# State of New Hampshire
Public Employee Labor Relations Board

**Sugar River Education Association, NEA-NH**

**v.**

**Claremont School District**

**Case No. E-0188-2**
**Decision No. 2016-161**

Order

I. Background:

This matter is the second of two related unfair labor practice cases filed by the Association involving arbitration over the District's unilateral change from a 4x4 Block Schedule to an A/B Schedule[1] at Stevens High School. In the first case[2] the Association charged that the District had improperly failed to comply with a binding arbitration[3] award in which the arbitrator found that the A/B Schedule change violated the parties 2014-17 Collective Bargaining Agreement (2014-17 CBA). See Joint Exhibit 4, June 29, 2015 Arbitration Award (first arbitration). On the day of hearing in Case No. E-0188-1, the parties agreed to return to arbitration over the issue of remedy. *See* PELRB Decision No. 2015-259 (December 15, 2015). The District also reserved the right to challenge any award in the second arbitration on public policy grounds.

---

[1] Under the Block Schedule, students take four block classes per semester. Under the A/B Schedule, students take the same number of classes over the course of the school year but have four classes on "A" days for the entire year and a separate set of classes on "B" days for the entire year. See Joint Stipulation of Facts dated June 22, 2016.
[2] *Sugar River Education Association, NEA-NH v. Claremont School District,* No. E-0188-1.
[3] The final step of the grievance procedure is binding arbitration per Article IX. See Joint Exhibit One (2014-17 Collective Bargaining Agreement).

The arbitrator's award in the second arbitration states, in relevant part, as follows:

> As a remedy, the School District must revert back to the prior block schedule previously agreed upon by the parties. This must occur for the 2016-17 school year. In addition, because of the additional instructional time required by the change in the schedule, Stevens High School teachers must be paid an additional 8% of their salary for this increased teaching workload.

See Joint Exhibit 5 (April 4, 2016 Arbitration Award).

When the school board announced that it still would not return to the Block Schedule, the Association filed this unfair labor practice complaint on May 6, 2016. The Association maintains there is no excuse for the District's refusal to comply with the second arbitration award and charges that the District's failure to do so violates RSA 273-A:5, I (a), (e), (g), (h), and (i). The Association has also moved for an immediate cease and desist order, claiming one is necessary to ensure the Block Schedule is in place for the upcoming 2016-17 school year. The Association has stipulated that, under the award, the 8% salary increase for high school teachers will be eliminated once the Block Schedule is reinstated.

The District has answered the complaint and objected to the Association's motion for a cease and desist order. The District accepts the arbitrator's finding that the District violated the 2014-17 CBA when it changed from a Block Schedule to the A/B Schedule, and the District has no objection to the 8% salary increase for high school teachers contained in the award. However, with respect to the arbitrator's directive that the District revert to the agreed upon Block Schedule, the District asserts that: 1) teacher schedules, like the Block Schedule and the A/B Schedule, are a prohibited subject of bargaining under RSA 189:1-a, II. Therefore, it is a violation of public policy for the PELRB to enforce the arbitrator's award requiring the District to revert to the previously agreed Block Schedule; 2) an arbitrator should not determine teacher schedules; 3) the District had good reasons to switch to an A/B schedule; 4) the District will

continue to pay high school teachers an 8% salary increase for the extra work required under the A/B schedule.

A hearing was held on June 23, 2016 on the Association's motion for a cease and desist order. The record in this case includes pleadings, a Joint Stipulation of Facts, and exhibits submitted at the hearing. Counsel argued the motion at the hearing, and the Association's request that the PELRB immediately issue a cease and desist order has been submitted for decision. It should be noted that the parties have agreed that the case on the merits will be submitted for action without further hearing following the submission of briefs, scheduled to be filed on or before July 15, 2016.[4]

II. Criteria for Cease and Desist Orders

The PELRB has the authority to issue cease and desist orders pursuant to RSA 273-A:6, III and N.H. Admin. Rules, Pub 304.02. Under the statute, the PELRB "may issue a cease and desist order if it deems one necessary in the public interest, pending the hearing." The rules are to the same effect, with some additional guidance:

> Pub 304.02 Interim Orders.
>
> (a) When the board considers it to be in the public interest, it shall issue a cease and desist order under RSA 273-A:6, III pending a hearing under Pub 201.05.
>
> (b) The board shall issue such an order for reasons to include, but not limited to:
>
> (1) Protection of the public safety;
> (2) To avoid prejudice to one party or another; or
> (3) To avoid irreparable harm.

III. Discussion:

We find that the Association is entitled to the benefit of the full remedy ordered by the arbitrator and that, in the circumstances of this case, granting the Association's motion at this

[4] See Pre-Hearing Order, PELRB Decision No. 2016-129 (June 13, 2016).

time is in the public interest and will avoid prejudice to the Association, notwithstanding the District's objection. This order is only necessary because the District has declined to comply with the result of a duly negotiated grievance procedure. While workable grievance procedures must be included in every collective bargaining agreement under RSA 273-A:4, the parties have considerable latitude in negotiating their precise structure. In particular, there is no obligation to include any form of arbitration, whether binding, advisory, or otherwise, as the final step of the grievance procedure. But when binding arbitration is included, the public interest is served by upholding the results, which in this case means ending the District's delay in compliance. The District's failure to adhere to the outcome of the grievance procedure undermines the statutory mechanism for resolving contractual disputes between parties to collective bargaining. It is axiomatic that a grievance procedure is not workable if the public employer refuses to adhere to the outcome of contractually negotiated arbitration. Accordingly, the District must comply with the results of the binding arbitration absent some exception which, as discussed in more detail below, is not present in this case.

Non-compliance with an arbitrator's award is justified when the award contravenes "a strong and dominant public policy as expressed in controlling statutes, regulations, common law, and other applicable authority." *Appeal of Merrimack County*, 156 N.H. 35, 44-45 (2007)(arbitrator's award reinstating a terminated county employee did not contravene a strong and dominant public policy). In this case, the District's main argument in opposition to the remedy the arbitrator has ordered can be summarized as follows: 1) there is a strong and dominant public policy under *Appeal of Merrimack County* against enforcement of collective bargaining agreement provisions which concern a prohibited subject of bargaining; 2) teaching schedules, such as the Block Schedule and the A/B Schedule, are a prohibited subject of

bargaining under *Appeal of State,* 138 N.H. 716 (1994); and 3) therefore, the District cannot be required to revert to the Block Schedule.

The classification of bargaining topics into mandatory, permissive, or prohibited subjects is determined by the three part test adopted in *Appeal of State*:

> First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation....Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy.... Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI.
> .....
> A proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.

*Appeal of State* at 721-723. The "statute or statutorily adopted regulation" referenced in the first part of the test does not include or mean the "managerial policy exception" described in RSA 273-A:1, XI.[5] *See Appeal of City of Nashua Board of Education*, 141 N.H. 768, 774 (1997)(rejecting "the city's bootstrapping attempt to utilize the statutory managerial policy exception as the statute that determines the scope and applicability of the managerial policy exception"). Matters within the statutory managerial policy exception are considered "permissive" subjects of bargaining. Further, descriptions of managerial authority set forth in statutes other than RSA 273-A must designate such authority as "reserved exclusively" for the public employer, within the "sole prerogative" of the public employer, or contain language to similar effect. For example, in *Appeal of State,* with respect to a union employee discipline

[5] RSA 273-A:1, XI. "Terms and conditions of employment" means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

proposal ("employer may discipline for just cause") made during bargaining, the court concluded that RSA 21-I:42, I and :43, II(j) and (k) did not render this subject a prohibited subject of bargaining under the first part of the three part test. The court explained that:

> [W]hile the cited statutes establish a division of personnel and mandate that the director of personnel adopt rules, *they do not state that the listed functions of the division or the subjects of the rules are reserved exclusively for the State*. Second, the cited statutes also list compensation of employees as a function of the division of personnel and mandate rule-making on compensation. Compensation is included in the public employer's obligation to bargain as a term and condition of employment and is not a subject reserved exclusively for managerial policy. RSA 273-A:3, I, :1, XI. *Therefore, the mere inclusion of "discipline" in RSA 21-I:42, I, and "discipline" and "removal" in RSA 21-I:43, II(j) and (k) do not mean that those subjects are within the sole prerogative of the State as employer.*

*Appeal of State* at 723 (emphasis added).

Here, the authority the District relies upon does not contain language that is the same, similar, or equivalent to the kind of language necessary to render teaching schedules a prohibited subject of bargaining. RSA 189:1-a, titled "Duty to Provide Education, provides in sub-section II as follows:

> Elected school boards shall be responsible for establishing the structure, accountability, advocacy, and delivery of instruction in each school operated and governed in its district. To accomplish this end, and to support flexibility in implementing diverse educational approaches, school boards shall establish, in each school operated and governed in its district, instructional policies that establish instructional goals based upon available information about the knowledge and skills pupils will need in the future.

Nothing in this statutory language provides that school board authority in this area is exclusive, or that the mentioned areas are within a school board's sole prerogative. While it is a clear enumeration of school board responsibilities, there is no particular limitation or specification on how school boards should carry them out. Instead, the precise manner in which a school board discharges its responsibilities is left to its discretion, even where that discretion is exercised to include a teaching schedule in a collective bargaining agreement, as is the case here. Therefore, we find that under *Appeal of State* teaching schedules are not a prohibited subject of bargaining.

The District also cites *Laconia Education Association/NEA-NH v. Laconia School District,* PELRB Decision No. 2008-204 (October 10, 2008) as additional support for the proposition that teacher schedules are a prohibited subject bargaining. However, the *Laconia* case is factually distinguishable from the current case, and the decision in *Laconia* does not go as far as the District suggests. Unlike the present case, *Laconia* did not involve a collective bargaining agreement which included a teaching schedule (the Block Schedule in this case), nor did it involve a dispute over implementation of an arbitration award directing the public employer to adhere to the teaching schedule contained in the collective bargaining agreement. *Laconia* did find that making a change in a teaching schedule, on the facts of that case, was not a mandatory subject of bargaining. This is not, however, the equivalent of a finding that teaching schedules are a prohibited subject of bargaining under the three part *Appeal of State* test. Our analysis in this case is consistent with *Laconia,* since we are not finding that teaching schedules are a mandatory subject of bargaining. We do reject the District's assertion that teaching schedules are a prohibited subject of bargaining.

The District also asks the PELRB to consider the efficacy of the A/B Schedule as compared to the Block Schedule as further support for its argument that the arbitration award violates a strong and dominant public policy. This is nothing more, however, than a restatement of the District's primary argument, which is that changes in the teaching schedule are within the District's sole prerogative. It simply adds the additional claim that the District has exercised its claimed sole prerogative well. We decline to delve into the reasons behind the schedule change. Whether or not the A/B Schedule is an improvement over, and should be substituted for, the contractually agreed Block Schedule is not for the PELRB to decide. Instead, the focus in this

case is on the remedy the Association obtained through the statutorily mandated grievance procedure.

Likewise, the District's complaint that granting the Association's motion will allow an arbitrator to usurp the authority of elected local school board members is incorrect; all the arbitrator has done in this case is require the District to follow the 2014-17 CBA, which is the *sine qua non* of the arbitrator's power. Having included the Block Schedule in the 2014-17 CBA, as recounted in the first and second arbitration awards, neither the school board nor the Superintendent has the right or option under RSA 273-A to unilaterally change from a Block Schedule to an A/B Schedule.

Finally, the District's argument that the Association's motion for a cease and desist order should be denied because the Association has an adequate remedy at law, represented by the 8% salary increase to compensate high school teachers for extra work performed during the 2015-16 school year, is misplaced. The adequacy of a remedy at law is not a listed consideration among the criteria the PELRB applies when acting upon requests for cease and desist orders under RSA 273-A:6, III and N.H. Admin. Rules, Pub 304.02. Moreover, in order to give full effect to the parties' agreement, and the purpose of collective bargaining under the Act, each party is expected to fulfill and discharge its obligations under their contract. Public employers, like the District, do not have the option to "buy out" of certain provisions in a collective bargaining agreement by unilaterally providing additional wages, like a salary increase in future school years, as compensation. Wages are a mandatory subject of bargaining under RSA 273-A:XI, and any salary change for future school years must be negotiated.

IV. Order

The Association's motion for a cease and desist order is granted. The District shall immediately comply with the complete remedy provided in the second arbitration award and take all necessary steps to revert to the Block Schedule for the 2016-17 school year.

So ordered.

Date: July 7, 2016

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

By unanimous vote of Chair Michele E. Kenney, Esq., Board Member Carol M. Granfield, and Board Member Richard J. Laughton, Jr.

Distribution: James F. Allmendinger, Esq.
Mark T. Broth, Esq.