



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Contoocook Valley Education Association, NEA-NH

v.

Contoocook Valley School District

Case No. E-0048-3

Decision No. 2010-212

Appearances:

Steven R. Sacks, Esq., NEA-New Hampshire, Concord, New Hampshire for the Complainant

Edward M. Kaplan, Esq., Sulloway & Hollis, P.L.L.C., Concord, New Hampshire for the Respondent

Background:

The Association filed an unfair labor practice complaint against the District on June 22, 2010. The complaint arises from a dispute over the implementation of an arbitration award. According to the Association, the District has failed to fully compensate paraprofessionals in accordance with the award and past practice for work on professional development days which took place on January 26 and June 26, 29 and 30 in 2009. The Association claims that the District has committed an unfair labor practice in violation of RSA 273-A:5, I (a), (c), (d), and (h).

The District denies that it committed an unfair labor practice and asserts that under the arbitration award the paraprofessionals are not entitled to additional compensation for the four days in dispute.

The board held a hearing on the complaint on October 12, 2010 at the offices of the PELRB in Concord at which time the parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties have filed post-hearing briefs pursuant to the schedule established by the Board at the conclusion of the hearing.

Findings of Fact

1. The Contoocook Valley School District is a public employer within the meaning of RSA 273-A:1, IX.
2. The Contoocook Valley Education Association/NEA-New Hampshire is the certified exclusive representative of teachers and paraprofessionals in the District.
3. The District serves the communities of Antrim, Bennington, Dublin, Frankestown, Greenfield, Hancock, Peterborough, Sharon and Temple.
4. The District includes ConVal High School, Great Brook Middle School, South Meadow Middle School, Antrim Elementary School, Bennington Elementary School, Dublin Elementary School, Frankestown Elementary School, Greenfield Elementary School, Hancock Elementary School, Peterborough Elementary School and Temple Elementary School.
5. The 185 day paraprofessional work year is divided into 180 regular work days and 5 professional development days. During a number of school years immediately prior to 2008-09 paraprofessionals were expected to work a 7.25 hour day and were paid on the basis of a 7.25 hour day for all 185 days.

6. The District made a change to the paraprofessional work schedule for the 2008-09 school year by requiring that they work a 7.75 hour day, inclusive of a one-half hour duty free but unpaid lunch. The paraprofessionals filed a grievance (the paraprofessional lunch grievance).

7. On July 24, 2009, Arbitrator Richard Higgins issued an award on the paraprofessional lunch grievance providing monetary damages to Association paraprofessionals. See Association Exhibit 1. On January 30, 2010 Arbitrator Higgins issued an "Arbitrator's Award-Remedy" concerning the paraprofessional lunch grievance. See Association Exhibit 2. This included the following provisions:

Any paraprofessional whose 7.25 hour work day was extended in 2008-09 as result of Mr. Markley's and the District's actions concerning lunch will be compensated for all time over 7.25 hours per day resulting from that change. Each such paraprofessional will be compensated at the 2008-09 hourly rate applicable to them for all such hours in 2008-09 over 7.25 hours per day. Excluded from this remedy are any paraprofessionals whose work day was not extended beyond the traditional 7.25 hours, as well as those paraprofessionals who departed the work site at the end of the 7.25 hours, purportedly taking their lunch after they had departed work.

I retain jurisdiction for 60 days solely on questions arising as to the computation and/or implementation of this remedy.

8. Prior to the 2010-11 school year the District did not maintain time records for paraprofessionals, who were hourly rate employees, to document the number of hours worked per day. In the absence of such time records the District relied upon its scheduling records, see District Exhibit B, C, D and E, and the fact that paraprofessionals were not directed to work more than 7 hours on the professional development days, to determine that paraprofessional work days were not "extended beyond the traditional 7.25 hours" on January 26, 2009 and June 26, 29 and 30, 2009. On this basis the District did not pay paraprofessionals additional

compensation for those dates and contends that it is not obligated to do so under the arbitrator's award.

9. There was little probative evidence offered into the record by the Association to show that paraprofessionals worked more than 7.25 hours on January 26, 2009 and June 26, 29 and 30, 2009, the four dates in question. Such evidence could have been offered in various forms from the involved paraprofessionals.

10. In February, 2010 the parties communicated about the calculation of the compensation to be paid to paraprofessionals pursuant to the arbitration award. See Association Exhibit 3 (February 4, 2010 emails between Micky Johnson, then the Association President, and Tim Markley, the District's Human Resources Director) and District Exhibit G (February 11, 2010 email from Tim Markley to Micky Johnson).

11. Mr. Markley included with his February 11, 2010 email several attachments showing how he had calculated the amount due to paraprofessionals under the arbitrator's award. He specifically informed Ms. Johnson that professional development days were excluded from the calculation and he provided her with an itemization of the dollar amount the District was going to pay to the approximately 100 affected paraprofessionals.

12. On March 10, 2010 Ms. Johnson emailed Mr. Markley stating that he had improperly based his accounting on 180 days, not 185 days, which is the length of the paralegal work year per the parties collective bargaining agreement. See Association Exhibit 4. The five excluded days were professional development days referenced in Mr. Markley's February 11, 2010 email to Ms. Johnson. See District Exhibit G.

13. Although the arbitrator expressly retained jurisdiction for 60 days after his January 30, 2010 as to "questions arising as to the computation and/or implementation of this remedy"

the Association did not ask the arbitrator to resolve the dispute about the entitlement of paraprofessionals to additional pay under the arbitrator's award during the professional development days.

14. The arbitrator's award did result in the distribution of an additional \$138,000 in compensation to the paraprofessionals for the 2008-09 school year, but the Association claims an additional \$3,000 is owed to paraprofessionals for the four professional development days in question.

Decision and Order

Decision Summary:

The Association's unfair labor practice charge is dismissed. The entitlement of paraprofessionals to any additional compensation for the dates in question is governed by the terms of the arbitrator's award. There is insufficient evidence to establish that the District extended the paraprofessional work day beyond the traditional 7.25 hour work day or that the paraprofessionals actually worked more than 7.25 hours on the dates in question. Therefore there is no entitlement to additional compensation pursuant to the arbitrator's award.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

The underlying paraprofessional lunch grievance was subject to the parties' grievance procedure. Under the applicable law, the Board does not have jurisdiction over the merits of such disputes, as it lacks jurisdiction to interpret a collective bargaining agreement and resolve such disputes on the merits when the parties have agreed that the last step of the grievance

procedure is final and binding, as is the case here.¹ The Board will address the Association's claim of non-compliance with the arbitration award despite the Association's failure to have the arbitrator resolve the question, but both parties are admonished that in the future such disputes should be presented to an arbitrator for resolution if he has expressly retained jurisdiction for that purpose.

In support of its claim the Association relies on the District's failure to maintain time records of the kind contemplated under applicable wage and hour laws to establish that paraprofessionals worked the requisite number of hours to qualify for additional compensation on the professional development days in question. The Association also argues that paraprofessionals always receive the same rate of pay on professional development days as on other work days. However, the District's failure to maintain time records does not, by itself, prove, as a matter of fact or as a matter of law, that the involved employees are entitled to the relief requested in this case. This is not to say that there might not be a remedy for this failure in other tribunals, but it does not excuse the Association from proving the hours worked on the dates in question in these proceedings. The Board cannot disregard the evidence submitted by the District, such as District Exhibits B to E and the testimony of Mr. Markley, which indicates that paraprofessionals were not required to and did not work beyond 7 hours on any of those days. The Board also cannot find, on the basis of the record submitted, that the Association did not have the means of offering probative evidence to establish that paraprofessionals worked

¹ *Appeal of Campton School District* 138 N.H. 267 (1994); *Appeal of State Employees' Association of NH, Inc.*, 139 N.H. 441 (1995); *Appeal of Town of Bedford*, 142 N.H. 637 (1998); *State Employees Assoc. of NH, Inc. SEIU Local 1984 v. State of New Hampshire, Dept. of Corrections*, PELRB Decision No. 2009-263 (December 1, 2009)(Appeal declined); *AFSCME Council 93, Local 1386 Portsmouth City Employees v City of Portsmouth*, PELRB Decision No. 2009-225 (October 15, 2009)(Appeal declined); *White Mountains Educational Support Personnel/NEA-NH v. White Mountains Regional School District*, PELRB Decision No. 2010-109 (June 3, 2010).

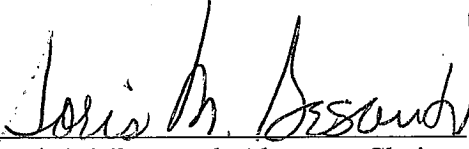
more than 7.25 hours on the dates in question and were therefore entitled to additional compensation pursuant to the arbitrator's award if in fact that is what occurred.

The Association's argument based upon how paraprofessionals were paid in the past on professional development days is misplaced. The arbitrator's award controls the amount of compensation paraprofessionals were entitled to receive during the 2008-09 school year on account of the increase in their work day to allow for a duty free but unpaid thirty minute lunch. The award states that "[e]ach such paraprofessional will be compensated at the 2008-09 hourly rate applicable to them for all such hours in 2008-09 over 7.25 hours per day." It does not provide that paraprofessionals are entitled to an additional thirty minutes of compensation for all 185 work days regardless of actual time worked.

In accordance with the foregoing the Association's unfair labor practice complaint is dismissed.

So ordered.

Date: November 19, 2010.


Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Member Carol Granfield and alternate Board Member Richard J. Laughton also voting.

Distribution:
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