



**State of New Hampshire**

**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

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CONTOOCCOOK VALLEY SCHOOL DISTRICT, SAU #1	:	
	:	
Complainant	:	
	:	
v.	:	CASE NO. T-0275:13
	:	
CONTOOCCOOK VALLEY EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE	:	DECISION NO. 1998-102
	:	
Respondent	:	

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APPEARANCES

Representing Contoocook Valley School District:

William Phillips, Esq.

Representing Contoocook Valley Education Association:

Mary Gaul, UniServ Director

Also appearing:

James Sweeney, Contoocook Valley Education Association  
Keith Burke, Superintendent, Contoocook Valley School Dist.

BACKGROUND

The Contoocook Valley School District, SAU #1 ("District") filed unfair labor practice (ULP) charges against the Contoocook Valley Education Association, NEA-NH ("Association") on September 29, 1998 alleging violations of RSA 273-A:5 II (d) and (f) for bad faith bargaining and breach of contract resulting from the Association's attempting to arbitrate a non-arbitrable grievance involving an instructional assistant/aide. The Contoocook Valley Education Association filed an answer and motion to dismiss on October 9, 1998. This matter was then heard by the PELRB on November 19, 1998.

FINDINGS OF FACT

1. The Contoocook Valley School District is a "public employer" of teachers and other personnel within the meaning of RSA 273-A:1 X.
2. The Contoocook Valley Education Association, NEA-NH, is the duly certified bargaining agent for teachers and other educational/instructional personnel employed by the District.
3. The Association and the District are parties to a collective bargaining agreement (CBA) for the period July 1, 1996 through June 30, 1998. The contract contains provisions relating to recognition (Article 1-1), the definition of "teacher" (Article 1-1.3) and the grievance procedure (Article 3-1.1 and 3-1.2) which are recited below:

1-1 For the purposes of collective negotiations as required under RSA 273-A, the Board recognizes the Contoocook Valley Education Association as the exclusive representative for full and part-time professional employees of the Contoocook Valley School District School Administrative Unit #1 including individuals employed by the Contoocook Valley School Board of School Administrative Unit #1 the qualifications for whose position are such as to require him or her to hold an appropriate credential issued by the State Board of Education under its regulation governing the certification of professional school personnel including assistants but excluding Superintendents, Assistant Superintendents, Principals, Assistant Principals, Teaching Principals, Business Administrators, and other persons employed by the State Board of Education and all other employees of the Board.

Full-time means any teacher working 3/5 or more of full-time, or an instructional assistant working 25 hours or more per week for the school year. The Association agrees to represent equally all such professional employees in the unit designated above without discrimination and without regard to membership in the Association. Employees working less than 3/5 or less than 25 hours as defined above shall not be entitled to economic benefits as prescribed under Articles 5 and 6, and with the exception of Article 6, Section 6-7, which

benefits shall be available to all bargaining unit members.

\* \* \* \*

1-3.3 The term "Teacher", as used in this Agreement, means a person employed by the Board included in the unit defined in Article 1, Section 1-1. of this Agreement.

\* \* \* \*

3-1.1 A "Grievance" shall mean a claim by the member of the bargaining unit that there has been to him/her a personal loss, injury or inconvenience because of a violation, misinterpretation or inequitable application of any of the provisions of this Agreement governing said employees, except a grievance shall not be:

- a. A claim of a non-continuing contract teacher which arises by reason of his/her not being re-employed; or
- b. Any matter which according to law is either beyond the scope of Board authority or limited to unilateral action by the Board alone as defined by State Statute or by the Powers and Duties of School Boards as defined by the State Board of Education.

3-1.2 The Board agrees to allow grievances to be filed under the following provisions through the Board level. The Board does not agree to binding arbitration on the following provision:

Any matter for which a specific method of review is prescribed and expressly set

forth by law or any rule or regulation of the State Commissioner of Education.

A grievance to be considered under this procedure must be initiated in writing by the employee within fifteen (15) school days, but no more than 21 calendar days, of the grievable action or when the grievant knew of its occurrence.

4. At the commencement of these proceedings before the PELRB on November 19, 1998, the parties offered the following stipulations:

Stipulations of Fact

- 1.) The District is a public employer within the meaning of RSA 273-A.
- 2.) The Association is a public employee organization and the exclusive representative of the bargaining unit referenced above.
- 3.) The bargaining unit represents both teachers and instructional assistants.
- 4.) Peter Thomas was employed as an instructional assistant by the District and is a member of the bargaining unit.
- 5.) Peter Thomas, as an instructional assistant, is not afforded the protection of RSA 189:14-a.
- 6.) Peter Thomas filed a grievance alleging in part that his termination of employment was unjust discipline.
- 7.) The District and the Association have agreed that other matters alleged in the grievance (specifically the use of the evaluation procedure, alleged retaliation for Association activity, and the inclusion and use of a resolved matter as a reason for ending Mr. Thomas' employment) shall be submitted to an arbitrator in accordance with Article 3, section 3-9. The parties have mutually agreed upon an arbitrator and have set a date for the arbitration of these portions of the grievance.

#### Stipulation of Issue

The District and the Association agree that the remaining issue to be addressed regarding arbitrability should be:

Whether it can be said with positive assurance that the remaining issue in the grievance of Peter Thomas is precluded from being placed before the arbitrator by the language of the Collective Bargaining Agreement, including but not limited to Article 3., Section 3-1.1.

The "remaining issue" referenced in the parties' stipulated issue refers to the fact that Thomas has been involuntarily separated from his employment with the District.

5. On April 15, 1998, Rick Nannicelli, principal of the Great Brook School, completed a Summary Evaluation of

Performance form for Peter Thomas for the 1997-98 school year. (Appendix 04 to ULP.) This document states that Nannicelli had a post-evaluation conference with Thomas and at that time told him that he would "not be issued a new work agreement for the 1998-'99 school year." UniServ Director Mary Gaul filed a grievance on behalf of Thomas on April 27, 1998 which states, "Grievant spoke with the principal at some length when he learned that dismissal was being considered. Principal did not change his mind and suggested Grievant resign." On May 6, 1998 the principal responded, on the same form, saying, "this is not a grievable item. The summary evaluation will remain in Peter's file."

6. The Association filed a demand for arbitration with the American Arbitration Association on June 22, 1998. It contained five (5) items listed as "Nature of Dispute," some of which have been addressed in that portion of the parties' stipulation (paragraph 7 thereof) which sets forth those topics which the parties have agreed to arbitrate. The five items attached to the demand for arbitration are: (1) dismissal without just cause, (2) failure to follow evaluation procedure, (3) failure to follow grievance procedure, (4) failure to follow warning procedures, and (5) discrimination based on Association activity.

#### DECISION AND ORDER

Our assessment of the grievant's status and entitlements under the CBA is substantially shortened by the stipulations of the parties. Thomas is a member of the bargaining unit, per the recognition clause. (Finding No. 3.) Likewise, he falls within the definition of "teacher" as set forth in Article 1-3.3 of the CBA. He is covered by the grievance procedure of the contract as well as all other applicable provisions of the contract unless there are specific exclusions making a given provision(s) inapplicable. Such an example of an inapplicable provision is the language found at Article 3-1.1 (a) pertaining to claims of "a non-continuing contract teacher which arises by reason of his/her not being re-employed." Logically, Thomas is a non-continuing contract teacher under this language because, as an instructional assistant/aide, he would never have a "continuing contract" under RSA 189-14 (a) and because he is a "teacher" under the definition provided in Article 1-3.3. Thus, if Thomas's sole "remaining issue" under the stipulation (Finding No. 4) is to seek arbitration and remedial relief for his not being offered a "continuing contract" or "a new work agreement" for the 1998-99 school

year, this process is not available to him given the exclusionary language of Article 3-1.1 (a).

The issue cannot be totally resolved that easily, however, because there is an allegation of dismissal in the grievance documents. (Finding Nos. 5 and 6.) The contract contains a "Discipline" article which, if breached, is grievable under the grievance procedure found in Article 3, except that under the Discipline article, Article 11, "discipline does not include non-renewal," to wit:

In the event that an employee is formally disciplined, said employee shall be provided with written notice specifying the reasons for the disciplinary action. Formal disciplinary actions shall be defined as written warnings or reprimands, suspensions, reduction in rank, probation, and dismissal. Dismissal does not include non-renewal. All teachers shall have the right to be represented by the Association at formal disciplinary conferences.

No written records of informal disciplinary action shall be filed in teachers' personnel files. Teachers shall have the right to attach written responses to the formal disciplinary report.

Normally, discipline shall be progressive and related to the nature of the offense.

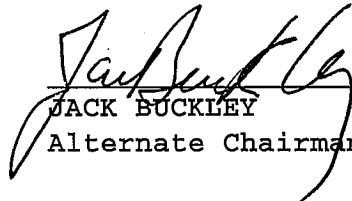
Thus, there is additional contractual affirmance that the parties did not intend to use a grievance alleging a violation of Article 11 to address a non-renewal situation. Conversely, if Thomas has a claim of improperly administered discipline, inclusive of dismissal as defined by Article 11 and customary usage by the parties, he may have a viable grievance, which he may or may not win at arbitration.

Our responsibility under Appeal of Westmoreland School Board, 132 NH 103 (1989) and Appeal of the City of Nashua School Board, 132 NH 699 (1990) is to apply a test whereby it can be said with *positive assurance* that the CBA's arbitration clause is not susceptible of a reading that will cover the dispute. We can say with *positive assurance* that the contract does bar any claims that Thomas may have relating to his non-renewal or not being offered a new work agreement for the 1998-99 school year. We cannot say, however, with the requisite *positive assurance* that the CBA bars any claims or grievances Thomas may wish to assert relative to his dismissal, if there was one, or may wish to assert relative to the imposition of discipline or other areas of the CBA, as may be or may not be addressed item 7 or the parties' stipulation (Finding No. 4).

Consistent with the authority conferred on arbitrators and the very purposes of having arbitration, as cited and discussed in Appeal of City of Nashua School Board, 132 NH 699 at 705-706 (1990), we direct the parties to proceed to arbitration over the "remaining issue" to be disposed of in the Thomas grievance. If the arbitrator finds that remaining issue to be the non-renewal or non-offering of a school year 1998-99 "work agreement" to Thomas, then those proceedings shall be dismissed by the arbitrator as being non-arbitrable, consistent with this opinion. If the arbitrator finds that the "remaining issue" addresses some other complaint or allegation of "violation, misinterpretation or inequitable application of any other provisions of the contract," then the arbitrator shall proceed by first addressing any other procedural matters and then the case on the merits, in accordance with generally acceptable arbitration practices.

So ordered.

Signed this 4th day of December, 1998.

  
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JACK BUCKLEY  
Alternate Chairman

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