



White Mountains Education Association, NEA-NH

v.

White Mountains Regional School District

**Case No. E-0083-4
Decision No. 2015-052**

Appearances:

Esther Kane Dickinson, Esq., NEA-New Hampshire, Concord,
New Hampshire, for the Complainant

Barbara F. Loughman, Esq., Soule, Leslie, Kidder, Sayward &
Loughman, Wolfeboro, New Hampshire, for the Respondent

Background:

On September 2, 2014, the White Mountains Education Association, NEA-NH (Association) filed an unfair labor practice complaint alleging that the White Mountains Regional School District (District) violated RSA 273-A:5, I (a), (g), and (h) when it failed to provide contractually required assistance to a non-tenured teacher prior to nonrenewing him after four years of employment. The Association argues that had the teacher been provided the assistance to which he was entitled under the collective bargaining agreement (CBA) and which he allegedly requested, "his non-renewal could well have been avoided." The Association requests, among other things, that the PELRB find that the District violated RSA 273-A and order the District to return the teacher to his position.

The District denies the charges and asserts, among other things, that the Association misinterprets the CBA; that the District provided all the assistance required under the CBA; and that the District has a statutory right to nonrenew a probationary teacher without cause or statement of reasons. The District also asserts that the Association failed to state a claim upon

which relief can be granted; and that the PELRB has no jurisdiction over the complaint because “RSA 189-14-a gives the School District the right to non-renew a probationary teacher ... without a statement of reasons or a hearing” and without giving the teacher an opportunity to improve. The District requests that the PELRB dismiss the complaint.

The District also filed a motion to dismiss claiming that the Association’s complaint involves a grievance “resulting from failure of a teacher to be renewed” and is, therefore, barred by RSA 273-A:4. The Association objected to this motion arguing, among other things, that it is not grieving that the employee was nonrenewed but, rather it is grieving a violation of the CBA; and that under the parties’ CBA, the Association is free to bring a grievance forward to whatever forum it wishes and ask for any remedy.

The adjudicatory hearing was conducted on October 30, 2014 at the Public Employee Labor Relations Board (PELRB) offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties filed post-hearing briefs on December 1, 2014. The parties’ factual stipulations are incorporated into the Findings of Facts below; and the decision is as follows.

Findings of Fact

1. The District is a public employer within the meaning of RSA 273-A:1, IX.
2. The Association is the exclusive collective bargaining representative for a bargaining unit of certain employees of the District.
3. The Association and the District are parties to a CBA that expired June 30, 2014.
See Statement of Uncontested Facts at 2.
4. The CBA Article XI, titled Jurisdiction and Authority of the Board, provides as follows:

The [School] Board, subject to the language of this Agreement, reserves to itself full jurisdiction and authority over all matters of policy and retains the unrestrictive right (a) to direct and manage all activities of the school district; (b) to direct the work of their

employees; (c) to hire, promote, and to suspend all employees; (d) to maintain the efficiency of the school district's operations entrusted to them; (e) to relieve employees from duties because of lack of work or for other legitimate reasons; (f) to determine the methods, means, and personnel by which the operations of the schools are to be conducted; (g) to take any actions as may be necessary or desirable to carry out the mission of the White Mountains Regional School District in emergencies; and (h) to adopt and implement any rule or regulation concerning employee practices or working conditions, provided it does not conflict or violate any terms of this Agreement or RSA 273-A.

See Joint Exhibit A.

5. The CBA Article XIV, titled Employee Evaluation, provides in part as follows:

The parties recognize the importance and value of a procedure for assisting in evaluating the progress and success of both newly employed and experienced personnel for the purpose of improving instruction. Therefore, to this end, the following procedures have been agreed to in an effort to accomplish this goal.

A. New Teacher (Non-Tenured)

Both parties recognize the responsibility to assist new teachers. During the first three weeks of school, the White Mountains Regional School Board, through its principals, shall orient all new teachers regarding evaluative procedures and School Board policies. All monitoring or observation of the performance of a teacher shall be conducted openly. All new (non-tenured) teachers shall be formally observed for the purpose of evaluation at least two (2) times during the school year. Whenever the building principal or superintendent feels more or fewer visits are necessary, he/she has the right to exercise this discretion.

B. Non-Probationary Teachers (Tenured)

All tenured teachers shall be observed for the purpose of evaluation at least once during the school year...

A written observation report shall be presented to the employee within ten (10) calendar days of an observation. A conference may be requested by either the supervisor or the employee and must occur within seven (7) calendar days after the request is made, unless mutually agreed otherwise. The employee must sign and return the observation report within ten (10) calendar days of receiving it. Signature only indicates that the observation report has been read, and does not necessarily denote agreement with the content of the report. If the form is not returned within ten (10) calendar days, then the form is considered accepted. If the employee wishes to attach any additional information, it must be included with the returned, signed observation form. The returned form along with any addenda will be copied in triplicate, one copy to the employee, one copy to the supervisor and one copy to the Superintendent's Office.

A yearly evaluation report will be presented to all employees by their supervisor at least ten (10) calendar days prior to nomination by the superintendent. This evaluation will be a compilation of reports, observations, and/or memoranda made by the principal, assistant

principal or designated administrator. Any information that may be detrimental to an employee's evaluation status must have been presented to the employee in writing at least thirty (30) calendar days prior to the presentation of the evaluation report for a letter "b" recommendation or January 5th for a "c" or "d" recommendation (below). This evaluation report must have one of the following recommendations to the superintendent:

- a) Recommended for continued employment with scheduled increment.
- b) Recommended for continued employment with improvement plan with scheduled increment.
- c) Not recommended for continued employment.

The employee must sign a form at the time the evaluation report is delivered to indicate that it has been received.

If an employee receives a "b" or "c" evaluation, the supervisor may require the employee to develop an improvement plan to address the areas of need. Within twenty (20) calendar days, the supervisor will communicate the following in writing: a) specific areas in need of improvement, b) available support to help address the identified needs, c) how and when improvements will be measured and evaluated, and d) possible consequences for failure to improve. Within twenty (20) calendar days of receiving this, the employee will respond to the supervisor with their specific plan for improvement. A teacher must be given notice that there is a possibility that they could be placed on an improvement plan. If they are placed on an improvement plan, the plan must be specific and reasonable. The plan shall prescribe: how the teacher can demonstrate results, how the evaluator will measure results, and how much improvement is enough. An in-district WMEA representative chosen by the teacher be [sic] present at every evaluation conference during this process.

See Joint Exhibit A.

6. The CBA Article XII, titled Fair Treatment, provides as follows:

No employee shall be disciplined without receiving a supportive statement of fact for said disciplinary action. Information forming the basis for disciplinary action shall be available to the employee and/or his/her designee. Inasmuch as possible, a letter or warning will be sent to the employee before disciplinary action is taken. The employee shall be provided with an opportunity to read and sign this letter prior to placing it in his/her personnel file. His/her signature does not indicate that he/she agrees with it. The Association and the School Board agree that there are circumstances when no written warning or letter is necessary prior to disciplinary action being taken. An employee may submit a response in writing and have it attached to the written warning or letter to be placed in his/her personnel file.

The parties agree that discipline should normally be progressive and corrective in nature.

See Joint Exhibit A.

7. The CBA Article XXII, titled Hiring, Placement, and Supplemental Pay for Teachers, provides in sub-section E that a “Teacher who will not be rehired will be notified by April 15th of the current year as provided in RSA 189:14.” See Joint Exhibit A.

8. The parties’ CBA contains a following grievance procedure: Level I – Principal; Level II – Superintendent; and Level III – School Board. It also provides that “[i]f the employee or the Association is not satisfied with the decision of the School Board, then the employee or the Association may take whatever action they may deem appropriate.” See Joint Exhibit A.

9. Douglas Richardson was a physical education teacher at the Lancaster School in the District for four years. As a full time teacher in the District, Mr. Richardson was covered by the terms of the CBA. See Statement of Uncontested Facts at 1 and 2.

10. Mr. Richardson was evaluated three times per school year and evaluation events included: (1) structural observation in October or November; (2) structural observation in January or February; and (3) a summative evaluation. During structural observations, an evaluator observed the class taught by Mr. Richardson and then discussed positive and negative, if any, aspects of the class with Mr. Richardson. After each summative evaluation, which is based on an employee’s overall performance during the year, Mr. Richardson sat down with the administrator/evaluator to discuss his performance.

11. During his first year as the District teacher, Mr. Richardson was assigned a mentor. He also attended an orientation for new teachers, at which he was explained policies of the District.

12. According to Lancaster School Principal Todd Lamarque, all new teachers were provided assistance, which included orientation, mentoring, professional development opportunities, daily informal contact, observations, conversations, summative evaluations, and letters, which are placed in personnel files after being reviewed by employees.

13. As a policy, the District never places non-tenured teachers on improvement plans.

14. Evaluator Patricia McLean conducted an observation of Mr. Richardson's performance on September 21, 2010, following which she prepared a structural observation report. The report addressed, among other things, lesson description, goals and objectives, strategies and skills to be reinforced, differentiated instructions, intended results of the lesson, teaching strengths identified by the observer, evidence of student learning, and the observer's recommendations, suggestions, and comments. The observer conducted a post-observation conference with Mr. Richardson on September 21, 2010, during which she provided her feedback regarding Mr. Richardson's performance during the class, including what went well for both the teacher and students, organization of the class, lesson plan, and specific features of the lesson (e.g., use of music as prompts). The feedback and the evaluation report were positive. See Joint Exhibit I.

15. On November 10, 2010, Principal Lamarque conducted another observation of Mr. Richardson's performance and issued a structured observation report addressing the same or similar factors as the September 21, 2010 report. See Findings of Fact at 14. A Post-observation conference with Mr. Richardson was held on November 12, 2010. Principal Lamarque provided extensive comments, recommendations, suggestions, and answers to Mr. Richardson's questions/requests for suggestions. The report was positive. See Joint Exhibit J (incorporated in full by reference).

16. The 2010-2011 Summative Evaluation of Mr. Richardson's performance, signed by evaluators Lamarque and McLean on March 29, 2011 and by Mr. Richardson on April 4, 2011, included 13 specific areas of accomplishment over the past year and three recommendations, some of which contained specific examples as to how to improve certain aspects of curriculum delivery or to achieve a particular goal. The evaluation positively described Mr. Richardson's performance and recommended him for continued employment with the scheduled increment. See Joint Exhibit K.

17. Principal Lamarque conducted a structured observation of Mr. Richardson's performance on October 19, 2011, met with Mr. Richardson for a post-observation conference on October 25, 2011, and issued a structured observation report the same day. The report contains, among other things, Mr. Lamarque's recommendations and suggestions as well as comments/suggestions regarding student behavior management and classroom organization in response to Mr. Richardson's request for focused feedback. The report did not contain any negative comments or observations and was generally positive. See Joint Exhibit L.

18. Patricia McLean conducted a structured observation of Mr. Richardson's performance in class on November 15, 2011, met with Mr. Richardson for post-observation conference on November 15, 2011, and issued a structured observation report on November 22, 2011. The report contained, among other things, the observer's suggestions, recommendations, and comments, including the following:

As discussed at the post-observation conference, the gym is the one place in the school where children can run. Do think of structuring the more energetic activities so that there is a purpose for channeling their energy. Prior to beginning a new task position students closer to you who tend to become off task. Re-positioning the audio system to half court was an effective way to get the student to spread out.

The report did not have negative comments and the observer noted, like on previous structured observation reports, that the "whole lesson went well". See Joint Exhibit M.

19. On December 8, 2011, there was an evaluator-teacher interaction between evaluator Patricia McLean, Mr. Richardson, and a music teacher. The purpose of this interaction was, among other things, to provide feedback, "to collaborate and problem-solve around areas of concern, to acknowledge, affirm, and praise good teaching and learning." After viewing the "videos that were produced from the fitness unit," on which the two teachers collaborated, Ms. McLean praised both teachers. See Joint Exhibit N.

20. In the 2011-2012 Summative Evaluation of Mr. Richardson's performance, the evaluators, Todd Lamarque and Patricia McLean, listed 15 areas of accomplishment over the

past year, included a couple of recommendations, and recommended Mr. Richardson for continued employment with the scheduled increment. See Joint Exhibit Q.

21. Assistant Principal Michael Whaland conducted a structural observation of Mr. Richardson's performance on September 24, 2012. In his 2012-2013 structural observation report, issued after a post-observation conference, Mr. Whaland, among other things, identified Mr. Richardson's strengths and provided recommendations, suggestions, and comments. The report was positive. See Joint Exhibit O.

22. Principal Lamarque conducted a structural observation of Mr. Richardson's performance on November 28, 2012. In his 2012-2013 structural observation report, which followed a post-observation conference, Principal Lamarque, among other things, identified Mr. Richardson's strengths, and provided recommendations, suggestions, and comments responding to Mr. Richardson's request for feedback. The report was positive. See Joint Exhibit P.

23. The 2012-2013 Summative Evaluation of Mr. Richardson's performance, dated March 21, 2013, was prepared by evaluators Whaland and Lamarque, contained positive comments, and listed the following areas of further development or recommendations:

- Promote safety during Physical Education and communicate with school nurse and administration when injuries arise.
- The expectation of proper staff relationships is a crucial responsibility of job as an educator.
- Student must be in class on time, be cognizant of master schedule regarding dismissal and arrivals [sic] to their next class.
- Continue to implement changes to the Wet N'Wild program to include a Sports Council for students in grades 5-8. As discussed, target those students who want to be part of an athletic team or organization that may not have the confidence to try out, participate or who did not make a team.

The evaluators recommended Mr. Richardson for continued employment with the scheduled increment. See Joint Exhibit R.

24. Mr. Richardson received two "January 5th letters" in his tenure at the Lancaster School. These letters are issued pursuant to Article XIV of the CBA and must be sent to teachers prior to January 5 if information detrimental to the teacher's evaluation status has been communicated to them. See Statement of Uncontested Facts at 4.

25. On January 4, 2013 Principal Lamarque sent to Mr. Richardson a letter which provided in part as follows:

As a result of some recent situation regarding issues and confrontations with other staff members, I need to advise you that continued professional improvement will be necessary in order for me to recommend you for employment beyond the current school year.

This letter serves as required written notice that information that may be detrimental to your evaluation status has been communicated to you prior to January 5, 2013...

Mr. Richardson signed the letter, which indicated "receipt of document and knowledge that it will be inserted into his/her personnel file," without indicating agreement or disagreement. See Joint Exhibit G.

26. According to Mr. Richardson, he talked to Principal Lamarque regarding the letter and what he could do to rectify the situation and Principal Lamarque told him "not to open his mouth too much" and "stay under the radar." Mr. Richardson and UniServ Director Jay Tolman met with the Superintendent and Principal Lamarque to discuss the January 4, 2013 letter. According to Mr. Richardson, right after the meeting, as suggested by the Superintendent, he wrote a letter of explanation to be placed in his personnel file.

27. On May 13, 2013, Interim Assistant Principal/Athletic Director Michael Curtis sent the following letter to Mr. Richardson:

... I understand the world of coaching is demanding and thankless at times. I do appreciate your efforts as we near the end of the 2013 track season. I need to address a couple of issues which have come across my desk during the 2013 spring track season.

The first issue deals with the reporting of an injury that occurred on May 7th at the Inter-Lakes track meet. A student was injured when he was stuck [sic] with a javelin in the foot by a fellow teammate. I understand accidents may occur but the incident was not reported

to Mr. Todd Lamarque, the school principal, or Gary Jenness, the athletic director – per district policy. The Athletic Department found out about the incident on May 9th via word of mouth, and informed the Lancaster School nurse who then start [sic] the reporting process. This formal reporting process should have commenced at the time of the incident...not two days later.

The second issue involves your lack of promoting and registering middle school track athletes for the May 11th North Country YMCA track meet that was held at Lancaster Elementary School. I believe this was the first in many years when Lancaster and Whitefield track team athletes were not encouraged or required to go as part of the track program. I understand there is an entry fee for each student but the Athletic Department had money budgeted for the event. Starting in 2014, the North Country YMCA track meet will be part of the middle school track teams scheduled track events.

I was also informed from [sic] a building principal and the middle school athletic directors that track athletes who had a Junior National Honor Society commitment were not excused from track practice until you had a discussion with Gary Jenness. As you can imagine, there were many stakeholders, including parents, who had legitimate concerns about this statement before school administrators were able to discuss the issue.

I bring these concerns to your attention so we can continue to move forward as a district athletic department. I would appreciate your feedback in regards to the above issues.

See School District Exhibit 3. According to Mr. Richardson, he did not receive this letter in hand and no one explained to him what the aforementioned injuries were. Mr. Richardson grieved the issuance of this letter.

28. According to Mr. Lamarque, he had several discussions with Mr. Richardson regarding issues with students.

29. On May 20, 2013, Principal Lamarque sent the following letter to Mr. Richardson:

I am formally notifying you that effective immediately, the use of scooters in physical education class, recess, or any other event at the Lancaster School has been revoked indefinitely, due to improper use and safety concerns while under your supervision. As discussed earlier this year with you, my primary concern is the improper use of the equipment (the scooters) during class time that has contributed to over 100 injuries reported from Physical Education class to the nurse. At that time, you stated that you would put the scooters away for the rest of the year.

After noticing the scooters out again last week during your class time, you and I had a discussion on the expectation of proper use and supervision. Since that conversation, I have had to draw your attention to 3 situations where students were misusing the

equipment under your supervision. As a result, the use of scooters from this point forwarded [sic] is forbidden without prior administrative written permission.

Mr. Richardson acknowledged the receipt of this letter. See School District Exhibit 4. According to Mr. Lamarque, prior to issuing the May 20, 2013 letter, he spoke with Mr. Richardson about the misuse of scooters three times and Mr. Richardson continued to allow students to misuse the scooters despite the conversations.

30. According to Mr. Richardson, after receiving this letter, he asked Mr. Lamarque if he needed to take any further action and Mr. Lamarque responded that he did not need to take any further action.

31. On July 18, 2013, Principal Lamarque sent the following letter to Mr. Richardson:

I need to bring to your attention the condition of your district laptop that was returned for summer updates. It was brought to my attention that your laptop was returned in poor and unsatisfactory condition. As noted from the IT Director's report; [sic] (A) The laptop was covered in dust and filth. (B) The touch pad area was covered in a sticky substance. (C) The last picture shows a broken USB port... Items such as-computer condition-[sic] is generally a part of our checkout process, which is required by all teachers before leaving for summer vacation. However, you did not complete your checkout sheet and return it to the office as requested by the administration before departing for the summer.

Please note that you are responsible for reasonable care of all school and district equipment that has been issued to you. Steps should be taken to make sure that your laptop is returned in the same condition in June as when you received it in August/September. If you have issues or problems with any school or district technology equipment (including broken pieces/equipment, spills, etc.) it should be reported to the IT director ... as well as the building administration so [sic] we can take the necessary steps to resolve the situation immediately.

See School District Exhibit 6.

32. On September 10, 2013, Mr. Richardson wrote a response to the Principal's July 18, 2013 letter stating in part as follows:

... When I returned my computer to the library, Deb Thurston, who signed my checkout sheet, never indicated that this was an issue. However, in understanding that I did not meet the standard of cleanliness that is expected of the IT Department I have taken steps to assure that I will not fall short of this requirement in the future – I will use Clorox disinfectant wipes weekly and will cover my computer at the end of each day to assure that dust and dirt from the gymnasium do not contaminate the device.

... "The last picture shows a broken USB port" and you suggested that these types of issues "should be reported to both the IT director ... as well as the building administration ... I have included emails to both Mr. Whaland (dated 10/12/12) and to the Help Desk/Mr. Orlando (dated 10/16/12) that indicated that I took these necessary steps. I met with both individuals and will gladly share the conversations that were had with each. Please note that upon receipt of my laptop this year, the USB port has still not been repaired. I will be sure to inform the Helpdesk as soon as possible. Additionally, I have taken the step of locking and shutting the door to my office when I am not in it to assure that this type of accident does not happen again. Finally, I will, in the future, be more thorough in my report to the IT Department with regards to issues with technology as I have learned that with everyone's hectic and busy schedule, assumptions can lead to confusion (as evidenced by the lack of detail in my email to Mr. Orlando).

C). You indicated that I "did not complete our checkout sheet ..." I did complete this step, when Mr. Whaland signed my sheet as a last step and returned it to me. I did, fortunately, make a copy before setting it on the desk in the front office before leaving for the summer, as I left after everyone else ... I have included a copy of my checkout sheet. Upon further reflection, however, I have since realized that the process I have been using of leaving documents for people, rather than handing them directly to people for filing is not the safest and most dependable practice for anyone. ... I will practice handing paperwork directly to the necessary individual.

I noticed that the letter you sent was copied to Dr. Fensom, Mr. Whaland and to my Personnel file. I am also concerned that Mr. Noyes is under the impression that I am irresponsible for not maintaining reasonable care of my school and/or district equipment that has been issued to me and that all involved are under the impression that I did not make every effort to follow the necessary steps at the end of last school year. I am hoping that, with the evidence that I have included with this letter and my effort to prevent any issues such as this or any other from happening, the message can be sent to all that my intentions are of respect and courtesy for the process and procedures of the Lancaster Elementary School and White Mountains Regional School District.

Mr. Richardson requested that this letter be added to his personnel file. See School District Exhibit 7.

33. On September 18, 2013, Principal Lamarque and Mr. Richardson discussed Mr. Richardson's rebuttal paperwork. On September 30, 2013, Principal Lamarque issued a letter noting that Mr. Richardson's rebuttal letter was placed in the appropriate files with the original July 18, 2013 letter. See School District Exhibit 9.

34. The November 18, 2013 structured observation was conducted by Mr. Whaland. In his written report, Mr. Whaland identified Mr. Richardson's strengths and provided recommendations and suggestions. The report did not contain negative comments. See Joint

Exhibit S.

35. The January 2, 2014 letter from Principal Lamarque to Mr. Richardson provides in part as follows:

As a result of previous documented situations from post-summative evaluation last year and the beginning of this contract year 2013-2014, I need to advise you that continued professional improvement will be necessary in order for me to recommend you for employment beyond the current school year.

This letter serves as required written notice that information that may be detrimental to your evaluation status has been communicated to you prior to January 5, 2013...

Mr. Richardson signed the letter acknowledging its receipt. See Joint Exhibit H. This was the second "January 5th" letter issued to Mr. Richardson pursuant to Article XIV of the CBA.

36. According to Mr. Richardson, when Principal Lamarque hand-delivered January 2, 2014 letter, Mr. Richardson asked the Principal if he needed a corrective action plan and the Principal responded that the letter was just a formality. Mr. Richardson was not placed on an improvement plan or assigned a mentor.

37. On January 21, 2014, Principal Lamarque conducted a structural observation of Mr. Richardson's performance. The structural observation report included, among other things, teaching strengths identified by the observer and the following recommendations and suggestions:

- Incorporate your P90X program as a warm up to each class and have students track their progress over the 6 week period. Modify the program for classes younger than 4th grade.
- Take measures to insist students are prepared each day (footwear, clothing, earrings, etc.) for physical education class each day [sic].

Have students use the locker room to change for PE class instead of your office. You may want to take a daily participation grade at the beginning of class for attendance, attire, and readiness.

- Think about purchasing a whiteboard easel or projector for whole group lessons to visual show [sic] the objectives, lesson plans, and/or activities.

- Incorporate a writing prompt or a written exit ticket to have student engage [sic] in some writing activities during PE.

The report did not contain negative comments. See Joint Exhibit T.

38. Mr. Richardson was recommended for non-renewal in March of 2014 and received notice of non-renewal from the Superintendent on April 7, 2014. See Statement of Uncontested Facts at 3.

39. The 2013-2014 Summative Evaluation of Mr. Richardson's performance, dated March 28, 2014, included, among other things, the following "areas for further development or recommendations":

- As documented on May 13, 2013, be sure to report any student injuries immediately to the appropriate supervisors and seek medical treatment for students.
- As documented on May 20, 2013, proper use of physical education equipment (i.e. scooters) should be used appropriately at all times to ensure the safety of students and liability of the WMRSD. [sic]
- As documented on July 18, 2013, you are responsible for reasonable care of all school and district property (i.e. laptop) that has been issued to you and follow proper procedure when checking out.
- Be sure to keep gym in a clean and organized environment [sic] on a daily basis.

In the Recommendations section at the end of the Summative Evaluation form, evaluators Lamarque and Whaland selected the following choice: "Not recommended for continued employment." See Joint Exhibit U.

40. After receiving the 2013-2014 Summative Evaluation, Mr. Richardson met with Principal Lamarque who informed him that he will be nonrenewed. According to Mr. Richardson, he asked Principal Lamarque if there was any other option. The Principal responded that there was not.

41. On April 7, 2014 Superintendent Harry Fensom sent Mr. Richardson the following letter:

In accordance with RSA 189:14-a, please be advised that you have not been renominated to a teaching contract with the White Mountain Regional School District for the 2014-2015 school year.

See Joint Exhibit V.

42. Mr. Richardson was never put on an improvement plan or a corrective action plan during his tenure at the District. See Statement of Uncontested Facts at 5.

43. On April 9, 2014, UniServ Director Jay Tolman filed a grievance with Principal Lamarque on behalf of Mr. Richardson. The grievant alleged "a violation, misinterpretation or misapplication of Article XIV Employee Evaluation, Article XII Fair Treatment, and all other pertinent Articles." The grievance provided in part as follows:

... Our concerns revolve around a statement in the CBA that states, "Both parties recognize the responsibility to assist new teachers." When Mr. Richardson received his January 2, 2014 notification, he asked to be put on an improvement plan. During the intervening weeks, he asked the school administration several times to be put on a plan and/or what he needed to do to improve. There was no assistance offered to him which is a violation of Article XIV of the collective bargaining agreement.

In the Areas for Further Development there are four things listed. Three of which happened in May through July of last year, to which Mr. Richardson wrote rebuttals to be included in his file [sic]. His explanations were not included in this Summative Evaluation as would be expected under Article XII Fair Treatment. In reviewing his personnel file on April 3, 2014, a letter dated May 13, 2013, written by Mike Curtis, then the Interim Assistant Principal/Athletic Director regarding some issues he said he was having with Doug Richardson when Doug was coaching the Middle School Track and Field program [sic]. This letter, though it was in Mr. Richardson's personnel file, was never cc'ed to that file [sic], nor was it ever signed by Mr. Richardson. This again would be a breach of Article XII Fair Treatment.

...

The next issues involve a breach of Article XXVII Grievance Procedures where during the discussion phase of the grievance, the Superintendent attended the meeting between the teacher and the immediate supervisor. We would contend that the Superintendent by attending the meeting gave up his claim to impartiality and thus should recuse himself from the rest of the process. Likewise the School Board during its April 7, 2014 meeting heard testimony regarding this case and should recuse itself in any future grievance proceedings...

The loss to the bargaining unit member is to deprive him of a Summative Evaluation for the 2013-2014 school year that reflects the observations and performance that took place as noted on the Observation Reports. The loss also includes his teaching position and future income and benefits.

The remedy is for [sic] the removal of the language as specified in the March 28, 2014 Summative Evaluation and reissue the revised Summative Evaluation for this school year, to offer Doug Richardson a contract for next year, to remove the May 13, 2013 letter from Michael Curtis from his personnel file, and to make him whole.

See Joint Exhibit B.

44. Principal Lamarque denied the Association's grievance on April 16, 2014 stating in part as follows:

There was no violation of Article XIV of the Collective Bargaining Agreement. One way of assisting new teachers is through compliance with the observation and evaluation requirements in the CBA which are designed to inform employees of deficiencies in performance and to assist them in improvement. Another way of assisting employees is through letters of reprimand pointing to deficiencies in job performance. You received two observations and a summative evaluation as required and within the deadlines of the [CBA]. January 2014 is the second year in a row that you received a notification of information detrimental to your evaluation status. Your file includes letters of reprimand.

There was no violation of Article XII, Fair Treatment. Non-renewal is not discipline. Furthermore, your grievance includes several misstatement of fact, including, but not limited to the following: you did not ask to be put on an improvement plan when you received your January 2, 2014 notification; I did not receive a rebuttal to your 2013 summative evaluation; the only rebuttal received was a September 2013 response to a July 18, 2013 letter; you were given in hand a copy of Mike Curtis's letter.

Although you state that your grievance concerns Articles XIV and XII, the remedy you are seeking is to overrule the Superintendent's decision to non-renew your contract...

See Joint Exhibit C.

45. On April 21, 2014, Superintendent Fensom denied Mr. Richardson's grievance on the same grounds. See Findings of Fact at 30. See also Joint Exhibit D.

46. On April 24, 2014, the Association submitted the Richardson grievance to the School Board. The Board denied the grievance on May 26, 2014 stating in part as follows:

... As a probationary teacher, Mr. Richardson is not entitled to a statement of reasons or a hearing on non-renewal.

...

Article XIV, Employee Evaluation, does not require the Administration to place a teacher on an improvement plan before non-renewal. Furthermore, assistance to teachers is provided through compliance with the observation and evaluation requirements in the CBA which are designed to inform teachers of deficiencies in performance and to assist them in improvement...

...

The other issue concerning Article XII is Mr. Richardson's claim that he did not know that Athletic Director Michael Curtis's May 13, 2014 letter to him was in his personnel file...

Mr. Richardson was given in hand a copy of Mike Curtis's letter, but he did not sign it. The letter has not been used to discipline Mr. Richardson. However, the Board directs the Administration to remove the letter from Mr. Richardson's personnel file.

See Joint Exhibit F.

Decision and Order

Decision Summary:

The evidence is insufficient to prove that, as claimed by the Association, the District violated RSA 273-A:5, I (a), (g), and/or (h) by failing to provide contractually required assistance to a non-tenured teacher prior to his nonrenewal. The relief requested by the Association is denied and the Association's claims are dismissed.

Jurisdiction:

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

Discussion:

I. District's Motion to Dismiss.

The District claims that the Association's complaint should be dismissed because, under RSA 273-A:4¹, the PELRB has no jurisdiction over the claims because the claims arise from the nonrenewal of a probationary teacher. The District's motion to dismiss is denied because the

¹ 273-A:4, titled Grievance Procedures, provides in part as follows:

... No grievance resulting from the failure of a teacher to be renewed pursuant to RSA 189:14-a shall be subject to arbitration or any other binding resolution, except as provided by RSA 189:14-a and RSA 189:14-b. Any such provision in force as of the effective date of this section shall be null and void upon the expiration date of that collective bargaining agreement. However, after the expiration date of that collective bargaining agreement, nothing in this section shall be deemed to prohibit the school district public employer and the exclusive bargaining representative from entering into a subsequent agreement that may include arbitration or any other binding resolution for teacher nonrenewals pursuant to RSA 189:14-a and RSA 189:14-b. If such grievance procedures become incorporated into a subsequent collective bargaining agreement, those procedures shall become null and void at the expiration of that agreement. "Grievance resulting from failure of a teacher to be renewed" means a grievance that challenges nonrenewal, or that seeks reversal or reinstatement from nonrenewal as a remedy.

PELRB has jurisdiction over unfair labor practice complaints based on alleged violations of RSA 273-A:5. In this case, the Association alleges that the District violated RSA 273-A:5, I (a), (g), and (h) by failing to provide contractually required assistance to a non-tenured teacher prior to nonrenewing him. The fact that the Association requested reinstatement of a teacher as relief does not convert an unfair labor practice complaint into a grievance within the meaning of RSA 273-A:4 or a hearing before the PELRB into an arbitration. Furthermore, reinstatement is only one of the remedies requested in this case. The Association also requests that the PELRB find the District in violation of the statute and “grant any other relief that is just and equitable.” In addition, RSA 273-A lists reinstatement as one of the remedies for violation of RSA 273-A within the PELRB’s jurisdiction without specifically excluding reinstatement of teachers. For the foregoing reasons, the District’s motion to dismiss is denied.

II. Association’s Claims.

The Association claims that the District breached the parties’ CBA, specifically Article XIV (Employee Evaluation) and Article XII (Fair Treatment), in violation of RSA 273-A:5, I (h) when it failed to provide contractually required assistance to Mr. Richardson, a non-tenured teacher, prior to nonrenewing him after four years of employment. The Association also claims that the District interfered with Mr. Richardson’s exercise of the rights conferred by RSA 273-A in violation of RSA 273-A:5, I (a) and failed to comply with the RSA 273-A in violation of RSA 273-A:5, I (g).

A CBA is a “contract between a public employer and a union over the terms and conditions of employment. When parties enter into a CBA, they are obligated to adhere to its terms, which are the product of their collective bargaining.” *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006) (citations and quotation marks omitted). “Collective bargaining agreements are construed in the same manner as other contracts.” *Appeal of Lincoln-Woodstock Coop. Sch. Dist.*, 143 N.H. 598, 601 (1999). In interpreting a CBA, a court begins “by focusing

upon the language of the CBA, as it reflects the parties' intent. This intent is determined from the agreement taken as a whole, and by construing its terms according to the common meaning of their words and phrases." See *Appeal of Nashua Police Commission*, 149 N.H. 688, 690 (2003) (citations and quotation marks omitted). "Absent fraud, duress, mutual mistake, or ambiguity," the search for the parties' intent must be restricted to the words of the contract. See *Appeal of Town of Durham*, 149 N.H. 486, 487 (2003). "A clause is ambiguous when the contracting parties reasonably differ as to its meaning." *Id.* The interpretation of a CBA, including whether a contract term is ambiguous, is a question of law. See *Appeal of Nashua Police Commission*, *supra*, 149 N.H. at 690.

Here, one of the CBA articles the Association claims to be breached is the Employee Evaluation Article which provides in part as follows:

The parties recognize the importance and value of a procedure for assisting in evaluating the progress and success of both newly employed and experienced personnel for the purpose of improving instruction. Therefore, to this end, the following procedures have been agreed to in an effort to accomplish this goal.

A. New Teacher (Non-Tenured)

Both parties recognize the responsibility to assist new teachers. During the first three weeks of school, the White Mountains Regional School Board, through its principals, shall orient all new teachers regarding evaluative procedures and School Board policies. All monitoring or observation of the performance of a teacher shall be conducted openly. All new (non-tenured) teachers shall be formally observed for the purpose of evaluation at least two (2) times during the school year. Whenever the building principal or superintendent feels more or fewer visits are necessary, he/she has the right to exercise this discretion.

B. Non-Probationary Teachers (Tenured)

All tenured teachers shall be observed for the purpose of evaluation at least once during the school year...

A written observation report shall be presented to the employee within ten (10) calendar days of an observation. A conference may be requested by either the supervisor or the employee and must occur within seven (7) calendar days after the request is made, unless mutually agreed otherwise...

A yearly evaluation report will be presented to all employees by their supervisor at least ten (10) calendar days prior to nomination by the superintendent. This evaluation will be

a compilation of reports, observations, and/or memoranda made by the principal, assistant principal or designated administrator. Any information that may be detrimental to an employee's evaluation status must have been presented to the employee in writing at least thirty (30) calendar days prior to the presentation of the evaluation report for a letter "b" recommendation or January 5th for a "c" or "d" recommendation (below). This evaluation report must have one of the following recommendations to the superintendent:

- a) Recommended for continued employment with scheduled increment.
- b) Recommended for continued employment with improvement plan with scheduled increment.
- c) Not recommended for continued employment.

...

If an employee receives a "b" or "c" evaluation, the supervisor *may require* the employee to develop an improvement plan to address the areas of need. Within twenty (20) calendar days, the supervisor will communicate the following in writing: a) specific areas in need of improvement, b) available support to help address the identified needs, c) how and when improvements will be measured and evaluated, and d) possible consequences for failure to improve. Within twenty (20) calendar days of receiving this, the employee will respond to the supervisor with their specific plan for improvement. A teacher must be given notice that there is *a possibility that they could be placed* on an improvement plan. If they are placed on an improvement plan, the plan must be specific and reasonable... An in-district WMEA representative chosen by the teacher be present at every evaluation conference during this process. [sic]

See Joint Exhibit A (emphasis added).

The Association argues that the District breached the Employee Evaluation Article because it failed to place Mr. Richardson on an improvement plan or otherwise assist him as a new teacher prior to nonrenewing him. The Association bases its claims on the following language of the Employee Evaluation Article: "Both parties recognize the responsibility to assist new teachers." The Association appears to take this sentence out of context and its interpretation of this article as requiring the District to place new teachers on an improvement place prior to nonrenewal is not supported by the language of the Employee Evaluation Article and the CBA as a whole. This sentence is a part of *Employee Evaluation* Article and the assistance referred to in this article is the assistance provided through the evaluation/observation process. Nothing in this Article requires the District to place a non-tenured, or a tenured, teacher on an improvement plan. On the contrary, the use of the words "may" and "possibility that they could be placed" in the subsection of the Article dealing with the improvement plans shows that the District has

discretion as to whether to place a teacher on an improvement plan.

Furthermore, the Association's claim that the District failed to provide assistance to Mr. Richardson is equally without merit. The evidence shows that, as a new teacher, Mr. Richardson received orientation when he commenced his employment with the District and was assigned a mentor for a year. In addition, he was observed/evaluated at least three times per year, including two structural observations and a summative evaluation. After each observation, Mr. Richardson had a conversation with the evaluator/observer during which various aspects of his performance were discussed. Such discussions provided opportunity for Mr. Richardson to ask any questions related to his work/performance, which he, in fact, did, and receive suggestions, recommendations, and advice from the evaluator (usually, the Principal or Assistant Principal). The structural observation and summative evaluation reports were provided to Mr. Richardson in accordance with the CBA. In addition, Mr. Richardson received letters of concern/warning, including contractually required "January 5th" letters, and had several conversations with the Principal when the issues arose. He was also provided with the opportunity to respond to the negative letters or comments. Therefore, the District provided all the assistance required under the Employee Evaluation Article of the CBA.

Further, the evidence is insufficient to prove that the District violated the Fair Treatment Article, which provides as follows:

No employee shall be disciplined without receiving a supportive statement of fact for said disciplinary action. Information forming the basis for disciplinary action shall be available to the employee and/or his/her designee. Inasmuch as possible, a letter or warning will be sent to the employee before disciplinary action is taken. The employee shall be provided with an opportunity to read and sign this letter prior to placing it in his/her personnel file. His/her signature does not indicate that he/she agrees with it. The Association and the School Board agree that there are circumstances when no written warning or letter is necessary prior to disciplinary action being taken. An employee may submit a response in writing and have it attached to the written warning or letter to be placed in his/her personnel file.

The parties agree that discipline should normally be progressive and corrective in nature.

See Joint Exhibit A.


Here, the Association failed to prove that Mr. Richardson's nonrenewal constituted discipline within the meaning of the Fair Treatment Article. Mr. Richardson was a non-tenured teacher and, under RSA 189:14-a², was not entitled to either an explanation of reasons for a nonrenewal or a hearing. He was entitled only to "be notified in writing on or before April 15 or within 15 days of the adoption of the district budget by the legislative body, whichever is later," if he was not to be renominated or reelected. See RSA 189:14-a. The District did notify him in writing of his nonrenewal in a timely manner. Under the circumstances of this case, the nonrenewal does not constitute discipline.

Lastly, the evidence is insufficient to prove that the District interfered with Mr. Richardson's exercise of the rights conferred by RSA 273-A in violation of RSA 273-A:5, I (a) and/or failed to comply with the RSA 273-A in violation of RSA 273-A:5, I (g).

Based on the forgoing, the District provided all the assistance required under the parties' CBA. Therefore, the District did not commit an unfair labor practice when it nonrenewed Mr. Richardson without first placing him on an improvement plan. Accordingly, the Association's claims that the District violated RSA 273-A:5, I (a), (g), and/or (h) are dismissed and the Association's request for relief is denied.

So ordered.

April 7, 2015


Karina A. Lange, Esq.
Staff Counsel/Hearing Officer

Distribution: Esther Kane Dickinson, Esq.
Barbara F. Loughman, Esq.

² RSA 189:14-a provides in part as follows:

I. (a) Any teacher who has a professional standards certificate from the state board of education and who has taught for one or more years in the same school district shall be notified in writing on or before April 15 or within 15 days of the adoption of the district budget by the legislative body, whichever is later, if that teacher is not to be renominated or reelected, provided that no notification shall occur later than the Friday following the second Tuesday in May.