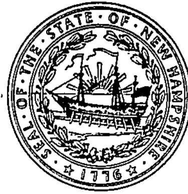


State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

LONDONDERRY SCHOOL DISTRICT

Complainant

v.

LONDONDERRY EDUCATION ASSOCIATION
NEA-NEW HAMPSHIRE

Respondent

CASE NO. T-0262:10

DECISION NO. 2000-046

APPEARANCES

Representing Londonderry School District:

Michael Elwell, Esq.

Representing Londonderry Education Association:

James Allmendinger, Esq.

Also appearing:

Gregory Andruschkevich, Londonderry Education Association
Beth Perkins, Londonderry School District
Dick Lates, Superintendent, Londonderry School District
Richard Nagy, Londonderry Education Association
Dennis Sheehan, Londonderry Education Association
Penny Felix, Londonderry Education Association
Stephen J. Tallo, Londonderry Education Association
Bernard J. Ellis, Keene, N.H.

BACKGROUND

The Londonderry School District ("District") filed unfair labor practice (ULP) charges on October 4, 1999, against the Londonderry Education Association, NEA/NH ("Association") alleging violations of RSA 273-A:5 II (d) and (f) for failure to bargain and breach of contract resulting from the District's attempting to arbitrate a grievance, the disposition of which was otherwise covered by Article 5 (A) of the parties' collective bargaining agreement (CBA). The Association filed its answer on October 15, 1999. Contemporaneously, criminal proceedings were initiated which may have been dispositive of this ULP before the PELRB, thus causing the parties to make a joint request to the PELRB to have this matter continued on its docket until those criminal proceedings shall have been concluded. The PELRB concurred and granted that continuance. See Decision No. 1999-124 dated December 3, 1999 and Decision No. 2000-115 dated February 15, 2000. By letter of March 15, 2000, counsel for the Association advised the PELRB that the criminal proceedings had been concluded, that the accused/grievant had been acquitted of charges against him and that the Association was prepared to have this matter docketed for hearing by the PELRB. Counsel conferred and advised their respective availability for hearing on May 30, 2000. The hearing was then docketed and conducted on that date, with post-hearing briefs due to be filed by the parties on or before June 14, 2000, upon receipt of which the record was closed.

FINDINGS OF FACT

1. As an employer of teachers and other personnel, the Londonderry School District is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Londonderry Education Association, NEA-New Hampshire, is the duly certified bargaining agent for all professionally certified teachers of the District.

3. The Association and the Londonderry School Board (Board) are parties to a collective bargaining agreement for the period 1993 through June 30, 1996 which has subsequently been amended and continued through the completion of School Year

1999-2000, until August of 2000, by an agreement dated August 28, 1996. (Attachment 1 to ULP.) Article 5 (A) of the grievance procedure defines "grievance" and provides, in pertinent part:

> A "Grievance" shall mean a complaint by a teacher or a group of teachers of the public school system or the Association that there has been to him, or them, a violation, misinterpretation or inequitable application of any provision of this Agreement, except that the term, "grievance" shall not apply to (a) any matter for which a specific method of review is prescribed by law; or (b) any rule or regulation of the State Commissioner of Education; or (c) any by-law of the Board of Education pertaining to its internal organization; or (d) any matter which according to law is either beyond the scope of Board authority or limited to unilateral action by the Board alone; or (e) a complaint of a probationary teacher which arises by reason of his not being re-employed or; (f) a complaint by any certified personnel occasioned by appointment to or lack of appointment to, retention in or lack of retention in any position for which "tenure" is either not possible or not required.

Article 18 is entitled "Rights of the Parties." Section G thereof provides:

> No teacher shall be disciplined unless for just cause.

"Just cause" is also referenced in Article 18, Section A, to wit:

> The Board, subject to the language of this Agreement, reserves to itself full jurisdiction and authority over matters of policy and retains the right in accordance with applicable laws and regulations to direct and manage all activities of the School District, including but not limited to the right: (a) to direct employees of the School District; (b) to hire, promote, transfer, assign and retain employees in positions within the School District and suspend, demote, discharge or take other disciplinary

action against employees for just cause; (c) to relieve employees from duties because of lack of work, or for any other legitimate reasons; (d) to maintain the efficiency of the District operations entrusted to them; (e) to determine the means, methods, and personnel by which such operations are to be conducted; (f) to take whatever actions might be necessary to carry out the mission of the School District in situations of emergency; and (g) to judge the relative qualification of candidates for all positions and assignments.

4. Dennis Sheehan began his employment in the Londonderry School District in 1982 and was continually employed there until removed by a 2:1 vote of the Londonderry School Board dated August 17, 1999. (District Exhibit No. 2) Previously, on July 6, 1999, Superintendent Richard Lates informed Sheehan by letter (District Exhibit No. 1) of his intent to terminate him under the provisions of RSA 189:13 for incompetence, immorality and failure to conform with regulations resulting from (1) an incident of alleged masturbatory conduct in the presence of student MB on June 4, 1999, (2) an incident of alleged masturbatory conduct in the presence of student AT on April 23, 1999, (3) an inappropriate touching and kissing incident with student AB on May 25, 1992 and (4) and "multiple occasions" of inappropriately touching female students. Sheehan was scheduled for a hearing before the Board, subsequently held on August 4, 1999, and placed on removal status in the meantime under RSA 189:31.

5. The Association, on behalf of Sheehan, filed a grievance dated July 27, 1999 alleging violations of Article 3, Sections F, I, J, K, Article 4 and Article 18, Sections A and G of the CBA. (District Exhibit No. 3.)

6. The Board held a hearing on August 4, 1999 which considered both the Superintendent's recommendation for removal and the grievance. Witnesses were called, inclusive of students MB and AT, and both the grievants and the Board were represented by counsel. After finding cause to disregard items

3 and 4 of District Exhibit No. 1, the Board, by a vote of 2 to 1, found credible evidence that the grievant had engaged in the conduct complained of in items 1 and 2 of the Superintendent's letter (District Exhibit No. 1) and affirmed the recommendation to dismiss Sheehan. The Board also dismissed the grievance, finding the dismissal to have been a disciplinary action (not an evaluation or observation provided by contract) for which there is a "statutory remedy" for the proposed removal under RSA 189:13 and 189:14, thus barring the matter from further consideration because of the language found at Article 5 (A) of the CBA. The Association then requested arbitration by letter of August 19, 1999 (District Exhibit No. 4)

7. Sometime thereafter, on or about September 15, 1999 according to the District's ULP, Sheehan was charged criminally with lewd conduct and indecent exposure for masturbating in the presence of two female students. Sheehan has since been to trial and acquitted in one incident and had the charges dropped in the other because the female student did not want to pursue the matter further through public testimony.

8. By letter of September 10, 1999 from Board counsel Elwell to Association counsel Allmendinger, the Board sought to have the Association drop the arbitration request. (District Exhibit No. 5.) By letter of September 20, 1999, Allmendinger advised Elwell that the Association would not withdraw the grievance from arbitration. (District Exhibit No. 6.) Thereafter, the District's ULP was filed on October 4, 1999.

9. Superintendent Richard Lates testified that RSA 189: 14 provides appellate rights and access to the superior court which, in turn, acts as a bar to arbitration inasmuch as it is a "specific method of review...prescribed by law" as referenced in Article 5 (A) of the CBA. Likewise, Lates said that RSA 189: 32 applies to persons removed by the school board *unless dismissed*; therefore, he believes, the con-

verse must be true so that dismissed employees have access to the courts rather than the state board of education. On cross examination, Lates agreed that Sheehan's termination was a dismissal case. He said the two female student witnesses saw only arm motions and heard sounds. There was no visual confirmation of the grievant's conduct in the form of exposed body parts or shapes in that the complained of activity was obscured by the grievant's briefcase.

10. Bernard Ellis was superintendent in Londonderry from 1968-1979 when the 1971-72 CBA (District Exhibit No. 7) was negotiated. Article 4 (A) of that agreement contained the same qualifying language, namely, "(a) any matter for which a specific method of review is prescribed by law." Ellis explained that this provision was proposed by the Board to keep appellate reviews limited to "one bite at the apple," with the initial decision being in the hands of the school board with the appeal going to the superior court. Arbitration provisions in the CBA at that time were only advisory, not binding. He believed the selection options for review after the school board were either the state board or the courts. This was not tested inasmuch as there were no dismissals during his tenure.

11. Penelope Felix has been employed in Londonderry since 1967 and is presently Association president. She was on the negotiating team for District Exhibit No. 7 and pointed out that it was not by error that the CBA referenced just cause in two places outside of what was then Article 4, namely in Article 3 (E) and Article 17 (C), both of which translate to Article 18 (G) and (A) of the current CBA. Her belief then and now was that the two avenues available for review were through the school board or under the procedures of the agreement, contrary to the approach taken by Ellis. She said, "Our understanding...that everything was covered by the grievance procedure....The avenues available were statutory process or [the] provisions of this agreement." "They never said there was any language we could not file a grievance over a dismissal or non-renewal."

12. Rick Nagy has been employed in Londonderry since 1978 and has used his skill as chair of the Math Department to assist his "number crunching" on the Association's negotiating team. He was on the team in the early 1980's when the grievance process changed from advisory to binding arbitration (Article 5 of Association Exhibit No. 6). He said that employee suspensions, dismissals and non-renewals conceptually provided the impetus to get binding arbitration. Without it the school board was perceived as both "judge and jury," "equivalent to Russia." The Association pushed for binding arbitration in order to get a final impartial decision maker. Likewise, the reference to "just cause" was specifically maintained in Article 18 (A) of Association Exhibit No. 6, in the same sentence which applied to suspensions, demotions and discharges. There was no discussion that any of these three disciplinary procedures were intended to be excluded from the grievance procedure. Nagy said the board had tried to remove just cause from the contract and, when the Association balked, the board relented. The board also attempted to remove binding arbitration from the CBA in the early 1990's but was unsuccessful in doing so at the bargaining table.

13. Stephen Tallo, employed by the District since 1986, was on the negotiating team for a 1999 and thereafter CBA. He testified that item 13 of a counterproposal from the District called for the Association to agree if HB 341 (1999 session) or a successor bill were passed (which would have eliminated the use of negotiated grievance and arbitration procedures in teacher non-renewal cases), then the contract language would make the provisions of such legislation effective thirty days after the bill became law, as opposed to the effective date of the legislation which could be as late as the termination date of the CBA. The parties reached no agreement on this proposal. Tallo said, "there was no way I would want this provision in our contract." It would place teachers in an "unfair position" of having to go to the state board of education whereas non-renewals, in his opinion, are currently covered by exiting contract language.

DECISION AND ORDER

When all is said and done, the hoopla gone and the notoriety forgotten, this is a simple case of arbitrability. Does Dennis Sheehan have the right to have his dismissal (distinguished from non-renewal) grievance heard and adjudicated under the contractually agreed-to provisions of the collective bargaining agreement? We believe he does.

The hearing and adjudication of the pending grievance involves only Sheehan's dismissal as an employee of the District and alleges unfair evaluation in violation of Article 3, unfair treatment in violation of Article 4 and discipline without just cause in violation of Article 18. We need not examine or determine the merits of the case under the foregoing contract articles in order to reach the issue of Sheehan's access to the grievance process and its final step of binding arbitration. That may be accomplished by an examination of the CBA and the grievance procedure (Article 5) in particular.

In Article 5, as noted in our Finding No. 3, a "grievance" is defined as a "violation, misinterpretation or inequitable application" of the contract. Sheehan's claims of violations of Articles 3, 4 and 18 meet that standard. Article 5 then continues to say that the term "grievance" shall not apply to "any matter for which a specific method of review is prescribed by law...," the language being relied upon by the District in its assertion that the Association is breaching the CBA by pursing the instant grievance. We disagree based on three reasons.

First, a clear and quantifiable reading of the contract as a whole reveals the concerns with "just cause" appearing not in one location, but two. We escape the issue of whether this dismissal was "discipline" within the meaning of Article 18-G by examining Article 18-A which reserves to the District and its Board the right "to hire promote, transfer....and suspend, demote, discharge or take other disciplinary action against employees for *just cause...*" Thus, the issue is joined as the result of Sheehan's alleging that his dismissal violated the just cause provisions of the contract. This language alone is the requisite "positive assurance" that the parties intended such disputes to

be arbitrated notwithstanding the provisions of Article 5 (A) (a) or, to be more accurate and within the presumption, it provides the "positive assurance" that the parties did not intend to exclude the subject matter of this grievance from arbitration. Appeal of Westmoreland School Board, 132 N.H. 103, 105 (1989). For the District to prevail on the issue of arbitrability, it would have to be said "with 'positive assurance' that the CBA is *not* susceptible of an interpretation that covers the dispute." Appeal of Lincoln-Woodstock Coop. Sch. Dist., 143 NH 598, 601 (1999). That positive assurance simply does not exist in this case, especially when we "look at the contract taken as a whole and construe its terms according to their common meaning." *Id.*

Second, the general and non-specific language of Article 5 A (a) pertaining to "specific methods of review prescribed by law" is not of a certainty or specificity sufficient to show an intent to limit or eradicate the authority of Article 18 A and G. Turning again to Westmoreland, *supra,* "under the positive assurance standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists and in the absence of any express provision excluding a particular grievance from arbitration, ...only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." In this case, there is neither an express provision excluding the subject matter from arbitration nor forceful evidence of the requisite purpose to do so. "Unless a contrary intention appears from the contract construed as a whole, the meaning of a general provision of the contract should be restricted by the more specific provisions of the contract." Labor and Employment Arbitration, Bornstein, Gosline and Greenbaum, §9.02 [3][d]. The specific language of Article 18 must be read to control over the generality of the Article 5 A (a) language being relied upon by the District. It is well-settled and of long standing that "through the mechanism of collective bargaining, public employees have the opportunity to expand upon or otherwise make binding agreements concerning rights which they feel may be granted to them by other provisions of law." Brown v. Bedford School Bd., 122 NH 627, 632 (1982).

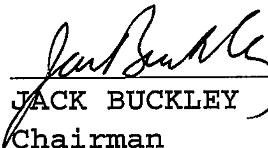
Third, this assessment is borne out by the negotiating history presented to us. While each side was able to produce witnesses who interpreted the provisions of the CBA in general and Article 5 A (a) in particular in a way which was favorable to their respective desired outcomes of this case, the progression of the CBA language over the past 29 years squares with the tes-

timony offered by the Association. According to Penny Felix, just cause was a pre-eminent issue from the time of the 1971-72 CBA. Richard Nagy said without the just cause language, the school board was perceived as "judge and jury," causing a need to initiate "just cause" standards and to keep the binding arbitration provision, even though the school board tried unsuccessfully to negotiate it out of the contract. (Finding Nos. 11 and 12.) Finally, Stephen Tallo's testimony about the school board's attempt to accelerate the effective date of HB 341, were it to have passed several sessions ago, clearly demonstrates that the school board believed the Association had the authority in the contract to arbitrate terminations, dismissals and non-renewals, otherwise they would not have sought the added protection of an accelerated effective date.

The District's unfair labor practice is DISMISSED; the parties are directed to proceed forthwith with the grievance arbitration process provided under the CBA and now being sought by the Association.

So ordered.

Signed this 19th day of JULY, 2000.



JACK BUCKLEY
Chairman

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