State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CONTOOCOOK VALLEY EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE Complainant v. CONTOOCOOK VALLEY SCHOOL DISTRICT Respondent	CASE NO. T-0275-15 DECISION NO. 2000-116

APPEARANCES

Representing Contoocook Valley Education Association:

Mary E. Gaul, Uniserv Director

Representing Contoocook Valley School District:

William J. Phillips, Esq.

Also appearing:

Diane Creeley, ConVal School District
Keith R. Burke, ConVal School District
Richard Nannicelli, ConVal School District
James P. Sweeney, ConVal Education Association
Jonathan F. Manley, ConVal Education Association
Michael P. Elkavich, ConVal Education Association

BACKGROUND

The Contoocook Valley Education Association, NEA-New Hampshire ("Association") filed unfair labor practice (ULP) charges against the Contoocook Valley School District (District) on July 10, 2000 alleging violations of RSA 273-A:5 I (a),(c),(e),(g),(h) and (i) resulting from a

refusal to bargain which occurred when the District unilaterally implemented a teacher evaluation program and engaged in direct dealing with members of the bargaining unit. The District filed its answer on July 25, 2000 after which the parties attended a pre-hearing conference on August 16, 2000 (Decision No. 2000-086) and a hearing before the PELRB on October 19, 2000. The record was closed at the conclusion of the October 19th hearing.

FINDINGS OF FACT

1. The Contoocook Valley School District, a/k/a "Con-Val," employs teachers and other personnel in the operation of its school district, and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Contoocook Valley Education Association, NEA-New Hampshire, is the duly certified bargaining agent for full-time and part-time professional personnel required to hold a credential from the New Hampshire Department of Education, excluding superintendent and assistant superintendents, principals, assistant principals, teaching principals and business administrators, and who are employed by the District.

3. The Association and the District are parties to a collective bargaining agreement (CBA) for the period July 1, 2000 to June 30, 2001. It contains language at Article X pertaining to "Evaluation," to wit:

ARTICLE 10

EVALUATION

10-1 Evaluation of Teachers

There shall be a guarantee of at least one formal classroom observation annually for each teacher and each teacher shall receive a written summary evaluation statement annually.

Formal classroom observations shall be openly conducted.

The classroom observer shall meet with the teacher about the results of the formal observation within a reasonable period of time. Teachers shall have the right to attach written responses to the formal observation report.

10.2 Evaluation of Instructional Assistants

Each instructional assistant shall be guaranteed one formal observation and conference and shall receive a written summary evaluation statement annually.

Formal observations shall be openly conducted.

The Administrative Supervisor shall meet with the

instructional assistant within a reasonable period of time about the results of the formal observation conference.

10.3 Employees shall be accorded access to their files pursuant to RSA 275-56.

10.4 Employees shall receive a copy of material added to their personnel file.

This language is unchanged from the prior CBA which was in effect from July 1, 1998 to June 30, 2000, the period in which the acts complained of occurred. (Assn. Exhibit No. 3)

4. The Association claims that, on or about June 8, 2000, the District refused to negotiate the implementation and procedure[s] of a new evaluation system to be used for bargaining unit members and that implementation of this plan would have impact on certain rights and benefits provided in the CBA, e.g., the provisions of Article 14-1.3 which call for job performance to be a tie-breaker in those cases where employees' uninterrupted length of service is equal, as discussed in the contract's reduction in force (RIF) clause.

5. James Sweeney, an industrial technology teacher and employee since 1976, is president of the Association. He testified that both the Association (Assn. Exhibit No. 4) and the District (Assn. Exhibit No. 5) made bargaining proposals which would have altered the language of Article 10 as it appears in both the 1998-2000 and 2000-2001 CBA's (Assn. Exhibit Nos. 1 and 3.) This would have included language pertaining to putting staff members on probation and pertaining to withholding of increments. The Districts' proposal of October 18, 1999 would have changed the minimum for formal summary evaluations to one every three years and would have eliminated teachers' contractual right to attach responses to their evaluation reports. When it became apparent that the parties still had not come to closure on a new contract in November of 1999, they proceeded to mediation which was conducted on January 3, 2000. While further modifications to the respective evaluation proposals were discussed at mediation (Assn. Exhibit No. 7), the parties ultimately settled the evaluation issues based on "current contract language." (See also District Tab E dated 12/20/99.) Notwithstanding this resolution of evaluation issues during mediation, by February the Association had learned of District initiatives to form a committee, inclusive of bargaining unit members, to "develop an evaluation system for teaching staff." By letter from Sweeney to School Board Chair Diane Creeley dated February 9, 2000, the Association affirmed its position that an "'evaluation system' is...a term and condition of employment and as such, is a mandatory

subject [of bargaining]." (Assn. Exhibit No. 8.) Sweeney said the District proceeded with the "Professional Development and Supervision Committee" (PD & SC) under the guidance of consultant Dr. Pamela Clark, inclusive of preparing a draft survey, all without any input from the Association. (Assn. Exhibit Nos. 9 and 10.)

6. Jonathan Manley, Sr., a 14 year employee, was a member of the "Education Council" committee which reformulated and renegotiated evaluation language after a rejection of prior proposals by the school board in 1987. The Council had constituent members from faculty, administration and the board. The resulting work product would have utilized a second assessment committee in instances of teacher non-renewal. Since this procedure would have utilized a component of teachers evaluating teachers, the protocol was never formalized or incorporated into a CBA. Likewise, there was an experimental period of utilizing student evaluations. These were eliminated when a summary evaluation was found to have quoted from the contents of a student evaluation. Notwithstanding the foregoing variations, Manley testified that the substantive components of Article 10 have remained basically unchanged since 1989.

7. Keith Burke has been employed by the District since 1988 and as Superintendent since 1997. He testified that the teacher evaluation process is remarkable for its flexibility, both as to evaluators and as to the actual form or recording of the events observed. For example, supervisory evaluators maybe principals, assistant principals, directors of special education, directors of vocational education or director of guidance. The principal delegates these responsibilities for evaluations; the responsibilities may change from one evaluator to another and from year to year (See also testimony of Richard Nannicelli, Principal at Gray Brook School.) Likewise, the form of the evaluation is flexible and may be narrative, with or without headers, self-assessment, self-assessment with cover letter, topical forms, check lists, with or without commentary, single page or multiple pages. (See District Exhibit Tab C.) The only constraints would be those imposed by school board policy, referred to by the parties as "Appendix D." (See District Exhibit Tab B.) The processing of evaluations at the central (Superintendent's) office assures the necessary compliance and uniformity with school board policy. It is "rare" when Burke must ask an evaluator to rewrite his or her work product.

8. Administrative Rule Ed 512 of the State Department of Education (NHDOE) was adopted on June 21, 1999 to become effective July 1, 2000. It calls upon districts to file new "master plans" which Burke

described as being more "goal oriented" when compared to the more limited purposes of tracking professional development hours in the existing methodology. Burke said that bargaining unit teachers serving on the PD & SC (Finding No. 5) are doing so after being designated by their principals, with the review and concurrence of his office, and are doing so voluntarily. The PD & SC consists of educators (teachers) and administrators. At this stage, their work is intended to identify a "common ground" so teachers will be able to understand those observation items being addressed by evaluators. Burke was aware of the Association's concerns about the work and consequences of the work of the PD & SC (See Assn. Exhibit No. 8) but said that the District had always reserved its rights about the substantive evaluation process which, in turn, did not have to be bargained because it was not a "term and condition" of employment. He noted that ED 512.03 (7) contemplated that individual professional development plans must contain a component for self-evaluation. (District Exhibit Tab D, p. 151.)

9. The District, in the course of pursing the work of the PD & SC, has, according to Burke, progressed to the point where committee members are discussing "teaching excellence" and certain "pathways" which may be used to assess, evaluate and remediate teacher performance. Pathways have been were identified for new teachers (I), experienced teachers (II) and teachers needing improvement (III). (Assn. Exhibit No. 13.) Burke said Pathway II drafting is complete and is ready for pilot participants. Part of the committee's assigned work involves assessing proposals which would standardize the evaluation instrument or documents throughout the District, but this has not been adopted yet. (See Assn. Exhibit No. 13, p. 2.) If adopted, it would utilize District-wide mentoring, which, in turn, may create a change in terms and conditions of employment.

DECISION AND ORDER

In its opening statement, the Association acknowledged that "there is no dispute that the employer has the right to decide that it wants to create an evaluation plan or that changes to the evaluation plan might be desirable. However, when such decisions have the potential to affect terms and conditions of employment, their implementation becomes bargainable, especially when the parties have bargained over these matters historically." This reprise fairly assesses the seminal case of Appeal of Pittsfield School District, 744 A.2d 594, ___N.H.___ (1999) which quoted from Appeal of the State of New Hampshire, 138 N.H. 716, 722 (1994), to wit:

> [A]lthough a school district's decision about whether or not to offer extracurricular program is part of broad managerial policy, staff wages, hours and other specifics

> of staff obligations and remuneration primarily affect the terms and conditions of employment.

Essentially the same principles apply in this case. Under the language found at RSA 273-A:XI, the employer is protected in its right to determine if it will conduct evaluations of its employees. Once it makes that determination, however, if the implementation of the unilaterally, non-negotiated evaluation program impacts terms and conditions of employment of the evaluatees then there must be negotiations about this change to those terms and conditions of employment.

The responsibility to negotiate occurs when the bargaining agent's proposal "primarily affects[s] terms and conditions of employment, rather than matters of broad managerial policy." Appeal of State, 138 N.H. 716, 722 (1994). This transformation occurs when the subject matter of the proposal addresses not the decision to use an employee evaluation procedure but rather when it addresses the consequences of that procedure as it impacts the terms and conditions of employment of the personnel being evaluated. To the extent the proposal addresses the consequences or impact either of implementing a new evaluation plan or unilaterally changing an existing plan, the status *status quo* must be honored, until negotiated to the contrary, under Appeal of Milton School District, 137 N.H. 240, 247 (1993) and Appeal of City of Nashua Board of Education, 141 N.H. 768,775 (1997) in which the Supreme Court says of itself, "Our cases have consistently recognized proposals and actions that primarily affect wages or hours as mandatory subjects of bargaining."

Turning again to Appeal of Pittsfield School District, *supra*, we heed that portion of the decision which says, "We need not decide whether the teacher evaluation proposed here are mandatory subjects of bargaining. Once parties to a CBA have chosen to bargain over matters not otherwise prohibited from negotiation, the parties must abide by the agreement entered into during the term of the CBA." It is apparent that the parties have done just that...chosen to bargain. The result of that effort, however, was that "current contract language," or "C-C-L" as reflected in Finding No. 5, became the agreed-upon resolution for the successor CBA. That being the case, each party was entitled to believe that the other had agreed that the evaluation process for the successor agreement would be the same as was used in the expiring agreement...current contract language as to policy (whether there should be evaluations) and procedures (how evaluations should be conducted).

Notwithstanding the foregoing assessment of rights accorded to each of the parties relative to the evaluation process, we cannot leave this case without returning to the triggering mechanism for the commission of an unfair labor practice, namely, the unilateral implementation of a new, or the unilateral modification of an existing, evaluation plan so that it affects the terms and conditions of the employment of the employees evaluated under it. That test has not been met. The record is detailed as to the meetings which have been held and the topics which have been discussed. There is, however, no evidence that a new plan actually has been adopted, that it has been implemented or used, or that it impacts terms and conditions of employment of the bargaining unit members covered by it. Without such evidence, further confirmed by Burke's testimony as to no adoption (Finding No. 9), there is no ULP. That is not to say that there could

not be one in the future; however, we feel the parties will find our analysis to be instructive in the meantime.

Likewise and incidental to the foregoing, we find no ULP for the alleged "direct dealing" between the administration and bargaining unit members, either as a result of being surveyed or as a result of serving on the PD & SC. The survey was a *de minimus* incursion, if any, on members of the bargaining unit, not inconsistent with their professional duties, and not at odds with any provisions of the CBA. Service on the PD & SC gives every appearance (Finding No. 8) of being voluntary; we cannot assume to the contrary without evidence of objection[s] of an involuntary requirement for participation.

The ULP is DISMISED.

So ordered.

Signed this 8th day of November, 2000.

Doris Desautel
Alternate Chairman

By unanimous vote. Alternate Chairman Doris Desautel presiding. Members Richard Molan and Seymour Osman present and voting.