



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**DERRY EDUCATION ASSOCIATION/
NEA-NEW HAMPSHIRE**

CASE NO. E-0073-1

v.

DECISION NO. 2009-152

**DERRY COOPERATIVE SCHOOL
DISTRICT #1**

APPEARANCES

Representing: Derry Education Association/NEA-New Hampshire
Thomas Coish, UniServ Director
NEA-New Hampshire
Concord, New Hampshire

Representing: Derry Cooperative School District #1
Michael S. Elwell, Esq.
Soule, Leslie, Kidder, Sayward & Loughman
Salem, New Hampshire

BACKGROUND

Derry Education Association/NEA-New Hampshire ("Association") filed an unfair labor practice complaint against the Derry Cooperative School District #1 ("District") on November 24, 2008. The Association claims that the District breached the parties' collective bargaining agreement and violated RSA 273-A:5, 1 (h) by denying the applications of two bargaining unit

members to use the Article 9 sick leave bank. According to the Association, the District improperly denied the requests on the grounds that the disputed sick leave applications did not involve extended illness or disability. As relief the Association requests that the PELRB find that use of the sick bank is not limited to employees who have an "extended" illness or disability and order the District to make whole the two bargaining unit members whose sick bank applications were improperly denied.

The District filed its answer on December 9, 2008 and denies the complaint. The District asserts that its administration of the sick leave bank is consistent with the parties' collective bargaining agreement, bargaining history, and past practice. The District also asserts that the complaint is moot as to one of the involved employees who is no longer employed by the District, that the Association has failed to state a claim upon which relief may be granted, and that the complaint is otherwise barred by waiver, estoppel, laches, and unclean hands. The District requests that the PELRB dismiss the unfair labor practice complaint.

Hearing dates of January 22, 2009 and March 26, 2009 were rescheduled on the District's motion with the Association's assent, and the hearing was held before the undersigned hearing officer on April 15, 2009 at the PELRB offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. At the parties' request the record was held open following the hearing to allow for the submission of post-hearing briefs. A portion of the parties' stipulated facts are set forth below as Findings of Fact 1-12.

FINDINGS OF FACT

1. The District is a municipal corporation organized under the laws of New Hampshire, and is public employer under RSA 273-A.

2. Since 1977, the Association has been certified by the PELRB as the representative of certain teachers and other professional employees of the School District.

3. The District and the Association currently are parties to a collective bargaining agreement with the duration of July 1, 2007 through June 30, 2010.

4. Sections 9-07 and 9-08 of the parties' collective bargaining agreement include the following sick leave and sick bank provisions:

9-07 Sick Leave

Teachers will be entitled to fifteen (15) days sick leave with pay each year for personal illness. Sick leave days may be accumulated from year-to-year with a maximum of one hundred twenty (120) days. Once a teacher has accumulated the maximum 120 days of sick leave, that teacher still shall be entitled to receive 15 sick days each year, but any of those 15 sick days not used during that year will not carry over to the next year. A teacher may use up to 15 days of sick leave under this section each year for the illness of a spouse, child, parent or domestic partner who resides in the teacher's home.

9-08 Sick Bank

The Board agrees to establish a sick leave bank for employees covered by this Agreement. Each employee covered by this agreement agrees to donate one (1) day from the fifteen (15) days set forth in Section 9-07 to be deposited in said "Bank" accumulative to two hundred fifty (250) days in one (1) year. If at any time, the bank reaches the level of thirty (30) days, every teacher shall be required to donate (1) sick leave day to the bank. To become eligible to request extended benefits from this sick bank, an employee must: have exhausted all his/her accrued sick leave under Section 9-07 of this Article 9; present satisfactory medical evidence of disability or illness (excluding work connected accident); and get approval of the Superintendent or his/her designee. An employee may draw up to thirty (30) days from said "sick bank" in any one (1) year. The sick leave bank shall be considered fully depleted at the end of each school year (The last working day for teachers). Supervision of this bank shall be conducted by the Assistant Superintendent for Business and (3) members of the Association. This section of the Article shall not be grievable.

5. After an employee exhausts individual paid sick leave under Section 9-07 of the collective bargaining agreement, an employee may receive paid sick bank leave under Section 9-08 of the collective bargaining agreement if certain requirements are met.

6. The parties disagree whether sick bank leave may be used only for extended illnesses or disabilities. The District's position is that sick bank leave may be used only for extended illnesses or disabilities. The Association's position is that use of sick bank leave is not limited to extended illnesses or disabilities.

7. The parties agree that sick bank leave may be used intermittently or non-intermittently if the other requirements for sick bank leave are met.

8. In Spring 2008, teacher Dawn Chouinard applied for 20 days of sick bank leave. Ms. Chouinard requested said leave for 3 days that she already had been absent. Ms. Chouinard also requested sick bank days for the last 17 days of the 2007-08 school year after her employment had been non-renewed in case she was ill during those days.

9. The District granted Ms. Chouinard's application for the 3 days that she had been absent, but denied her application for the 17 days.

10. In April 2008, teacher Martha Raymond applied for sick bank days for the period of April 14, 2008 to April 21, 2008 due to a back condition. The District granted that application.

11. In June 2008, Ms. Raymond applied for one sick bank day for May 30, 2008 when she had been absent due to gastroenteritis. The District denied that application.

12. A number of employees have taken disability leave due to childbirth under Section 9-08 of the collective bargaining agreement since they had accumulated insufficient individual sick leave under Section 9-07 of the collective bargaining agreement to cover the entire period of disability due to childbirth. In such cases the District allows disability leave up to 6 weeks (30 days) in the case of vaginal delivery or 8 weeks (40 days) in the case of

Caesarean delivery. For example, an employee with a vaginal delivery who had accrued 23 days of individual sick leave was granted 7 sick bank days.

13. In 1997 then Assistant Superintendent David Jack wrote a letter to Jean Callahan, then an employee who maintained sick bank records on behalf of the Association. Mr. Jack's letter outlined a method of granting an eligible employee a block of time from the sick bank as follows:

Any member of the Derry Education Association who has an ongoing medical issue and has exhausted all of their accrued sick leave and who can present satisfactory medical evidence of disability or illness should ask for a small block of time from the sick bank. This could perhaps be 3-5 days and cannot be accrued to the next year as part of that individual's accrued sick time.

This would solve a couple of logistical problems:

- A. The school district would not have to dock an employee's pay.
- B. Things could be done in advance and you would not be requested for access to the sick bank on a day to day basis.

14. Subsequent to Mr. Jack's 1997 letter the District has granted and denied blocks of time from the sick bank to eligible employees. Examples of District action on such applications are reflected in a number of District Exhibits, and most, but not all, of such applications were granted at least in part.

15. At the time Dawn Chouinard applied for the disputed 17 days from the sick bank she was not ill or disabled, but she did anticipate that she might be absent from work during the final seventeen days of the school year on account of injuries she suffered in a December 2007 automobile accident.

16. In the past the sick bank has been made available to employees with a variety of conditions, ranging from nose bleed and stomach flu to child birth and related maternity leave.

Applications for use of the sick bank have been denied in cases where the request has not been supported by "sufficient medical evidence" like a doctor's note. One such example is reflected in District Exhibit 16, where the application was denied because "no evidence of illness" was presented.

17. Superintendent Hannon denied Martha Raymond's application to the sick bank because Ms. Raymond did not have an "extended illness or disability." Superintendent Hannon maintains that an "extended illness or disability" requirement is necessary to maintain a distinction between Section 9-07 personal sick leave and the Section 9-08 sick bank.

DECISION AND ORDER

DECISION SUMMARY

The Association's complaint is granted in part and denied in part. Under Section 9-08 of the parties' collective bargaining agreement the Superintendent or the Superintendent's designee has approval authority over applications for use of the sick bank. However, in the exercise of this approval authority the Superintendent is limited by the criteria set forth in the parties' agreement and may not substitute a more restrictive eligibility standard employees must satisfy before obtaining access to the sick bank. Because Superintendent Hannon applied an extra-contractual and more restrictive standard to Martha Raymond's sick bank application the denial of Ms. Raymond's application was improper, and this portion of the Association's complaint is sustained. However, there is insufficient evidence that Superintendent Hannon applied an inappropriate standard to Dawn Chouinard's application for a seventeen day block of time, and the portion of the Association's complaint based upon the District's denial of Ms. Chouinard's application for an extended block of time from the sick bank is denied.

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 Association has alleged violations of RSA 273-A:5, 1 (h)(to breach a collective bargaining agreement).

DISCUSSION:

Superintendent Mary Ellen Hannon's denial of Martha Raymond's June 3, 2008 application to the sick bank, duly supported by a doctor's note documenting gastroenteritis, was improper because Superintendent Hannon applied an "extended illness or disability" standard to Ms. Raymond's application. The District's argument that use of the sick bank is limited to employees with an extended illness or disability is unpersuasive, as there is insufficient evidence that having an "extended illness or disability" is a prerequisite to the receipt of a sick bank award. This conclusion is warranted by the express language of Section 9-08. Additionally, there is insufficient past practice evidence to establish that sick bank eligibility is limited to employees with an "extended illness or disability."

The phrase "extended illness or disability" does not appear in Section 9-08, nor can Section 9-08 be reasonably interpreted to impose such a requirement. The only place the word "extended" appears in Section 9-08 is in the fourth sentence, and it is an adjective which describes the immediately following word "benefits," and not the words "disability or illness" which appear later in the sentence. Further, the Superintendent's approval authority under Section 9-08 does not give the Superintendent the power to subject sick bank applicants to criteria that are more stringent than those expressly stated in the contract. The Superintendent's approval authority is an oversight mechanism to ensure that applicants have satisfied the contractually agreed upon criteria, namely exhaustion of their personal sick leave and the

provision of “satisfactory medical evidence of disability or illness,” typically provided in the form of a physician’s note. It is worth noting that such “satisfactory evidence” is not required in order to utilize personal sick leave under Section 9-07.

The final sentence of Section 9-08 provides that “[t]his section of the Article shall not be grievable.” However, the deference accorded to the Superintendent’s determination as to whether an employee has met the contractually agreed upon eligibility criteria does not also empower the Superintendent to modify the substance of Section 9-08 by the announcement and application of stricter eligibility standards than those contained in the parties’ agreement. Any such changes need to be made through the collective bargaining process.

Accordingly, based upon Section 9-08 the Superintendent is precluded from applying an “extended illness or disability” standard when reviewing sick bank applications. The evidence offered by the District in an attempt to establish a binding past practice of limiting use of the sick bank to employees with an “extended illness or disability” is insufficient to require a different conclusion. In general, resort to past practice evidence is appropriate to clarify ambiguity, establish a binding term and condition in situations where the collective bargaining agreement is silent, or to establish an amendment or modification to existing contract language. *See Labor and Employment Arbitration*, 2nd Ed., §10.01. In this case the contract is not silent and the agreement is unambiguous as to the medical eligibility criteria that must be met in order to access the sick bank. The agreement states that an employee must provide “satisfactory medical evidence of disability or illness (excluding work connected accident).” A contract is ambiguous when there is more than one reasonable interpretation of the disputed provision. The District’s interpretation of Section 9-08, and in particular its argument that the word “extended” applies to the words “disability or illness” contained in the phrase “satisfactory medical evidence of

disability or illness" is unreasonable and is insufficient to establish an ambiguity in the sentence under consideration or Section 9-08 as a whole.

The evidence is otherwise insufficient to establish a binding term or condition that is contrary to the unambiguous requirement in Section 9-08 that eligibility is based, in part, on "sufficient medical evidence of disability or illness." The record reflects that the District has approved sick bank applications for a variety of physical conditions, not just for those conditions which can be fairly characterized as an extended illness or disability. The record does reflect that the majority of approved sick bank applications involve conditions that are more serious than, for example, the common cold. However, the fact that it is more common for sick bank applicants to have more significant conditions is to be expected, as such conditions are more likely to cause a depletion of personal sick leave and to create a need for access to the sick bank. Additionally, the "sufficient medical evidence" requirement, which usually entails a doctor's visit and a physician's note, likely reduces the number of sick bank applications involving a more moderate illness or disability.

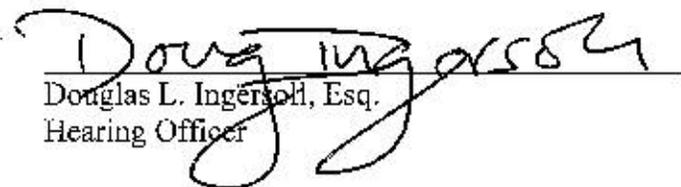
The Association's complaint concerning the Superintendent's denial of Dawn Chouinard's request for a block of 17 days is denied as the Superintendent's decision was not based upon the application of an inappropriate standard and is not otherwise contrary to the Superintendent's Section 9-08 approval authority. In the past the District has, for the most part, allowed a block of time from the sick bank as a convenience in order to avoid the filing and processing of numerous and repetitious sick bank applications for a continuing medical condition, consistent with the process outlined in former Assistant Superintendent David Jack's 1997 letter. Dawn Chouinard's request for a block of time from the sick bank was not

supported by documentation of a current need using the criteria set forth in Section 9-08, and she did not reapply with a request supported by the necessary information.

In accordance with the foregoing, the Association's complaint as to Martha Raymond's application to the sick bank is sustained. The District shall approve Ms. Raymond's application and adjust Ms. Raymond's payroll and personnel file records as necessary. The District shall refrain from applying an "extended illness or disability" standard to sick bank applications unless the parties agree to such a standard through the collective bargaining process. The Association's complaint as to the District's action on Ms. Chouinard's application for a seventeen block of time from the sick bank is denied.

So ordered.

July 23, 2009


Douglas L. Ingertoll, Esq.
Hearing Officer

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