

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

<hr/>		*
Association of Portsmouth Teachers/NEA-NH		*
		*
Complainant		*
v.		*
	Case No. E-0043-1	*
Portsmouth School District		*
		*
Respondent	Decision No. 2008-025	*
<hr/>		*

APPEARANCES

Representing Association of Portsmouth Teachers/NEA-NH
James F. Allmendinger, Esq., NEA-NH, Concord, New Hampshire

Representing Portsmouth School District:
Daniel P. Schwarz, Esq., Flygare, Schwarz & Closson, PLLC Exeter, New Hampshire

BACKGROUND

The Association of Portsmouth Teachers/NEA-NH (the "Association") filed improper practice charges on June 18, 2007. The Association claims that the Portsmouth School District (the "District") violated RSA 273-A:5, I (a) (e) and (h) by failing to negotiate a new evaluation system for coaches and by its non-renewal of Martin James, the boys varsity soccer coach who was evaluated under the new evaluation system.

As remedies, the Association requests that the PELRB: 1) Find that the District has committed an Unfair Labor Practice; 2) Order that Mr. Martin be re-employed as the boys' high school soccer coach, (3) Order that Mr. Martin suffer no loss of pay or other benefits; 4) Order the District to negotiate with the Association over the new evaluation system for athletic coaches; and 5) Grant such other and further relief as may be just.

The District filed its Answer on July 3, 2007. The District contends that the complaint is untimely, that the District only determined that Mr. Martin's non-renewal was not subject to the grievance procedure, and the complaint should be dismissed.

The District requests that the PELRB: 1) Dismiss the instant Unfair Labor Practice Charge with prejudice; 2) Order the Association to reimburse the District for all costs associated with responding to the ULP; and 3) Grant such other relief as may be just and proper.

The board held a hearing on August 14, 2007 at the PELRB offices in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The record was held open until September 14, 2007 to allow the parties to file briefs. Both parties have filed briefs, and the record is now closed.

FINDINGS OF FACT

1. The Association of Portsmouth Teachers/NEA-NH is the board certified exclusive representative for Portsmouth Teachers.
2. The District is a public employer within the meaning of RSA 273-A:5, I.
3. Martin James is a Portsmouth middle school teacher and a member of the Association of Portsmouth Teachers bargaining unit.
4. Article 55 of the parties July 1, 2003 to June 30, 2006 collective bargaining agreement ("CBA") contains compensation schedules for coaching, extra-curricular, and special services.
5. Dr. Robert Lister is the school superintendent for Portsmouth schools. In early 2006 he was involved in New Hampshire Interscholastic Athletic Association ("NHIAA") meetings concerning topics such as Portsmouth's lack of an athletic director, a handbook, and coaching evaluations.
6. Subsequent to these meetings Rus Wilson was hired as the new high school athletic director. By July, 2006 Mr. Wilson had prepared a formal athletic handbook and formal coach evaluation procedures.
7. The District did not negotiate the evaluation procedures with the Association.
8. Martin James is a Portsmouth middle school teacher who in the fall of 2006 was in his fourth year as the boy's high school varsity soccer coach.
9. Mr. Wilson testified that his office distributed and he implemented the new handbook and evaluation process during the fall sports seasons, although Mr. Martin disputes receiving the handbook or the evaluation forms until after the season was over.
10. On or about December 19, 2006 the athletic director provided Mr. Martin with an evaluation for the 2006 season and notified Mr. Martin that he would not be coaching soccer at the high school in 2007.

11. In early 2007 the Association grieved the athletic director's decision that Mr. Martin would not coach soccer in 2007 and the District's failure to negotiate the new evaluation procedures. The Association filed an unfair labor practice complaint on June 18, 2007

DECISION AND ORDER

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. RSA 273-A:6 I. PELRB jurisdiction is proper in this case as the Association has alleged violations of different provisions of RSA 273-A:5.

DISCUSSION

The board declines to dismiss the complaint as untimely, since it was filed within 6 months of December 18, 2007, the date when the athletic director used the new evaluation to review with Mr. Martin his performance and when he told Mr. Martin that he would not be coaching the soccer team in 2007. *See* RSA 273-A:6, VII.

The District also contends that the subjects of the complaint are subject to final and binding arbitration under the parties' CBA and should be dismissed on that basis. The board finds that the central issue in this case is whether the teacher-coach evaluation is a mandatory subject of bargaining. This is a question to be decided under RSA 273-A, not the parties' collective bargaining agreement. Additionally, the parties' collective bargaining agreement does not reflect an intention to resolve this statutory issue through the grievance and arbitration process. The board finds with positive assurance that the CBA is not susceptible of an interpretation that covers this dispute. *Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998).

The District argues that the varsity soccer coach position is outside the bargaining unit and the District has no obligation to bargain with respect to the coaching evaluation process on that basis. However, extracurricular activities, such as the coaching position at issue in this case, are within the scope of a teacher's duties and therefore the terms and conditions of such extracurricular activities constitute a mandatory subject of bargaining. *Appeal of Berlin Education Association, NHEA/NEA*, 125 N.H. 779, 782 (1984)(holding that the salary scale for teachers performing extracurricular activities such as coaching and supervising student activities is a mandatory subject of bargaining).

Whether the coaching evaluations are a mandatory subject of bargaining requires the application of a three part test (the "bargaining" test):

First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation. Second, the proposal

must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy. Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with the public control of governmental functions contrary to the provisions of RSA 273-A:1, XI.

Appeal of City of Nashua Board of Education, 141 N.H. 768, 773-74 (1997)(citations omitted). Under the three step bargaining test, a proposal is a prohibited subject of bargaining if it fails to satisfy the first step, it is a permissive subject of bargaining if it fails to satisfy the second or third step, and it is a mandatory subject of bargaining if it satisfies all three steps. *Id.*

As to the first step, it is settled that teacher evaluations are not reserved to the exclusive managerial authority of a public employer and are not a prohibited subject of bargaining provided they do not contain hiring standards or evaluation standards. *In re Pittsfield School Dist.*, 144 N.H.536, 539-540 (1999); *Appeal of White Mountain Regional School District*, 154 N.H. 136, 141 (2006). Accordingly, the evaluations at issue in this case satisfy the first step of the bargaining test as long as they avoid delving into these prohibited areas. The court has not, however, decided whether evaluations are permissive or mandatory subject of bargaining, as such a determination was not required in the *Pittsfield* or *White Mountain* cases.¹ In this regard, the court in *Pittsfield* provided some useful guidance:

Often, both the public employer and the employees will have significant interests affected by a proposal. Determining the primary effect of the proposal requires an evaluation of the strength and focus of the competing interests. For example, although a school district's decision about whether or not to offer extracurricular programs 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."

Id. At 539.

The board's earlier decision in the case of *Contoocook Valley Education Association, NEA-New Hampshire v. Contoocook Valley School District*, Case No. T-0275-15 indicates that certain aspects of the disputed teacher-coach evaluation process may likely constitute mandatory subjects of bargaining. In that case, the board construed RSA 273-A:XI to mean that 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.

PELRB Decision No. 2000-116. In general, procedures to implement an employer's policy choice satisfy steps two and three of the bargaining analysis, making such procedures a

¹ In both cases the parties had already bargained evaluation procedures, a circumstance not present in this case.

permissive subject of bargaining. The procedures are only mandatory subjects of bargaining if they satisfy all three steps of the bargaining analysis. *Appeal of the State of New Hampshire*, 138 N.H. 716, 722 (1994). In *Appeal of the State of New Hampshire*, the court considered whether an SEA discipline proposal was a mandatory subject of bargaining:

Next, we must assess whether the discipline proposal primarily affects the terms and conditions of employment or matters of broad managerial policy. Discipline unquestionably affects employee welfare by influencing attitudes, productivity, longevity, safety, as well as other aspects of employment. In the same manner, disciplinary policy is central to the employer's relationship with, responsibility to, and control of its employees. Both the employer and the employees, therefore, have significant interests affected by provisions for employee discipline.

Id. At 723-724. The teacher-coach evaluation process impacts employee and employer interests in ways that are similar to the impact of the disciplinary proposal on such interests under consideration in *Appeal of State of New Hampshire*. However, the SEA disciplinary proposal at issue in *Appeal of State of New Hampshire* was not a mandatory subject of bargaining because the proposal contained a just cause standard which infringed upon the State's "prerogative to establish policy if the State, as employer, were not free to define 'just cause.'" *Id.* The SEA's disciplinary proposal was, however, a permissive subject of bargaining.

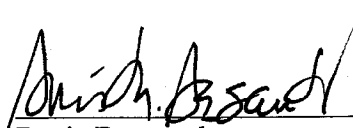
The board finds that in this case the conditions and certain procedures under which the evaluation of teacher-coaches take place involve matters which primarily affect the terms and conditions of employment, so the second step of the bargaining analysis is satisfied. The board finds the third step is also satisfied so long as the evaluation negotiations do not seek to restrict the information the District may consider when conducting evaluations, set the standards the District applies in the evaluation process, control the action the District may take given the results of the evaluation, address any changes in policy the District may need to institute, or address the nature and extent of the evaluator's personnel contact or observation of the employee. These areas are within the purview of the managerial policy exception, as they are properly considered as part of the "functions, programs and methods" of the District, such as the selection and direction of its personnel "so as to continue public control of governmental functions. See RSA 273-A:1, XI. On this basis, the board finds that the disputed teacher-coach evaluation process is a mandatory subject of bargaining.

However, the board declines to reinstate Mr. Martin to his position as the high school varsity soccer coach. The board does not find that Mr. Martin's reinstatement is the appropriate remedy for the District's failure to bargain as to the teacher-coach evaluation process, especially when the impetus for creation and implementation of the teacher-coach evaluations was critical input received from the NHIAA. Another and independent reason for the board's decision not to order Mr. Martin's reinstatement is that the board believes the District's decision to replace Mr. Martin as high school varsity soccer coach was made in good faith and would likely have been made irrespective of Mr. Martin's formal evaluation. However, to the extent Mr. Martin's teacher-coach evaluation is included in his personnel file it should be removed. Further, in the event Mr. Martin applies for the same or a similar position in the future the District shall not use or rely upon his 2006 coaching evaluation in any respect.

In accordance with the foregoing, the board finds that the District committed an unfair labor practice on account of its failure to bargain the components of the teacher-coach evaluation process which affect the terms and conditions of employment as outlined in this decision. The District shall cease and desist its use of any teacher-coach evaluation plan which has not been negotiated with the Association as required by this decision.

So ordered.

Signed this 15TH day of February, 2008.


Doris Desautel
Chair

By unanimous decision. Chair Doris Desautel. Members E. Vincent Hall and James M. O'Mara, Jr. present and voting.

Distribution:

James F. Allmendinger, Esq.

Daniel P. Schwarz, Esq.