State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CONCORD EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE and DAVID SHAGENA	:	
Complainant	:	
v.	:	CASE NO. T-0220:35
CONCORD SCHOOL DISTRICT	:	DECISION NO. 1999-101
Respondent	:	

APPEARANCES

Representing the Concord Education Association, NEA-New Hampshire and David Shagena:

Steven Sacks, Esq.

Representing Concord School District:

Edward Kaplan, Esq.
Timothy Gudas, Esq.

Also appearing:

Curt Sokness, Superintendent

BACKGROUND

The Concord Education Association, NEA-New Hampshire ("Association") filed unfair labor practice (ULP) charges on its behalf and on behalf of Daniel Shagena on July 6, 1999 against the Concord School District ("District") alleging violations of RSA 273-A:4 and 273-A:5 I (h) for breach of contract resulting from the District's failure and refusal to implement a final and binding arbitration award. The District filed its answer on July 22, 1999 after which this matter was heard by the PELRB on September 2, 1999.

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 were parties to a CBA for the period of September 1, 1996 through August 3, 1999. Article VI, Section F presently reads as follows in the 1996-1999 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. 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." The last step in the grievance procedure calls for final and binding arbitration.

5. 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 as found in Appendix K of the CBA.

6. The District then filed a ULP on June 26, 1997 charging the Association with a violation with RSA 273-A:5 II (f), breach of contract for filing and attempting to process a grievance over the non-renewal of a non-tenured teacher, Shegena. In the hearing of this matter, the parties stipulated the issue before the PELRB to be "May the non-renewal of a non-tenured teacher be arbitrated under the [parties'] collective bargaining agreement?" In Decision No. 1997-121, issued January 2, 1998, the

PELRB assessed the parties' bargaining history, inclusive of their interpretations of their labor agreement over the terms of several CBA's, and, in doing so, found no ULP to have been committed, answered the issue, above, in the affirmative, dismissed the ULP and directed the parties to process the grievance in accordance with the contract. Thereafter, the PELRB denied the District's motion for rehearing of this case, in Decision No. 1998-021 on March 20, 1998.

7. On July 16, 1998, the New Hampshire Supreme Court accepted the District's appeal of decisions No. 1997-121 and 1998-021. On September 11, 1998, the District sought an order from the court to stay the arbitration proceedings. That relief was denied on September 22, 1998. (Exhibit A to the Association's ULP.) Thereafter, the arbitration hearing was held on December 17, 1998 before Arbitrator Elizabeth Neumeier. According to the pleadings at paragraph 8 of the complaint and answer, the only issue in dispute was whether the grievance was arbitrable under Article IV, Section F of the CBA. The arbitrator's rendition of the parties' stipulated issue references the same contract provisions, to wit:" whether Section VI-F of the Collective Bargaining Agreement provides the Arbitrator with the authority to require just cause for the non-renewal of a non-tenured teacher, the Grievant?" (See AAA Case No. 11-390-0141-97.)

8. Arbitrator Neumeier issued her opinion and award on April 22, 1999 (Exhibit B to the Association's ULP) in which she found the grievance to be arbitrable and that the contract provided the arbitrator with the authority to require just cause for the non-renewal of a non-tenured teacher, quite obviously under the particularized facts of this case. Sometime thereafter an inquiry was directed through the American Arbitration Arbitration (AAA) concerning certain provisions of the Neumeier award. By letter of May 27, 1999 directed to a senior case administrator at the AAA, Neumeier clarified the award and said in part:

> At the arbitration hearing both parties agreed that the only issue being presented for decision concerned arbitrability. The District conceded that, should the grievance be found to be arbitrable, it had not met a standard of just cause of support its failure to renew the Grievant's contract. The grievance requested that the District "renew [the Grievant's] teaching contract for the 1997-1998 school year" and make him whole for

all losses.

In sustaining the grievance without limitation, therefore, the award sustained the requested remedy. Making the Grievant whole for all losses included back pay and includes placing him in the position he would be in and with the status he would have attained, but for the discharge.

See Exhibit C to Association's ULP.

9. On June 9, 1999, K.L. Clock, the Association president, sent a memo to District Superintendent Sokness, along with the Neumeier clarification letter of May 27, 1999, inquiring " when and how" Sokness intended to implement the "specific performance" provisions of the award and letter of clarification. (See Exhibit D to the Association's ULP.) On June 11, 1999, Sokness sent a return memo to Clock saying "we do not intend to implement any aspect of Arbitrator Neumeier's award until the New Hampshire Supreme Court decides Appeal of Concord School District, No. 98-231, currently under consideration." (See Exhibit E to the Association's ULP.) To this board's knowledge, there have been no requests of the Supreme Court sought and granted to suspend, stay or vacate the Neumeier award since it was issued. Conversely, the PELRB is aware of an effort by the Association on or about July 2, 1999 to have the Supreme Court declare the District's appeal moot as the result of the Neumeier decision. We are also aware that the Supreme Court denied that motion on August 4, 1999. (See District Exhibit No. 1.)

10. As the result of the foregoing history, the Association filed the instant ULP seeking an order from the PELRB that the District "immediately implement the arbitrator's award at issue by reinstating Mr. Shagena forthwith and by making Mr. Shagena whole for back pay and benefits." As of the date of the parties last appeared before the PELRB, we understand that the parties had briefed the pending appeal to the Supreme Court but that no dates for oral argument had been set.

DECISION AND ORDER

This board fully explored the facets of the bargaining history of the parties, the features of their various collective bargaining agreements over the years, inclusive of the grievance and arbitration provisions, and the practices which have evolved therefrom in the utilization and administration of the grievance procedure when we issued our decision on

January 2, 1998 finding no sustainable charge of ULP against the Association and ordering the parties to proceed through the grievance and arbitration procedures of the contract. (Decision No. 1997-121.) While we in no way intend the present case to detract from the importance of our decision issued on January 2, 1998 or to minimize our findings as to the practices and customs of the parties as they interpreted, utilized and administered contract grievance procedures of the CBA across the breadth of the bargaining unit, our function at this phase of the proceedings, in a post-arbitral setting, is to determine whether the Association is entitled to an order directing compliance with the arbitrator's decision while our order (Decision No. 1997-121) directing the parties to proceed through the totality of the grievance procedure is on appeal and not finally adjudicated by the Supreme Court.

When we heard Case No. T-0220:23, which resulted in Decision No. 1997-121, we noted that the contract grievance language applied to all "certified employees" without regard to their being tenured or non-tenured. We also noted in 1997-121, as did the arbitrator in her decision (in the next-to-the-last paragraph, page 19), that there is no proscription which prohibits the parties from following a practice which extends hearing rights or specified protections for teachers, tenured or non-tenured, which are more than those provided by law. Thus, when we evaluate the consequences of our order in Decision No. 1997-121 and of the arbitrator's award more than a year later, we rely on the fact that the parties had a contractually bargained-for grievance procedure ending with final and binding arbitration, a process the parties knew, used and understood under the auspices of not one, but many CBA's. This reality is further established by the parties' bargaining history, especially after the Sweatt case, evidenced by the District's attempt to negotiate changes to the coverage of the grievance procedure and then dropping those demands prior to or as part of a contract settlement. When the parties grieved, arbitrated and received the decision and award of Arbitrator Neumeier, they received no more and no less than the benefit of their bargain. It so happened that the "award resulted in the not uncommon and sometimes inevitable situation where it was not satisfactory to one of the parties. Such dissatisfaction, in the setting of a final and binding arbitration award, is not grounds for us to change the award." Londonderry Admin. Employees Association v. Town of Londonderry, Decision No. 1999-089 (September 22, 1999). This suggests that a compliance order is, indeed, appropriate.

Next, RSA 541:18 specifically provides that no appeal taken from an order of an agency shall suspend the operation of such an order, provided that the Supreme Court may order a suspension of such order pending such appeal whenever justice may require such a suspension. Practically, the same holds for the arbitration award being reviewed in these proceedings because, if and as we order compliance with such an award in keeping with the negotiated terms for final and binding arbitration under the parties' contract, the dissatisfied party has the ability to seek such relief from the court. That has not yet occurred, either in the form of a request for

relief or in the form of an order from the court. For that matter, the converse happened when the court, prior to the arbitration hearing, denied the District's request to stay arbitration pending the appeal. (Finding No. 7, above.) Collectively, the provisions of RSA 541:18 not suspending an agency order, the parties' ability to seek post-arbitral relief from the aribtrator's award with this being something which has not occurred, and the prior pre-arbitral denial of a request to stay the arbitration process all tip the scales even further in favor of a compliance order.

When we review the arbitrator's award, we see that the parties stipulated an issue as to the arbitrator's authority to require just cause for the non-renewal of a non-tenured teacher. This issue was decided by the arbitrator in the context of the parties' relationships under the CBA, their interpretations of its language in the past, and the related history as to the give and take of the bargaining process as it pertains to the procedures outlined in the grievance procedure, inclusive of final and binding arbitration. Accordingly, when the parties proceeded with their arbitration proceeding before Arbitrator Neumeier, they were not engaging in an extraordinary event. They were merely engaging in a contractually agreed to process they had promised to each other in the course of bargaining, a process which is not only sanctioned, but required by RSA 273-A:4.

We perceive our duty in this case to be exactly the same as it was in Appeal of Timberlane Regional School Board, 142 N.H. 830, 837 (1998), namely, ordering the enforcement of a valid CBA. In this case, the provision of the contract being enforced is the grievance procedure, a process which is vital to the effective administration of the entire agreement. We direct the District to comply with the arbitrator's award forthwith in conformity with Articles IV and VI of their CBA, said order to remain in effect until such time as a suspension of this Board's order has been sought from and granted by the New Hampshire Supreme Court.

So Ordered.
Signed this 13th day of October, 1999.

JACK BUCKLEY, CHAIRMAN

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