Dismisses appeal of PELRB
Decision No. 2016-176

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2016-0562, Appeal of Claremont School Board, the court on October 2, 2017, issued the following order:

Having reviewed the supplemental memoranda filed by the parties in response to our August 11, 2017 order, the court concludes that the case is moot. Accordingly, the appeal is dismissed.

Appeal dismissed.

Dalianis, C.J., and Hicks, Lynn, and Bassett, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
New Hampshire Public Employee Labor Relations Board, E-0188-2
Mark T. Broth, Esquire
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Attorney General
File

NH Supreme Court dismissed appeal of this decision on 10/20/2017
(NH Supreme Court Case No. 2016-0562)

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. 2016-201

Order on Motion for Rehearing

The District filed a motion for rehearing of PELRB Decision No. 2016-176 (July 29, 2016) on August 29, 2016. Sugar River Education Association, NEA-NH filed an objection on September 9, 2016. Motions for rehearing are governed by RSA 541:3 and Pub 205.02, which provides in part as follows:

> **Pub 205.02 Motion for Rehearing.**
>
> (a) Any party to a proceeding before the board may move for rehearing with respect to any matter determined in that proceeding or included in that decision and order within 30 days after the board has rendered its decision and order by filing a motion for rehearing under RSA 541:3. The motion for rehearing shall set out a clear and concise statement of the grounds for the motion. Any other party to the proceeding may file a response or objection to the motion for rehearing provided that within 10 days of the date the motion was filed, the board shall grant or deny a motion for rehearing, or suspend the order or decision complained of pending further consideration, in accordance with RSA 541:5.

Upon review, the District's Motion for Rehearing is denied.

So ordered.

Date: September 20, 2016

/s/ Andrew Eills
Andrew Eills, Esq., Chair

By unanimous vote of Alternate Chair Andrew Eills, Esq., Board Member Carol M. Granfield, and Board Member Richard J. Laughton, Jr.

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

NH Supreme Court dismissed appeal of this decision on 10/02/2017 (NH Supreme Court Case No. 2016-0562

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. 2016-176

Appearances:

James F. Allmendinger, Esq.,
Contract Attorney, NEA-NH
Concord, New Hampshire for the Complainant

Mark T. Broth, Esq. and Anna B. Cole, Esq.,
Drummond, Woodsum & McMahon, P.A.
Manchester, New Hampshire for the Respondent

Background:

On May 6, 2016, the Sugar River Education Association, NEA-NH (Association) filed an unfair labor practice complaint under the Public Employee Labor Relations Act. The gravamen of the Association's complaint is that the Claremont School District (District) has improperly refused to completely implement the remedy specified in an April 4, 2016 binding arbitration award. The disputed award is based upon a finding in a preceding arbitration award (dated June 29, 2015) issued by the same arbitrator which found that the District violated the parties' 2014-17 collective bargaining agreement (2014-17 CBA) when it adopted an A/B teaching schedule. The award requires the District to: 1) compensate Stevens High School teachers with an 8% salary increase because they were compelled to teach on an A/B schedule during the 2015-16

school year, which the District has done; and 2) revert to the prior and agreed upon Block teaching schedule for the 2016-17 school year, which the District refuses to do.

The Association charges that the District has violated RSA 273-A:5, I (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter); (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations); (g)(to fail to comply with this chapter or any rule adopted under this chapter); (h)(to breach a collective bargaining agreement); and (i)(to make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule). The Association requests that the PELRB find that the District has committed an unfair labor practice in violation of the cited provisions and order the District to comply with the award's requirement that it revert to the Block schedule. The Association also filed a motion for an immediate cease and desist order, asking the PELRB to issue a cease and desist order requiring the District to, in substance, immediately comply with the arbitration award to ensure that the Block schedule is in place for the upcoming school year.

The District denies the charges. The District maintains that the award's requirement that the District adhere to the 2014-17 CBA and revert to the prior Block Schedule violates a strong and dominant public policy grounded in the provisions of RSA 189:1-a, II. According to the District, under this law the District school board, and not an "unaccountable labor arbitrator," is responsible for setting academic policy and determining the mode for instruction delivery, and the award prevents the District school board from exercising this statutory obligation. As to the fact that the arbitrator's award was based upon the 2014-17 CBA, the District argues that the Block Schedule contained in the 2014-17 CBA is a prohibited subject of bargaining to the extent

that it prevents the District from unilaterally changing to an A/B Schedule. Therefore, according to the District, the District school board's agreement to the Block Schedule provision in the 2014-17 CBA was an *ultra vires* act and is void as a matter of law.

A hearing on the complaint was originally scheduled for June 21, 2016. However, at the pre-hearing conference the parties agreed to submit this case for decision following the submission of briefs, due on or before July 15, 2016.[1] They also agreed to a June 23, 2016 hearing on the Association's motion for a cease and desist order. The PELRB granted the motion by order dated July 7, 2015. See PELRB Decision No. 2016-161, incorporated herein by reference. In that order the PELRB ordered the District to "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." The record for decision in this case includes a Joint Stipulation of Facts and exhibits submitted at the June 23, 2016 motion hearing. Both parties filed briefs by the July 15, 2016 deadline, and 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 and bargaining agent for teachers in the District, including teachers at Stevens High School.

3. This case is the second of two unfair labor practice cases filed by the Association involving the outcome of two related arbitration proceedings. Both arbitrations relate to the school board's decision to change the Stevens High School teaching schedule from a Block Schedule to an A/B Schedule. 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

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

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.

4. In the first case,[2] the Association filed an unfair labor practice complaint on August 26, 2015, charging that the District school board had improperly rejected the June 29, 2015 binding[3] arbitration award (Joint Exhibit 4). This award found that the school board's plan to implement an A/B Schedule for the 2015-16 school year violated the 2014-17 CBA but did not provide a specific remedy.

5. For the 2015-16 school year, the District implemented the A/B schedule at Stevens High School, notwithstanding the June 29, 2015 arbitration award and the pending unfair labor practice charge.

6. On December 15, 2015, the parties appeared for the PELRB hearing in the first case. However, instead of proceeding with the hearing, the parties elected to return to arbitration before the same arbitrator over the issue of remedy. *See* PELRB Decision No. 2015-259 (December 15, 2015). The District reserved the right to challenge any award in the second arbitration on public policy grounds.

7. The second arbitration award is dated April 4, 2016 (Joint Exhibit 5). It summarizes the result of the first arbitration and reviews and discusses the fact that Stevens High School teachers were compelled to teach under the A/B schedule for the 2015-16 school year. With respect to remedy the second arbitration award provides 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.

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[2] *Sugar River Education Association, NEA-NH v. Claremont School District*, PELRB Case No. E-0188-1

[3] The parties' 2014-17 Collective Bargaining Agreement (2014-17 CBA) contains a grievance procedure which includes binding arbitration as the final step.

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

8. The District accepts the arbitrator's underlying finding that the school board violated the 2014-17 CBA when it changed from a Block Schedule to the A/B Schedule. It also has no objection to the 8% salary increase for high school teachers to compensate for the increased teaching workload during the 2015-16 school year under the A/B schedule. The District also states it will continue to provide the 8% salary increase for so long as teachers are working under the A/B schedule but the parties have stipulated that the increase will be eliminated in the event the Block Schedule is reestablished.

9. However, the District still refuses to comply with the second arbitration award's requirement that it revert to the Block Schedule, claiming this portion of the award violates public policy.

10. The District's refusal to follow the second arbitration award in its entirety resulting in the filing of the current case.

Decision and Order

Decision Summary:

The District's refusal to comply with the second arbitration award's requirement that it revert to the Block Schedule for the upcoming school year constitutes an unfair labor practice in violation of RSA 273-A:5, I (e), (g), and (h). The District school board is ordered to immediately cease and desist in its refusal to fully and completely carry out the remedy contained in the second arbitration award.

Jurisdiction:

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

Discussion:

In a case like this, non-compliance with the arbitrator's award is only 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). We begin by rejecting the District's general argument that sustaining the Association's complaint violates a strong and dominant public policy expressed in RSA 189:1-a, II because the award is tantamount to giving "unaccountable labor arbitrators," and not school board members, responsibility over academic policy and instruction methods. There is no evidence in this case that the arbitrator has ordered the District to follow a class schedule that he developed and which he deems appropriate for Stevens High School. To the contrary, all the arbitrator has done in this case is settle a grievance based upon the terms of the 2014-17 CBA which, as the District concedes, provides for a Block Schedule.

This leaves the District's argument that to the extent the 2014-17 CBA prevents the District school board from unilaterally determining the class schedule, class schedule provisions in the contract are the result of District school board *ultra vires* acts and are void as a matter of law because the Stevens High School class schedule is a prohibited subject of bargaining given the provisions of RSA 189:1-a, II.

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.

Significantly, the "statute or statutorily adopted regulation" referenced in the first part of the test does not include or mean the statutory "managerial policy exception" described in RSA 273-A:1, XI, which provides as follows:

"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.

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").

Descriptions of managerial authority set forth in statutes other than RSA 273-A, and which are cited for the proposition that a particular topic is a prohibited subject of bargaining, must provide that such authority is "reserved exclusively" for the public employer, is 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 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).

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 statute provides that school board responsibility "for establishing the structure, accountability, advocacy, and delivery of instruction" is exclusive, or that it is within the school board's sole prerogative. Further, while RSA 189:1-a, II is a clear enumeration of school board responsibilities, there is no particular limitation or specification on how school boards should fulfill these responsibilities. Instead, the precise manner in which a local school board discharges these responsibilities is left to its discretion. There is nothing in this statute which prevents or bars a school board from exercising its discretion by addressing the subject of teaching schedules through collective bargaining with education professionals, as happened in this case.

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 teaching schedules were 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 find, for the reasons discussed, that teaching schedules are not a prohibited subject of bargaining.

The District's refusal to fully implement the arbitration award constitutes an unfair labor practice in violation of RSA 273-A:5, I (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations); (g)(to fail to comply with this chapter or any rule adopted under this chapter); (h)(to breach a collective bargaining agreement). See *Appeal of Police Commission of the City of Rochester,* 149 N.H. 529, 531 (2003). 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 29, 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.