State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Manchester Education Association, NEA-NH Complainant v. Manchester School District Respondent	*	Case No. T-0242-17 Decision No. 2003-016

APPEARANCES

Representing the Manchester Education Association, NEA-NH:

James F. Allmendinger, Esq., Staff Attorney for NEA-NH

Representing the Manchester School District:

Dennis T. Ducharme, Esq.

BACKGROUND

The Manchester Education Association, NEA-NH ("Union") filed unfair labor practice charges against the Manchester School District ("District") on October 7, 2002. In its complaint, the Union alleges that it previously filed a grievance with the District based upon the non-renewal of a teacher who was a member of the bargaining unit and that the District refused to process that grievance. The Union alleges that the non-renewed teacher who was the subject of the grievance had been employed for at least three years within the District and under the terms of the grievance procedure contained in the parties' collective bargaining agreement ("CBA") the teacher was entitled to have her grievance processed by the District. The Union states that to fail or refuse to process the grievance constitutes a violation of RSA 273-A: 5, I(a), (e), (g) and (h).

The District filed its answer with the PELRB on October 21, 2002. It asserts that it has no obligation to process the grievance because this employee had not been employed in the District for three years at the time of her non-renewal. The District denies that its actions violate the statute.

A pre-hearing conference was conducted on December 3, 2002 and a pre-hearing order followed on December 6, 2002. A final hearing was conducted before the Public Employee Labor Relations Board at its offices in Concord, New Hampshire on January 28, 2003 at which both parties were present with counsel, and had the opportunity to present witnesses for examination and cross-examination and to offer exhibits into the record. Prior to the conduct of the evidentiary hearing, the parties submitted a statement of certain stipulated facts that appear below as Findings of Fact No. 5 A-G. Before the submission of any evidence at the hearing, the parties also stipulated that Ms. Jennifer Dahlberg, the employee that was not renewed in her position by the District may be considered to have been a "teacher" at all times relevant to these proceedings, thereby eliminating any question of whether or not the employee was covered by the provisions of the parties' CBA and further narrowing the issue for consideration by the PELRB.

FINDINGS OF FACT

1. The Manchester School District (hereinafter referred to as the "District") employs educational staff and other personnel in the operation of its school district and therefore is a public employer within the meaning of RSA 273-A:1 X.

2. The Manchester Education Association is an association of employees affiliated with the National Education Association – New Hampshire (hereinafter referred to as the "Association") that is the duly certified exclusive bargaining representative.

3. The District and the Association are parties to a Collective Bargaining Agreement (CBA) effective July 1, 2000 to June 30, 2003 and that contains a workable grievance procedure.

4. The CBA contains the following relevant provisions:

ARTICLE XXV - GRIEVANCE PROCEDURE

> A.1. A 'grievance' is 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.

ARTICLE IX - TEACHER EMPLOYMENT

A.1. ...To be eligible for an annual step increase, a teacher must actually work ninety-two (92) days or more of the teacher's work year....

ARTICLE IX - TEACHER EMPLOYMENT

A.4. Any teacher who is hired to work for a full contract year will receive full contract benefits. Any teacher who is hired to work for less than a full contract year, but is a permanent replacement or a permanent addition and contracted to begin work during the first ninety-two (92) days of the contract year to teach for the entire balance of the year will receive full contract benefits on a prorated basis for salary and fringe benefits....

ARTICLE IX - TEACHER EMPLOYMENT

A.4. ...If a position becomes vacant within the first ninety-two (92) days of the work year and is to be vacant for the remainder of the work year, the position shall be filled by a permanent replacement....

ARTICLE IX - TEACHER EMPLOYMENT

E. ...his/her right to recall for the remainder of the academic year, but shall remain on the recall list for the next school year....

ARTICLE XI - INDIVIDUAL TEACHER CONTRACTS

B.2. The contract shall be renewed annually, automatically, during the period of said teacher's first three (3) years of continuous employment by said Board, unless the teacher has been notified, in writing, prior to April 15 that the contract will not be renewed for the following year....If a teacher receives a notice of non-renewal set forth in the preceding sentence, the parties agree that the teacher shall not be entitled to a statement of reasons relating to any such notice except as may be required by law....

ARTICLE XI - INDIVIDUAL TEACHER CONTRACTS

> B.3.c. The Board (District) may terminate this (teacher's individual) contract at any time for one or more of the following reasons: ...(6) other due and sufficient cause, provided prior to terminating the contract, the Board shall give the teacher a written notice that termination of that teacher's contract is under consideration and upon written request filed by the teacher with the Board within five (5) days after receipt of such notice, the Board shall within the next succeeding five (5) days give the teacher a statement, in writing, of its reasons therefore.

5. The parties submitted a statement of "Agreed-Upon Facts" as follows:

   A. Ms. Dahlberg was originally hired as an Out Of District Monitor on October 15, 1998.

   B. She worked in that position until her resignation. Her resignation letter is undated but was received by the school district on April 13, 2001.

   C. She completed the 2000-2001 school year. Her resignation was effective June 30, 2001.

   D. Ms. Dahlberg prepared an application for employment as an EH teacher on June 29, 2001, and was interviewed on that day.

   E. Ms. Dahlberg received an offer of employment from the District on August 15, 2001, effective August 27, 2001.

   F. Ms. Dahlberg began the 2001-2002 school year as an EH teacher at Central High School and was employed in that capacity until the end of that school year.

   G. Ms. Dahlberg was nonrenewed on April 10, 2002.

6. Since the parties stipulated that Ms. Dahlberg could be considered a "teacher" for purposes of these proceedings, at the time of Ms. Dahlberg's non-renewal, she and the District were subject to the provisions of the parties' CBA effective July 1, 2000 to June 30, 2003.

7. Ms. Dahlberg was informed at the time of her application and interview for another teaching position on June 29, 2001 that she would be receiving a

formal offer for the position she was applying for from the District later during the summer, but before the school year was to begin.

8. Ms. Paula Wakefield is the Human Resource Coordinator for the District and testified that the school year is defined as beginning with the day before the first day of classes through June 30th of the following year.

9. According to the provisions of the parties' CBA, the work period for which teachers are paid and provide their services to the District is variously referred to as a "school year" (ARTICLE IX E) or a "contract year" or a "work year" (ARTICLE IX A.4) or a "teacher's work year" (ARTICLE IX,A.1.) ending on June 30th of each year. The District pays teachers their salary with twenty-six, bi-weekly paychecks spanning the calendar year as a convenience to the teachers under the provisions of the CBA.

DECISION AND ORDER

JURISDICTION

The sole issue presented in this matter calls upon the PELRB to determine whether or not there is a genuine issue of contractual interpretation and dispute between the two parties. That is, whether or not the issue raised by the Union is "arbitrable". If it is, then the parties are obligated to utilize the grievance procedure that they previously agreed to use by their inclusion of that procedure in their CBA. If the issue before the PELRB is not determined to be arbitrable, then the District cannot be compelled to process the grievance presented to it by the Union. The PELRB has exclusive jurisdiction to determine whether or not a dispute is arbitrable. Appeal of Westmoreland School District 132, N.H. 103 (1989), Nashua School District v. Murray, 128 N.H. 417 (1986).

FINDING

We find that the combination of the existence of the negotiated grievance procedure, the definition of what constitutes a grievance, the contractual reference to employment, the varying contractual references to the definition of a teacher's work period and contractual reference to rights afforded to a non-renewed teacher all create a presumption of arbitrability. In turn, we find no "forceful evidence" of the parties' purpose to exclude of the grievance from arbitration that would serve to overcome the presumption afforded to arbitration. Without sufficient evidence to so find, we have determined that the District has not satisfied the "positive assurance" test that the PELRB must apply in this instance as provided by the *Westmoreland* and *Nashua* cases cited above.

FACTS

The parties' dispute arises from a so-called "non-renewal" notice to Jennifer Dahlberg on April 10, 2001 that resulted in her termination from employment with the District at the conclusion of the 2001-2002 school year. Her notice of non-renewal indicated that it was being done pursuant to RSA 189:14-a. (Joint Exhibit #26). RSA 189:14-a states in relevant part, "any such (non-renewed) teacher who has taught for 3 consecutive years or more in the same school district and who has been so notified (of non-renewal) may request in writing within 10 days of receipt of said notice a hearing..." At the time of Ms. Dahlberg's receipt of a non-renewal notice and subsequent termination the parties were subject to the terms of a collective bargaining agreement. (Finding of Fact #6). The CBA has a workable grievance procedure. (Finding of Fact #3).

As a result of the District's action, the Union filed a grievance alleging that she had not been given proper notice. (Joint Exhibit #27). The District responded by letter of counsel, dated May 30, 2002, indicating, "As (counsel to the District) interpret both RSA 189:14-a and Article XI B.2 of the collective bargaining agreement, Ms. Dahlberg is entitled to a statement of reasons only after three years of continuous employment. It does not appear that she has ever reached that threshold." (Joint Exhibit #28). On that basis, the District refused to provide the grievant with a statement of reasons for her non-renewal. *Id.*

The parties submitted a stipulation that Ms. Dahlberg was "originally hired" by the District on October 15, 1998. (Finding of Fact # 5A). Ms. Dahlberg was notified of her non-renewal on April 10, 2002. (Finding of Fact # 5G, Joint Exhibit # 26). If these two dates are used to establish her length of employment, it represents a period greater than three calendar years. If the three years relied upon by the parties are three school years, then through the pro-ration provided by ARTICLE IX, A.4 of the CBA, the period would also be greater than three years. However, the parties are in dispute as how certain CBA terms and provisions related to the computation of Ms. Dahlberg's period of employment and the rights that accrue in the event of non-renewal are to be interpreted.

DISCUSSION

The issue before the PELRB, focuses on a provision of the parties' CBA that provides certain rights of prior notice to teachers (Finding of Fact #4, ARTICLE XI, B.3.c.) who have completed their "first three (3) years of continuous employment". (Finding of Fact #4, ARTICLE XI, B.2.). In short, if they complete that period of employment, the District must, upon request, provide the soon to be discharged teacher with a written statement of the District's reasons for non-renewal of that teacher prior to terminating that teacher's contract. (Finding of Fact #4, ARTICLE XI, B.3.c).

During the period October 15, 1998 and April 10, 2002 Ms. Dahlberg submitted a letter of resignation on or about April 13, 2001(Finding of Fact #5B, see Joint Exhibit #

10) to be effective with the end of the school year on June 30, 2001. (Finding of Fact #5C). On June 29, 2001, the day before her resignation was to take effect, she interviewed for another teaching position within the same District and was given an oral confirmation on June 29, 2001 that she would receive a favorable nomination letter later in the summer of 2001. (Finding of Fact #7). She did receive a written notice on August 15, 2001 that she had been "elected" to her new position effective August 27, 2001 for the ensuing school year. (Finding of Fact #5E, see Joint Exhibit #18). The school year spans that period of time from the day before the first day of school in the fall through June 30th of the following calendar year. (Finding of Fact #8) Ms. Dahlberg had performed her duties as a teacher through the end of the 2000-2001 school year. (Finding of Fact #5C). She performed her duties as a teacher on the first day of the school year 2001-2002 and completed that school year. (Finding of Fact #5F).

The CBA makes her right to know the reasons for her dismissal contingent upon completing three years of continuous employment. (ARTICLE XI, B.2) One interpretation of the word "employment" used in ARTICLE XI, B.2. is "activity in which one engages or is employed" or "an instance of such activity". (Webster's Ninth New Collegiate Dictionary, p.408). Another interpretation of the word "employment" as so used is "the act of employing: the state of being employed". (*Id.*). The first accentuates the activity comprising the employment. The second accentuates the status of the individual. If we were to rely on documents maintained by the District we might conclude that the District considered Ms. Dahlberg to have maintained continuous status as an employee since September 28, 1998 as that is the date the district has used to establish her accumulated seniority. Several of the joint exhibits submitted, consisting of documents from her personnel file maintained by the District, varied as to the specific date on which Ms. Dahlberg began working for District. The seniority listing indicates her "service" began on September 28, 1998. (Joint Exhibit #27). On a personnel information sheets her "date of hire" appears as October 13, 1998. (Joint Exhibits #11, #15 and #25). On an application for employment Ms. Dahlberg indicates a start of "10/ /98" when characterizing previous experience with the District. (Joint Exhibit #13). On her IRS Form W-4 her signature is accompanied with an indication that it was signed on September 16, 1998. (Joint Exhibit #1). That same document carries an apparent subsequent notation indicating that she is being employed as a "new teacher – part-time;" and that there will be action undertaken at an "Oct. Board" meeting. Ms. Dahlberg received a letter from the Superintendent of Schools advising her that she had been "elected to a position in the Manchester School System for the 1998-1999 school year..." (Joint Exhibit #3). This letter is dated October 15, 1998.

There are other documents in evidence that indicate that she did not enroll in the District sponsored insurance plans until after she had been elected to her second position with the District. (Joint Exhibits # 19 and # 20) and that she did not enroll in the retirement system until after that second election. (Joint Exhibit #21). Notwithstanding the position taken by the District that Ms. Dahlberg had never reached the threshold of the required length of employment because of an intervening resignation, as we review the many personnel documents maintained by the District, we find it difficult to determine whether the District treated her employment as, for instance, continuous as

indicated by her accumulated seniority since September 1998 or treated her employment as not being continuous because of her resignation at the end of the 2000-2001 school year notwithstanding her subsequent election to a second position before the start of the school year 2001-2002. This is particularly relevant to our consideration because the resignation and re-election did not constitute an interruption in employment if the definition of employment as "the activity in which one engages or is employed." (Webster's Ninth Collegiate Dictionary, p. 408) is applied. Also relevant to our consideration of this contractual reference to "employment" are other references in the parties' CBA to teacher employment consisting of a "school year" (Finding of Fact #4, ARTICLE 4.E), "teachers work year" (*Ibid.* ARTICLE A.1), "contract year" and "work year" (*Ibid.* ARTICLE A.4). The parties have agreed to define "grievance" in their CBA 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." (Joint Exhibit #4 ARTICLE XXV, A.1.) Our examination therefore leads us to believe that there is a genuine issue of contractual interpretation and dispute between the parties to constitute a valid claim for grievance arbitration.

We have considered all of the pleadings and documentary evidence, the relevant provisions of the parties' collective bargaining agreement, and the credibility of the witnesses' testimony. We do not find any exclusion of this type of grievance from arbitration within the parties' CBA nor do we find there is sufficiently forceful evidence to rebut the long-standing presumption of arbitrability and to exclude the claim from arbitration. Appeal of Westmoreland School District, 132 N. H. 103 (1989); see also, Appeal of AFSCME Local 3657, 141 N.H. 291, 293 (1996) We cannot, therefore, say with positive assurance that the parties' arbitration clause is not susceptible of an interpretation that covers this dispute regarding Ms. Dahlberg's period of employment and her concomitant rights under the non-renewal provisions of the parties' CBA.

ORDER

The District's refusal to participate in grievance arbitration of this matter is a breach of the parties' CBA and, as such, is an unfair labor practice under RSA 273-A:5, I (h). The District is directed to CEASE AND DESIST from refusing to process the grievance to arbitration forthwith.

So ordered.
Signed this 5th day of March, 2003

Jack Buckley, Chairman

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