



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**HILLSBORO-DEERING FEDERATION
OF TEACHERS, AFT LOCAL #2348,
AFT-NH, AFL-CIO**

CASE NO. E-0045-3

v.

DECISION NO. 2008-236

HILLSBORO-DEERING SCHOOL BOARD

APPEARANCES

Representing Hillsboro-Deering Federation of Teachers, AFT Local #2348, AFT-NH, AFL-CIO:
Teresa D. Donovan, Esq., AFT-NH, Bow, New Hampshire

Representing Hillsboro-Deering School Board:
Edward Kaplan, Esq., Sulloway & Hollis, P.L.L.C., Concord, New Hampshire

BACKGROUND

Hillsboro-Deering Federation of Teachers, AFT, Local #2348, AFT-NH, AFL-CIO (the "Union") filed an unfair labor practice complaint on April 28, 2008 alleging that the Hillsboro-Deering School Board (the "School Board") committed an unfair labor practice in violation of RSA 273-A:5 (g) and (h). The Union contends the School Board is enforcing an arbitrator's award that the Union contends is not binding pursuant to section 13.3.4 of the parties' collective bargaining agreement because the award is contrary to provisions of the parties' contract.

The Union requests that the PELRB: 1) find that the arbitrator exceeded his authority under the CBA in violation of RSA 273-A:5 (g) and (h) and vacate the decision of the arbitrator;

2) order the School District to reinstate the affected teacher with back pay and benefits and follow the Professional Evaluation Plan; 3) order the School District to administer the Professional Evaluation Plan in accordance with the CBA; 4) order the arbitrator to reimburse the union for its share of the arbitration costs in this case; 5) in the alternative, order that the case be submitted to arbitration with a newly appointed arbitrator for a new hearing; and 6) grant such other and further relief as may be just and necessary.

The School Board filed its answer and a motion to dismiss on May 13, 2008 denying the charge. The School Board contends the arbitrator properly decided the specific questions submitted to him and that there is no basis for disturbing his award under section 13.3.4 of the parties' collective bargaining agreement or otherwise. The School Board requests that the PELRB dismiss this matter, award the School Board its costs and fees in connection with this matter; and grant such other and further relief as may be just and appropriate.

At the pre-hearing conference on June 19, 2008 the parties agreed to submit this matter on stipulated facts and memoranda of law, which submissions have been made in accordance with the schedule set out in PELRB Decision No. 2008-130. The agreed upon record in this case consists of the 2007-09 CBA (Union Exhibit 2), the Professional Evaluation Plan (Union Exhibit 3), and the Arbitration Decision (Union Exhibit 4). The School Board objects to the remaining Union Exhibits (1, 5-32). All of the Union Exhibits were also exhibits at the arbitration proceeding. The School Board contends the disputed Union Exhibits are not relevant because the Union is not entitled to a de novo hearing and because these Exhibits are only a portion of the evidence presented to the arbitrator as the arbitrator also received witness testimony which was not recorded. The School Board's objections are overruled because the School Board has agreed to the submission of the Arbitration Decision which expressly

references some of the Union Exhibits and in general all of the Union Exhibits may assist in deciding the issues in this case.

FINDINGS OF FACT

1. The Union is the board certified exclusive representative for teachers in the Hillsboro-Deering school district pursuant to RSA 273-A:10.

2. The Hillsboro Deering School Board is a public employer within the meaning of RSA 273-A:1, X.

3. The Union and the School Board are parties to a July 1, 2006 to June 30, 2009 Collective Bargaining Agreement (the "2006-09 CBA").

4. Article 13.3.4 of the 2006-09 CBA is entitled "Step 4- Arbitration," and provides in part as follows:

The arbitrator's decision will be binding on all parties concerned, provided that the questions of law may be submitted to the appropriate court of law having jurisdiction; providing further that is not (sic) contrary to any provisions of this contract of the Laws of the State of New Hampshire.

5. Paul Rounds was a Special Educator and his responsibility included preparing Individual Education Plans ("IEP") and reports on student progress to parents. At some point Karen Ralph, the special education coordinator, determined there were issues with Mr. Round's completion of these responsibilities. The situation evolved to the point where the school administrators concluded that Mr. Round was claiming to complete work that he had not completed. There were a number of contacts between Mr. Rounds and school administrators to address the concerns with Mr. Rounds' performance in 2006-07.

6. At the end of May, 2007 Principal Nanicelli placed Mr. Rounds on Track 3 of the Professional Evaluation Program, Article 6.8.1 of the 2006-09 CBA. See Union Exhibits 2 and

3. The purpose of the Professional Assistance Program Track 3 is described as follows:

Professionals who are experiencing difficulty meeting the basic level of Standards of Professional Practice may be placed in the Professional Assistance Program. The program will provide a good faith effort to support and guide the employee to return to a level of competence set forth in the Standards for Professional Practice.

7. On June 25 Principal Nanicelli recommended that Mr. Rounds be terminated, even though Mr. Rounds had not completed the Track 3 process.

8. In July, 2007 the Union filed a grievance concerning the termination of Special Educator Paul Rounds. The Union pursued the grievance to arbitration, and the arbitrator issued his opinion and award on March 25, 2008.

9. The arbitrator specifically addressed the Professional Assistance Program in his decision:

Nanicelli made an honest effort when he informed Rounds that he had placed him on track 3 of the Professional Assistance Program. The next step was up to Rounds who failed to respond to the directive to meet with Nanicelli by June 15 with his Professional Assistance Plan. There is no evidence in the record that shows any explanation by Rounds for his non compliance.

In any event, in my opinion, the Professional Assistance Program is an optional plan that allows for modification or even avoidance when management chooses not to follow it. There was testimony by the union's witnesses that on at least three occasions employees had been terminated for just cause without recourse to the evaluation plan. The language of the Track 3 Professional Assistance Program clearly gives the employer the option when it states: "Professionals who are experiencing difficulty meeting the basic level of Standards of Professional Practice *may be* placed in the professional assistance program. In other words placement is optional. In my opinion, the district met whatever obligation it had under the program when Nanicelli recommended and the school board, after a hearing, approved Rounds' just cause termination."

10. The arbitrator denied the grievance and stated that the "district was acting within its contracted management rights when it found just cause to terminate the grievant and had no further obligation under the Professional Evaluation Program."

DECISION AND ORDER

DECISION SUMMARY

The Union's evidence is insufficient to establish a violation of RSA 273-A:5, I (g) or (h). Final and binding arbitration decisions are subject to limited review, and in this case the arbitrator's interpretation of the 2007-09 CBA is not so implausible as to require reversal of his opinion and award.

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I. PELRB jurisdiction is proper in this case as the Union has alleged violations of RSA 273-A:5 I (g)(To fail to comply with this chapter or any rule adopted under this chapter); and (h)(To breach a collective bargaining agreement).

DISCUSSION

The standard of review applicable to a challenge to an arbitration decision is set out in *Appeal of Merrimack County*, 156 N.H. 35 (2007), a case involving a dispute arising under a collective bargaining agreement between Merrimack County and employees at the county nursing home. This decision makes clear that the decision of an arbitrator retained to issue a final and binding decision as part of the collective bargaining agreement grievance process is

subject to limited review. The following statements by the court in *Appeal of Merrimack County* underscore this point:

Just as the court may not reject the arbitrator's factual findings simply because it disagrees with them, neither may the court reject the arbitrator's interpretation of the CBA simply because the court disagrees with it. While the arbitrator cannot ignore the plain language of the CBA, because the parties authorized the arbitrator to give meaning to that language, a court should not reject an award on the ground that the arbitrator misread the contract. As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. The court's task is thus ordinarily...limited to determining whether the arbitrator's construction of the [CBA] is to any extent plausible.

Id at 40. (citations and quotations omitted)

The Union complains that in his factual findings the arbitrator failed to acknowledge and give appropriate weight to evidence that Mr. Rounds was absent on sick leave with the exception of one day between May 29 and June 25, 2007. The Union contends that this circumstance excused Mr. Rounds' failure to meet with Principal Nanicelli on June 15 or otherwise satisfy his obligations under Professional Assistance Plan Track 3, and therefore his termination was improper. The arbitrator's written decision reflects that he heard testimony and received documentary evidence. His written decision makes clear he understood that Mr. Rounds went out on sick leave on May 29 and only returned for one day, although at another point in his decision he states that "[t]here is no evidence in the record that shows any explanation by Rounds for his non compliance" with Professional Assistance Program Track 3.

There are several problems with the Union's challenge to this aspect of the arbitrator's decision. First, a complete record of the evidence considered by the arbitrator is not available for review, since there is no transcript of witness testimony. Second, even if such a record were available for inspection, the arbitrator's decision is not subject to a "sufficiency" of the evidence review. "Because the parties have contracted to have disputes settled by an arbitrator chosen by

them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept." *Appeal of Merrimack County* at 40 (citations omitted). This effectively forecloses the Union's challenge to this portion of the arbitrator's decision.

The arbitrator also provided a separate and somewhat independent basis for his decision in his analysis of the School Board's obligations under the Professional Assistance Program Track 3 which the Union also challenges. He cites language that an employee like Mr. Rounds "may be placed in the professional assistance program" and in his analysis essentially concludes that the School Board was not obligated to complete Professional Assistance Program Track 3 before proceeding with disciplinary measures such as termination. The Union argues that as a result the arbitrator's decision is not final and binding under Article 13.3.4 because it is contrary to provisions of the contract, namely Article 6.8.1 and the Professional Assistance Program Track 3.

Again, the level of review is limited. "When the parties include an arbitration clause in their CBA, they choose to have disputes concerning constructions of the CBA resolved by the arbitrator." *Appeal of Merrimack County* at 40. The Professional Evaluation Program, Union Exhibit 3, does not specify whether the School District is obligated to keep an employee like Mr. Rounds in the Professional Assistance Program Track 3 once the process has begun. Although arguments can be made that the School Board should have allowed Mr. Rounds to complete the Track 3 process before proceeding with termination, the arbitrator's contrary analysis and conclusions are sufficiently cogent and logical to satisfy the "to any extent plausible" standard discussed in *Appeal of Merrimack County*. On this basis, the arbitrator's opinion and award is not contrary to any provision of the contract, and therefore it is final and binding upon the parties.

In accordance with the foregoing, the Union's complaint is dismissed.

So ordered.

November 19, 2008.



Douglas L. Ingersoll, Esq.
Staff Counsel/Hearing Officer

Distribution:

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