:	CASE NO. T-0220:33
CONCORD EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE Respondent	:	DECISION NO. 97-121

APPEARANCES

Representing Concord School District:

Edward Kaplan, Esq.

Representing Concord Education Association, NEA-NH:

Steven R. Sacks, Esq.

Also appearing:

Curtis J. Sokness, Concord School District
Wally Cumings, NEA-New Hampshire
Jeanine Poole, Concord School District

BACKGROUND

The Concord School District (District) filed unfair labor practice (ULP) charges against the Concord Education Association, NEA-New Hampshire (Association) on June 26, 1997 alleging a violation of RSA 273-A:5 II (f) resulting from the Association's filing and attempting to process a grievance over the non-renewal of a non-tenured teacher. The Concord Education Association, NEA-New Hampshire, filed its answer on July 9, 1997. This matter was heard by the PELRB on November 13, 1997 after intervening continuances sought by and granted to the parties for the dates of August 19, 1997,

October 16, 1997 and November 6, 1997. During the presentation before the PELRB, the parties stipulated the issue being addressed by this case, namely, "May the non-renewal of a non-tenured teacher be arbitrated under the collective bargaining agreement (CBA)?" The record in this matter was held open until December 4, 1997 for the filing of the parties' post-hearing briefs, both of which were received on that date.

FINDINGS OF FACT

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

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

3. The District and the Association are parties to a CBA for the period September 1, 1996 through August 3, 1999. According to unrefuted testimony from Association witness Waldo Cumings, Article II, Section F of the CBA was bargained by the parties before the bargaining law (Chapter 273-A) had been passed by the legislature. Article VI, Section F presently reads as follows in the 1996-99 agreement, "no certified employee will be discharged or reprimanded except for just cause, as long as this provision does not violate state tenure law."

4. The CBA also contains a section knows as "Appendix K." According to testimony from Cumings, which was unchallenged, the provisions for this appendix were first discussed between the parties in 1987. Appendix K is entitled "Staff Appraisal and Development Procedures" and contains requirements for staff appraisal and development and a professional review process. Under Appendix K, II C any new teacher with two years or less of experience "will automatically have a mentor assigned by the administration for at least six months." There are provisions for a "mentorship program" to be cooperatively developed between the District and the Association as well as rules pertaining to teacher observations, pre-and post-observation conferences and peer observers. There is an appeal process set forth in Appendix K which provides as follows:

> Appeals under this procedure for non-tenured

staff will be limited to a hearing before the Superintendent of Schools. Appeals for tenured teachers will follow the procedures of Article IV of the Master Agreement. Beginning with the 1994-95 year, no non-tenured teacher will be non-renewed without taking part in full mentorship program during the same year.

5. Article IV A (1) of the CBA defines "grievance" as a "claim based upon 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."

6. On April 11, 1997, the Association filed a grievance on behalf of Daniel Shagena, a math teacher, saying that he had been notified that his teaching contract for School Year 1997-98 would not be renewed, that this was "termination of employment" without just cause, and that the District had failed to provide him with a "full year mentorship program in accordance with the specifications in the Staff Appraisal and Development Procedures." The Superintendent responded by denying the grievance and saying, "It is the district's position that non-renewal is a non-grievable action and not subject to the terms of the Collective Bargaining Agreement. He also denied failing "to comply with the Staff Appraisal and Development Procedures outlined in the Collective Bargaining Agreement." (See Tab C to ULP.)

7. UniServ Director Cumings, in unrefuted testimony for the Association, said that proposed revisions to the Staff Appraisal and Development Procedures (SADP) in 1990 (Association Exhibit No. 4) and in 1993 (Association Exhibit No. 5) suggesting that non-tenured staff would be entitled to a hearing that concludes with a decision by the Superintendent were rejected because their adoption would limit access to the grievance process.

8. In addition to Appendix K (Finding No. 4), there are ten (10) other appendices to the CBA, A through J, which include individual teacher contract, educational activities contract, teachers' and nurses' salary schedule, co-curricular schedule, medical insurance, dental insurance, disability

income, sabbatical leave, dues deduction form, non-degree nurse salary schedule, and dental insurance.

DECISION AND ORDER

The scope of this decision has been narrowed by the parties' stipulation on the issue, namely, whether the non-renewal of a non-tenured teacher may be arbitrated under the collective bargaining agreement. Our analysis is in parts, addressing Appendix K, other contract language, and the history of the relationship between the parties as it is pertinent to the issue presented.

Appendix K is dedicated to staff appraisal and development procedures. (Finding No. 4.) Section III of this appendix is entitled "Professional Review Process" and envisions an individual development plan, an annual growth plan, a performance improvement plan when and if needed, a prescribed observation sequence which includes pre- and post-observation conferences and an annual recommendation form from administrators to the superintendent. Section V of this appendix is entitled "Appeal Procedures" and is recited in Finding No. 4, above. It speaks to "appeals under this procedure," namely, under procedures found in Appendix K. Thus, if there were a problem with a pre-observation conference or failure to issue an annual recommendation form prior to March 1st, both of which are provisions internal to Appendix K, then that problem should be and would be addressed under the appeal procedure built into Appendix K itself. Non-renewals are not such problems nor are they addressed in Appendix K. Appendix K, then, does not apply to non-renewals because they are not covered subject matter.

Appendix K is the only place in the CBA and its appendices where appeal rights differ between tenured and non-tenured teachers. If the provisions of Appendix K applied to non-renewals, the non-renewal of a non-tenured teacher would follow the procedures outlined in Finding No. 4 and that teacher would be entitled only to the contractually-provided hearing before the superintendent. Since Appendix K does not address or apply to non-renewals, then its provision limiting appeal rights of non-tenured teachers does not apply in this case. It does not bar Shagena's proceeding under other provisions of the CBA. Conversely, the parties' stipulation as to issue removes the alleged violation of Article VI B of the CBA, the assertion that management failed to comply with the staff appraisal and development procedures of the contract, from further consideration by us.

Because there is no controlling language outside Appendix K limiting "appeal rights" of non-tenured teachers, the rights of all teachers, whether tenured or not, who are public employees within the meaning of RSA 273-A:1, are covered by the parties' definition of

"grievance" as found in Article IV of the CBA. Likewise, the definition of what constitutes an actionable grievance is also controlled by that same article. (Finding No. 5.) We explore this by looking both at the language and how the parties have interpreted it over their many years of having a collective bargaining relationship, a relationship which apparently pre-dates the passage of RSA 273-A. (Finding No. 3.)

The operative language of Article IV provides that "only claims based upon the interpretation, meaning or application of any of the provisions of this Agreement shall constitute grievances under this Article." (Finding No. 5.) The operative language of Article VI provides "no certified employee will be discharged or reprimanded except for just cause, as long as this provision does not violate state tenure law" and has been in the contract longer than RSA 273-A has been in existence. (Finding No. 3.)

When we look to the "interpretation, meaning or application" language of Article IV, we are reminded of previous litigation between these same parties in the Sweatt case in 1989. The applicable contract language in Article IV was the same then as it is now. Under that language the PELRB directed the parties to proceed to binding grievance arbitration, as agreed to by the parties in the CBA, over the suspension and termination of Sweatt, who, although it makes no difference to the outcome of the Shagena case, happened to be a tenured teacher. Implicit in that case before the PELRB was whether the termination fell within the "Discharge, Discipline or Reprisal" proscriptions of Article VI F of the then applicable CBA, where the language is unchanged from how it reads today. We ordered the parties to proceed to arbitration, saying "the parties' interests can be best served by strict application of the grievance procedure." Decision No. 89-70, finding no. 9 (October 19, 1989).

Thereafter, counsel for the District filed a Motion to Clarify our order in Decision No. 89-70 by seeking "a rehearing on the issues of whether its decisions to remove Sweatt from the classroom and not renew her contract...was arbitrable." Upon review of the record, we declined to modify Decision No. 89-70, saying we had directed the parties to process the case "involving a contractual dispute of three issues," one of which was the teacher's non-renewal. Decision No. 90-29 (April 16, 1990). The parties' have lived with that assessment of their contract language for nearly eight years and have not changed it to exclude non-renewals from the contract grievance procedure. We will not disturb that long-standing understanding, nor will we modify the terms of the language of the CBA through this litigation. Such changes appropriately should be handled through the negotiations process.

The last area of the contract which we address is the "no certified employer will be discharged or reprimanded except for just cause, as long as this provision does not violate state tenure law" language of Article VI. This language, too, remains unchanged from 1989 (Decision No. 89-70, *supra*.) Three observations are critical. First, the language applies to all "certified employees" without regard to their being tenured or non-tenured. Second, there appears to be no "violation" of state tenure law, RSA 189:14-a, as the result of the way the parties have interpreted this language since 1989-1990 through Decision Nos. 89-70 and 90-29, *supra*. RSA 189:14-a provides certain notice and hearing rights for non-tenured and tenured teachers, respectively. There is no evidence those rights have been infringed upon by the manner in which the parties have written and construed their CBA over the years. Likewise, there is no proscription which prohibits the parties from following a practice which extends notice and/or hearing rights to teachers which are more than the statute mandates. Third and finally, all the language in Article VI assessed in this paragraph has been in place at least since 1990 without evidence of its being disturbed by subsequent negotiations. As was the case with Article IV, we will not disturb or modify the terms and customs associated with the language found in Article VI through this litigation. Again, such changes should be addressed in the negotiations process.

After completing the foregoing assessments of the contract language and the parties' bargaining history, we find no ULP to have been committed. The ULP is DISMISSED and the parties are directed to proceed with processing this case through the steps of the grievance procedure as contemplated in the CBA.

So ordered.

Signed this 2nd day of January 1998.

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Alternate Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.