STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

Winchester School District
v.
Winchester Teachers' Association

Case No. E-0193-1
Decision No. 2016-130

Appearances:

William J. Phillips, Esq.,
Peterborough, New Hampshire for the Complainant

Steven R. Sacks, Esq.,
Contract Attorney, NEA-NH
Concord, New Hampshire for the Respondent

Background:

On January 15, 2016 the Winchester School District (District) filed an unfair labor practice complaint under the Public Employee Labor Relations Act charging that the Winchester Teachers' Association (Association) violated RSA 273-A:5, II (f)(to breach a collective bargaining agreement) and (g)(to fail to comply with this chapter or any rule adopted hereunder) and RSA 273-A:4 when it demanded arbitration of a school board's decision upholding the non-renewal of a District teacher. The District maintains that: 1) RSA 273-A:4 bars non-renewal arbitration during status quo periods; 2) assuming the successor 2015-2017 collective bargaining agreement (effective July 1, 2015)(2015-17 CBA) applies, the Association is still not entitled to non-renewal arbitration because the 2015-17 CBA provides for advisory arbitration instead of binding arbitration, contrary to the requirements of RSA 273-A:4; and 3) the underlying grievance is untimely. The District requests, among other things, that the PELRB find that the

Association committed an unfair labor practice and order the Association to cease and desist from violating RSA 273-A.

The Association denies the charges. According to the Association, following the school board hearing and decision (in July, 2015), it timely filed a grievance charging that the teacher was non-renewed without just cause[1] and subsequently made a proper demand for non-renewal arbitration under the 2015-17 CBA. The Association contends that non-renewal arbitration is available under the 2015-17 CBA even though the parties' grievance procedure only provides for advisory arbitration, especially when the right to maintain a subsequent action at the PELRB is taken in account. The Association requests that the PELRB order the parties to proceed with the non-renewal arbitration as the Association has demanded.

This case was originally scheduled for hearing on March 1, 2016. However, at the pre-hearing conference the parties agreed to submit this case for decision based upon stipulated facts and exhibits. Both parties filed opening briefs by the March 24, 2016 deadline and reply briefs by the April 12, 2016 deadline. The decision is as follows.

Findings of Fact

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

2. The Association is the exclusive representative of bargaining unit employees like the teacher at issue in this case.

3. The District and the Association were parties to a July 1, 2011 through June 30, 2014 Collective Bargaining Agreement (2011-14 CBA). They did not negotiate a successor agreement to cover the July 1, 2014 through June 30, 2015 time period, but they now have an agreement that is effective from July 1, 2015 through June 30, 2017 (2015-17 CBA).

[1] The school board held a hearing on the non-renewal issue and the Superintendent's RSA 189:13 dismissal recommendation and after hearing voted to uphold the non-renewal and also voted for dismissal. This case is limited to the Association's effort to arbitrate the District's non-renewal action.

4. The "Grievance Procedure" provisions set forth in Article 8 of the 2011-14 CBA and Article 8 of the 2015-17 CBA are identical. Both provide for advisory arbitration as the final step, unless the parties have agreed, in writing, to binding arbitration.

5. The "Employee Discipline" provisions of Article 14 of the 2011-14 CBA and Article 14 of the 2015-17 CBA both state that "[n]o teacher shall be disciplined without just cause" and include "non-renewal" within the definition of discipline.

6. On April 13, 2015 the school board voted in a non-public session not to elect Anna Brunk to a teaching position for the 2015-16 school year. On April 14, 2015 the Superintendent notified Brunk that pursuant to RSA 189:14-a she was not re-elected to a District position for the 2015-16 school year.

7. Brunk duly requested a hearing before the school board to challenge the non-reelection action.

8. On June 16, 2015 the Superintendent notified Brunk that he was recommending her dismissal to the school board pursuant to RSA 189:13.

9. On June 23, 2015 and July 6, 2015 the school board held a combined hearing on Brunk's non-renewal[2] and dismissal, and issued its decision (Joint Exhibit 5) on July 9, 2015. One of the school board's rulings was that "[t]he non-renewal of Katie Brunk's contract was intended by the Superintendent as a non-renewal but framed as a non-election so that the Board (school board) could consider the charges." The school board affirmed the non-renewal action and also approved the Superintendent's dismissal recommendation.

10. On August 31, 2015 the Association filed a grievance (the Brunk grievance) over the school board's non-renewal and dismissal actions.

[2] Both parties characterize the school board's action as a non-renewal for purposes of this case.

11. On September 22, 2015 the Association demanded arbitration of the Brunk grievance.

Decision and Order

Decision Summary:

The Brunk non-renewal is not arbitrable, and the Association has committed an unfair labor practice on account of its wrongful demand for arbitration. The outcome in this case is the same regardless of whether the arbitrability of the Brunk grievance is evaluated under the RSA 273-A:4 "null and void" language applicable during the period between July 1, 2014 and June 30, 2015 or is analyzed under the provisions of the 2015-17 CBA. The Association is ordered to cease and desist from its efforts to arbitrate the Brunk non-renewal grievance.

Jurisdiction:

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

Discussion:

The dispute in this case centers around the meaning and operation of both RSA 273-A:4 (Grievance Procedures) and RSA 189:14-b (Review by State Board). RSA 273-A:4 provides as follows:

> Every agreement negotiated under the terms of this chapter shall be reduced to writing and shall contain workable grievance procedures. 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.

RSA 189:14-b provides as follows:

> I. A teacher aggrieved by such decision may either petition the state board of education for review thereof or request arbitration under the terms of a collective bargaining agreement pursuant to RSA 273-A:4, if applicable, but may not do both. Such petition must be in writing and filed with the state board within 10 days after the issuance of the decision to be reviewed. Upon receipt of such petition, the state board shall notify the school board of the petition for review, and shall forthwith proceed to a consideration of the matter. Such consideration shall include a hearing if either party shall request it. The state board shall issue its decision within 15 days after the petition for review is filed, and the decision of the state board shall be final and binding upon both parties. A petition for review under this section shall constitute the exclusive remedy available to a teacher on the issue of the nonrenewal of such teacher.
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> II. The state board of education shall uphold a decision of a local school board to nonrenew a teacher's contract unless the local school board's decision is clearly erroneous.

The Association defends against the District's unfair labor practice complaint, and attempts to avoid the effect of the provision in RSA 273-A:4 that any collective bargaining agreement provision allowing "arbitration or any other binding resolution for teacher nonrenewals" is null and void at the expiration of the contract, by relying upon the 2015-17 CBA, which became effective on July 1, 2015. The Association argues that relevant school board activity (completion of hearing and decision) did not occur until after July 1, 2015 and therefore the 2015-17 CBA applies. The Association further maintains that it is entitled to bring the Brunk grievance to arbitration under Articles 8 and 14 of the 2015-17 CBA.

The District contends that the "null and void" language in RSA 273-A:4 bars any demand for non-renewal arbitration. The District says the null and void language applies because both the school board's initial decision to non-reelect Brunk, and the Superintendent's corresponding notice to Brunk, happened in April of 2015, following the expiration of the 2011-14 CBA and before the effective date of the 2015-17 CBA. The District also argues that the Association's

attempt to arbitrate the Brunk grievance under the 2015-17 CBA is similarly without merit. According to the District, the Article 8 Grievance Procedure in the 2015-17 CBA is legally insufficient under RSA 273-A:4 to compel non-renewal arbitration because the grievance procedure provides for advisory arbitration instead of some version of binding arbitration or resolution.

"The extent of the parties' agreement to arbitrate determines the arbitrator's jurisdiction, and the overriding concern is whether the contracting parties have agreed to arbitrate a particular dispute." *Appeal of City of Manchester,* 153 N.H. 289, 293 (2006)(quotations and citations omitted). Both a wrongful refusal to arbitrate and a wrongful demand can be litigated as a possible breach of a collective bargaining agreement in violation of RSA 273-A:5, I (h) and II (f). *See School District #42 v. Murray,* 128 N.H. 417, 422 (1986). The PELRB "does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration. Absent specific language to the contrary in the CBA, however, the PELRB is empowered to determine as a threshold matter whether a specific dispute falls within the scope of the CBA." *Appeal of the City of Manchester*, 153 N.H. at 293 (citations omitted). The analysis of arbitrability disputes is governed by four general principles:

> (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 ...

Appeal of the City of Manchester, 144 N.H. 386, 388 (1999)(citations omitted).

> A presumption of arbitrability exists if the CBA contains an arbitration clause, but the court may conclude that the arbitration clause does not include a particular grievance if it

> determines with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute. Furthermore, the principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties.

Appeal of Town of Bedford, 142 N.H. 637, 640 (1998).

Applying this standard to the Brunk grievance, we conclude that the Association has no right to proceed to arbitration. Under RSA 189:14-b, "[a] teacher aggrieved by such decision (i.e. school board non-renewal) may either petition the state board of education for review thereof or request arbitration under the terms of a collective bargaining agreement pursuant to RSA 273-A:4, if applicable, but may not do both." The form of "arbitration" referenced in RSA 273-A:4 is "arbitration or any other binding resolution." The term "arbitration" in the statutory phrase "arbitration or any other binding resolution" is cited as one example of a "binding resolution." The parties are also free to agree to "any other" form of "binding resolution." In this case the last step of the Article 8 Grievance Procedure under both CBAs is advisory arbitration, which is not a form of "binding resolution," and which therefore is not an acceptable form of "non-renewal arbitration" under RSA 273-A:4.

This interpretation of the phrase "arbitration or any other binding resolution" as used in RSA 273-A:4 is consistent with the second option under RSA 189:14-b, which is to have a school board non-renewal action reviewed by the state board of education, whose decision is "final and binding." Advisory arbitration lacks this kind of finality. Following advisory arbitration the Association would have the right to file an unfair labor practice with the PELRB alleging breach of the collective bargaining agreement if, for example, the arbitration award is rejected by the District, or if the award effectively upholds the school board's non-renewal action. This means, in substance, that the parties would re-litigate the Brunk grievance in

another forum (the PELRB), a possibility that is avoided in the case of binding arbitration. *See Appeal of Silverstein*, 163 N.H. 192, 197-99 (2012).

Consistent with the foregoing, it makes no difference whether the arbitrability of the Brunk grievance is determined based upon the statutory null and void language applicable during a status quo period or under the provisions of the 2015-17 CBA. The Association is not entitled to proceed to arbitration in either situation for the reasons stated, and we therefore find that the Association made a wrongful demand for arbitration in violation of RSA 273-A:5, II (f). The Association is ordered to refrain from any further effort to bring the Brunk non-renewal grievance to arbitration.

So ordered.

June 13, 2016

/s/ Michele E. Kenney
Michele E. Kenney, Esq., Chair

By unanimous vote of Chair Michele E. Kenney, Esq., Board Member Senator Mark Hounsell, and Board Member James M. O'Mara, Jr.

Distribution: William J. Phillips, Esq.
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