STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Governor Wentworth Regional School District

v.

Governor Wentworth Education Association, NEA-New Hampshire

Case No. E-0101-2
Decision No. 2011-193

Appearances: Maureen L. Pomeroy, Esq., Soule Leslie etc., for the Governor Wentworth Regional School District

Steven R. Sacks, Esq., NEA-NH, Concord, New Hampshire for the Governor Wentworth Education Association, NEA-NH.

Background:

The District filed an unfair labor practice complaint against the Governor Wentworth Education Association, NEA-New Hampshire (Association) on December 22, 2010. The District claims that the Association committed an unfair labor practice in violation of RSA 273-A:5, II (d), (f), and (g) when it sought to arbitrate a non-renewal of a probationary teacher.[1] The District argues, among other things, that per the parties' collective bargaining agreement (CBA) the only procedure to be followed in the non-renewal of a teacher are those set forth in RSA 189:13 and/or RSA 189:14-a. The District asserts the CBA is not susceptible to an interpretation that would cover this dispute. The District requests the PELRB declare that the Association's demand for arbitration is an unfair labor practice in violation of RSA 273-A:5, II (d), (f), and (g), order the Association to permanently cease and desist from attempting to arbitrate its claim, and stay all arbitration proceedings pending a final decision in this case.

[1] *See School District #42 of Nashua v Murray, 128 N.H. 417 (1986).*

The Association denies the charges and claims that the subject of the grievance it seeks to arbitrate is not a non-renewal but rather violations of the CBA which occurred when the District non-renewed the teacher. The Association requests that the PELRB dismiss the complaint and order that the grievance should proceed to arbitration.

This case was initially scheduled for a February 11, 2011 adjudicatory hearing, but upon motion the hearing was rescheduled to April 19, 2011, at which time the Board held a hearing on the complaint at the offices of the PELRB in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and requested and were provided with the opportunity to file post-hearing briefs on or before May 24, 2011. Post-hearing briefs have been filed, and the Board's decision is as follows. The parties' Joint Stipulation of Facts are set forth as Findings of Fact 1 through 5, 11, 12, and 14.

Findings of Fact

1. The District is a public employer within the meaning of RSA 273-A:1.

2. The Association is an employee organization certified as the exclusive representative of teachers employed by the School District for purposes of collective bargaining negotiations and the settlement of grievances.

3. The parties 2007-2012 collective bargaining agreement (CBA) expires on June 30, 2012.

4. Kathryn York was employed by the District as a probationary (i.e. non-continuing contract) teacher during the 2007-08 through 2009-10 school years.

5. In April 2010, Ms. York was notified by Superintendent John Robertson that he would not renominate her for employment for the 2010-11 school year.

6. Ms. York was required under applicable law and regulations to obtain a highly qualified status in the area of mathematics in order to be eligible for continued employment as a

District teacher after the 2009-10 school year, which means obtaining a passing score on the relevant Praxis II test. She took the test in January 2010 but did not pass. She took the test a second time in March, 2010 but learned in May that she had not passed. She took the test a third time on June 12, 2010 and learned in mid July that she had obtained the requisite passing score.

7. Ms. York kept Principal Ross informed of her ongoing testing activity and efforts to obtain a passing score, and he was generally supportive of her efforts.

8. Although the parties have stipulated that in April, 2010 Ms. York was notified by the Superintendent that she would not be renominated (Stipulation 5), at hearing Ms. York denied ever receiving a written notice of non-renewal. The District contends Ms. York was in fact provided with a timely notice of non-renewal by April 15, 2010 as per District Exhibits B and C and the testimony of Assistant Principal Suzanne Onufry who had responsibility for the delivery of non-renewal notices and 2010-11 teacher contracts during the April, 2010 time period.

9. By letter dated June 30, 2010 Ms. York wrote to Superintendent Robertson and Principal Ross stating that "I was terminated in June 2010 because I do not have highly qualified teacher (HGT) status in math. I am requesting that my teaching status be reconsidered by the School District..." See District Exhibit G.

10. In mid July, after learning she had obtained a passing score on the Praxis II tests she immediately contacted Principal Ross and Superintendent Robertson. She discovered that the District was in the process of interviewing candidates for her former position. Although she was granted an interview she learned on July 27, 2010 the District had offered the position to someone else.

11. On August 11, 2010 the Association filed a grievance alleging that non-renewal of Ms. York's employment violated Sections A.1.1, B.1.1, C.3.2 and D.1.2 of the CBA. See District Exhibit D.

12. The grievance was denied at the Principal's, the Superintendent's and the School Board's levels of the grievance process. One of the School Board's reasons for the denial of the Association's grievance was that the CBA does not allow the use of the grievance procedure for non-renewals under RSA 189:14-a.

13. The CBA grievance procedure is set forth in Section C.4 and consists of five steps: Level One-Informal; Level Two – Principal; Level Three – Superintendent; Level Four – School Board; and Level Five – Arbitration. In denying the Level Four grievance the School Board stated as follows:

> 1. The letter in question (the non-renewal letter) was hand delivered to the Grievant on April 14, 2010 as noted in the written delivery certification issued by Ms. Onufry that has been kept on file since April 2010 in the SAU 49 Office.
>
> 2. There was no violation, misinterpretation or misapplication of any provision in the collective bargaining agreement.
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> 3. Under Sections C.3.2 and C.4.1 of the collective bargaining agreement, the grievance procedure is unavailable regarding non-renewals and the only procedure to be followed is RSA 189:14-a
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> 4. The grievance was not initiated within 20 days, as required by Section C.4.6 of the collective bargaining agreement. The Grievant knew or should have known of her non-renewal in April, but did not initiate the grievance until early August.

14. On December 3, 2010, the Association appealed the grievance by filing a demand for arbitration with the American Arbitration Association.

15. Section C.3 of the CBA is titled "FAIR TREATMENT". Section C.3.2 provides:

> No teacher shall be suspended, disciplined, reprimanded or reduced in rank or compensation, without just cause. No teacher shall receive an evaluation which results in suspension, discipline reprimand, reduction in rank or compensation, without just cause. All information forming the basis for disciplinary action will be made available to the teacher, the administration and the Board. Notwithstanding any other provisions of this Agreement, the only procedure to be followed in the non-renewal and/or discharge of a teacher certified to be represented by the Association shall be limited to the provisions of RSA 189:13 and/or RSA 189:14-a. A teacher shall be entitled to have present a representative of her/his choosing when being reprimanded or disciplined for any infraction of rules or delinquency in professional performance.

16. The "[n]otwithstanding any other provisions of this Agreement..." sentence in Section C.3.2 of the current CBA has appeared in all of the parties' collective bargaining agreements since the agreement for the 1977-78 school year. See District Exhibit E. Per Superintendent Robertson, who has held different positions in the District and been involved in contract negotiations since 1992, there have been no prior Association grievances like the York non-renewal grievance at issue in this case.

17. Section D.1.2 of the CBA is titled "COMPENSATION" and provides:

> Based upon continued satisfactory service, as determined by the Superintendent or her/his designee, each teacher will proceed annually to the next credited years teaching experience until maximum is reached.

18. Section C.4.1(a) of the CBA provides:

> A "grievance or complaint" means an alleged violation, misinterpretation, or misapplication of any provision of this Agreement except a matter for which a review or appeal is provided by law. An "Aggrieved Teacher" is the person, or persons making the claim.

Decision and Order

Decision Summary:

The Association's insistence that the District arbitrate the dispute concerning Ms. York's non-renewal constitutes a demand to arbitrate a matter outside the scope of the CBA's arbitration clause and is an unfair labor practice in violation of RSA 273-A:5, II (d). Teacher non-renewals and terminations are not covered by the CBA but instead are governed by the provisions of RSA 189:13 and 14-a, and the parties have not agreed to arbitrate disputes concerning such matters.

Jurisdiction:

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

Discussion:

The Association claims it is entitled to proceed to arbitration because the underlying York grievance arises from alleged violations of Sections D.1.2 and C.3.2 of the CBA. The

decision in this case requires the application of the following four well established arbitrability principals and standards per *Appeal of AFSCME Local 3657, Londonderry Police Employees,* 141 N.H. 291 (1996).

> 1) arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit
>
> 2) unless the parties clearly state otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator;
>
> 3) a court should not rule on the merits of the parties['] underlying claims when deciding whether they agreed to arbitrate; and
>
> 4) under the "positive assurance" standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists, and in the absence of any express provision excluding a particular grievance from arbitration, ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.... (the language of the contract itself may provide the "forceful evidence.")

In these types of disputes, the "overriding concern is 'whether the contracting parties have agreed to arbitrate a particular dispute.'" *Id. at 294 (citing Appeal of Westmoreland School Board,* 132 N.H. 103, 109 (1989)).

The underlying dispute in this matter is, in substance, about the District's alleged non-compliance with the law applicable to the non-renewal of probationary teachers. With respect to the alleged violation of Section C.3.2, the question is whether the inclusion of references to RSA 189 in Section C.3.2 of the CBA means the District is obligated to submit a dispute over its alleged non-compliance with non-renewal procedures set forth in RSA 189:14-a to advisory arbitration. Section C.3.2 provides, in part, that: "[n]otwithstanding any other provisions of this Agreement, the only procedure to be followed in the non-renewal and/or discharge of a teacher certified to be represented by the Association shall be limited to the provisions of RSA 189:13 and/or RSA 189:14-a." [2] This language has been included in all prior collective bargaining

[2] The grievance does not involve other subjects set forth in Section C.3.2 such as the suspension, discipline, reprimand or reduction in rank or compensation of Ms. York, an evaluation of Ms. York which resulted in

agreements between the parties since the 1976-77 school year, and according to Superintendent Robertson has not been the subject of prior grievances.

In regard to Section D.1.2 of the CBA, the issue is whether the non-renewal or discontinuation of Ms. York's employment is covered by contractual language describing annual changes in compensation arrangements for teachers, sometimes generically referred to as "step" increases.

The CBA defines a grievance as an alleged violation, misinterpretation, or misapplication of any provision of the CBA. The RSA 189 references in Section C.3.2 under consideration provide, in effect, that nothing in the CBA shall supercede, supplement, or modify the operation of RSA 189 with respect to the subject of teacher non renewals and terminations. In other words, by this Section C.3.2 language the parties continue to acknowledge and agree that the subject matter of teacher non-renewals and terminations is not covered by the CBA, an arrangement that by 2010 had been in place for approximately 33 years. This necessarily means that disputes about such matters are not subject to the contractual grievance procedure set forth in Section C.4 of the CBA. Given the language of Section C.3.2, the 33 years of its inclusion in the parties' collective bargaining agreements, and the lack of any RSA 189 non-renewal grievances over this extensive period of time, the Board finds there is "forceful" evidence of a purpose to exclude the current non-renewal dispute from arbitration.

The Association's reliance on Section D.1.2 is similarly to no avail given the RSA 189 references in Section C.3.2 and our finding that the parties have acknowledged that non-renewals are not covered by the CBA and are not subject to the contractual grievance procedure. As noted, the substance of the dispute in this case is whether the District has complied with the law applicable to the non-renewal of probationary teachers. The Association's argument that the

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"suspension, discipline reprimand, reduction in rank or compensation," or whether or not Ms. York received "information forming the basis for disciplinary action."

appropriateness or legality of Ms. York's allegedly improper non-renewal is subject to analysis under Section D.1.2 cannot be reconciled with the clear language in Section C.3.2 which confirms the exclusion of non-renewal and termination disputes from the CBA, as discussed.

Accordingly, the Association has committed an unfair labor practice on account of its improper demand for arbitration, and it shall cease and desist in its demand that the District arbitrate Ms. York's non-renewal.

July 20, 2011.

Doris M. Desautel, Alt. Chair

By unanimous vote of Alt. Chair Doris M. Desautel and Board Members Richard J. Laughton, Jr. and James M. O'Mara, Jr.

Distribution:

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