



**STATE OF NEW HAMPSHIRE**  
Public Employee Labor Relations Board

**Manchester School District**

**v.**

**Manchester Education Association/NEA**

**Case No. E-0140-6**  
**Decision No. 2017-050**

**Appearances:**

James A. O'Shaughnessy, Esq., Drummond/Woodsum, Manchester, New Hampshire, for the Manchester School District

Steven R. Sacks, Esq., NEA-New Hampshire, Concord, New Hampshire, for the Manchester Education Association/NEA

**Background:**

On September 9, 2016, the Manchester School District (District) filed an unfair labor practice complaint against the Manchester Education Association/NEA (Association). The District charges that the Association violated RSA 273-A:5, II (f)(to breach a collective bargaining agreement) when it demanded that the District arbitrate the non-renewal of a continuing contract teacher under the 2015-18 Collective Bargaining Agreement between the Manchester Board of School Committee (school board) and the Manchester Education Association (the 2015-18 CBA). The District argues that this case is distinguishable from the typical arbitrability unfair labor practice case because: 1) the statutory provisions<sup>1</sup> which permit the arbitration of teacher non-renewals have removed the usual presumption of arbitrability; and 2) the 2015-18 CBA lacks statutorily required language granting to the Association the right to

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<sup>1</sup> RSA 189:14-a and b; RSA 273-A:4.

bring a teacher non-renewal to arbitration. The District requests that the PELRB: 1) find that the Association has made a wrongful demand for arbitration and committed an unfair labor practice in violation of sub-section (f); 2) order the Association to cease and desist from pursuing the arbitration of teacher non-renewals under the 2015-18 CBA; and 3) award the District costs and attorneys' fees.

The Association denies the charge and claims that it has made a proper demand for arbitration given the relevant law and the provisions of the 2015-18 CBA. The Association has also filed a motion to dismiss, arguing that the issues raised in the complaint are barred by the doctrine of collateral estoppel given the PELRB's prior decision in *Manchester Education Association/NEA-NH v. Manchester School District*, Case No. E-0140-3 (Decision No. 2016-146, June 27, 2016)(appeal pending, N.H. Supreme Court Case No. 2016-0582).

The PELRB scheduled a hearing on the District's complaint for October 25, 2016 but the parties subsequently agreed to submit this case for decision on stipulated facts and briefs, and the hearing was cancelled on that basis. The parties have filed joint stipulations, joint exhibits, and briefs, and the decision is as follows.

### **Findings of Fact**

1. The District is a public employer within the meaning of RSA 273-A:1, X.
2. The Association is the certified exclusive bargaining representative for certain employees of the District, including all full time classroom teachers. See PELRB Decision No. 2016-170 (July 26, 2016).
3. 2015-18 CBA Article 11 is titled "Individual Teacher Contracts," and provides as follows:
  - A. The Board and the individual teachers will enter into individual contracts as set forth in Appendix attached hereto and incorporated herein by reference.

B. 1. The following terms and conditions shall apply with respect to the employment of each teacher.

B. 2. The contract shall be renewed annually, automatically, during the period of said teacher's employment by said Board, unless the teacher has been notified, in writing, prior to May 10th that the contract will not be renewed for the following year. If a teacher receives a notice of non-renewal set forth in the preceding sentence, the parties agree that the teacher shall not be entitled to a statement of reasons relating to any such notice except as may be required by law under RSA 189:14-a...

B. 3. In accordance with RSA 189:14-a, once an employee has attained "continuing contract" status in the District the employee's contract shall continue in force from year to year, subject to the following conditions:

a. It may be terminated by mutual consent at any time.

b. The teacher may resign by submitting written notice to the Board not later than June 30 of the teacher's intention not to return for the ensuing year.

c. The Board may terminate this contract at any time for one or more of the following reasons:

(1) inefficiency or incompetence;

(2) insubordination against reasonable rules of the Board;

(3) moral misconduct;

(4) disability, as shown by competent medical evidence;

(5) elimination of the position to which the teacher was appointed, if no other positions exists to which the teacher may be appointed, if qualified, or

(6) other due and sufficient cause,

provided prior to terminating the contract, the Board shall give the teacher a written notice that termination of that teacher's contract is under consideration and upon written request filed by the teacher with the Board within five (5) days after receipt of such notice, the Board shall within the next succeeding five (5) days give the teacher a statement, in writing, of its reasons therefore. Within twenty (20) days after receipt from the Board of written notice that contract termination is under consideration, the teacher may file with the Board a written request for a hearing, which the Board shall hold within fifteen (15) days after receipt of such request. Such hearing shall be public if the teacher so requests or the Board so designates. The teacher shall have the right to appear with counsel of the teacher's choice at such hearing, whether public or private. The Board shall give the teacher its written decision within fifteen (15) days after such hearing. Nothing herein contained shall deprive the Board of the power to suspend the teacher from duty

immediately when serious misconduct is charged, without prejudice to the rights of the teacher as otherwise provided herein.

C. The contract will automatically terminate upon termination of the Master Agreement.

D. Pay will be terminated at the time services are terminated.

4. 2015-18 CBA Article 13 is titled "Involuntary Transfer" and provides, in part, as follows:

A. When a transfer is required and the teacher does not wish to accept the transfer voluntarily, the Superintendent may implement the change as an involuntary transfer. The teacher shall be notified as soon as practicable that a transfer is being considered and shall be notified of the reason for the transfer by the appropriate administrator(s) involved.

.....

F. The final decision regarding the implementation shall rest with the Superintendent and the actual transfer and implementation shall not be subject to the grievance procedure provided that it is in compliance to (sic) the criterion set forth in Section G. below, and that the transfer has not been arbitrary or capricious. Failure to follow the procedure leading up to the involuntary transfer, as outlined in Sections A., B., C., D., and E. of this Article, shall be grievable.

5. 2015-18 CBA Article 25 sets out the contractual grievance procedure, and defines a grievance as a "claim based upon the interpretation, meaning or application of any of the provisions of this Agreement." The last step of the grievance procedure is binding arbitration.

6. During the 2015-16 school year Steffany Maloney was a full time first grade teacher and a member of the bargaining unit represented by the Association. She enjoyed "continuing contract" status because of her years of service.

7. The District Superintendent did not nominate Maloney for a 2016-17 school year teaching position because, according to the District's complaint, "she had been found guilty of facilitating a drug or underage alcohol house party in violation of state law."

8. As a result, Maloney requested a school board hearing under RSA 189:14-a, and the Association filed a grievance over Maloney's non-renewal.

9. On August 15, 2016, the school board voted to uphold the non-renewal action. On August 28, 2016, the Association notified the District that it was submitting the Maloney grievance to arbitration under Article 25.<sup>2</sup> The District then filed this unfair labor practice complaint, claiming the Association was not entitled to arbitrate the non-renewal action under the CBA and therefore the Association's actions constitute a wrongful demand for arbitration.

### **Decision and Order**

#### **Decision Summary**

Under the relevant law, the parties were free to include the subject of non-renewal actions in their collective bargaining agreement and subject school board non-renewals of teachers with continuing contract status to the grievance procedure, including arbitration. As recounted in the findings of fact, the non-renewal of teachers with continuing contract status is addressed in detail in CBA Article 11 B.3. We find that disputes arising from the school board's administration of Article 11 B.3, like disputes arising under other contract provisions, are subject to the Article 25 grievance procedure, which includes binding arbitration. The District's complaint is dismissed, and the parties are directed to proceed to arbitration as the Association has demanded.

#### **Jurisdiction**

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

#### **Discussion**

##### **I. Association Motion to Dismiss**

The Association's motion to dismiss is based upon the argument that the parties previously litigated whether non-renewals are subject to arbitration under the 2015-18 CBA in

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<sup>2</sup> As noted in the complaint, the Association mistakenly referenced Article 23 (relating to sabbatical leave) instead of Article 25 when it provided this notice.

Case No. E-0140-3, which resulted in PELRB Decisions No. 2016-146 and No. 2016-206 (order on motion for review of hearing officer decision).

The doctrine of collateral estoppel precludes parties, or those in privity with them, from relitigating in a subsequent action any issue that was actually litigated in a prior proceeding where they were also parties. For collateral estoppel to apply, the issue subject to estoppel must be identical in each action, the first action must have resolved the issue finally on the merits, and the party to be estopped must have appeared in the first action, or have been in privity with someone who did. Further, the party to be estopped must have had a full and fair opportunity to litigate the issue, and the finding must have been essential to the first judgment.

*Appeal of Wingate*, 149 N.H. 12, 15-16 (2002) (citations and quotation marks omitted). In its objection, the District argues that PELRB Decision No. 2016-146 was based on errors of fact and law and was not necessarily based upon an analysis of the 2015-18 CBA because it discussed the 2009-13 CBA as well as the 2015-2018 CBA. The District also maintains that the PELRB did not specifically find in Decision No. 2016-146 that the 2015-2018 CBA provides a right to arbitrate teacher non-renewals and therefore that decision is not dispositive as to the present complaint.

The order in Decision No. 2016-146 was based primarily upon a finding that L'Italien had been terminated and denied the grievance arbitration to which he was entitled. The decision also included alternative grounds for finding that L'Italien had been improperly denied access to arbitration even if his treatment was categorized as a non-renewal. There were also issues concerning the application of the 2009-13 CBA, the 2015-18 CBA, and the status quo doctrine which are not present in this case. In contrast, in this case we are only addressing the arbitrability of a school board non-renewal action under the 2015-18 CBA. Given the differences between the two cases, the Association's motion to dismiss is denied, and we will address the merits of the District's complaint.

## II. District's Unfair Labor Practice Complaint

The standard by which the PELRB evaluates claims of an improper refusal to arbitrate or a wrongful demand to arbitrate has been described in numerous prior PELRB and court decisions. Both a wrongful refusal to arbitrate and a wrongful demand to arbitrate 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). A central tenet in such cases is that “[t]he 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). 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).<sup>3</sup> Arbitrability analysis 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).

The statutory process for teacher non-renewal is addressed in RSA 189:14-a and b. In general, teachers with the statutorily required years of creditable service are entitled to a school board hearing and, if necessary and requested, a subsequent review by the state board of education. In contrast, for teachers who do not meet the years of service requirement, non-

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<sup>3</sup> There is no CBA language to the contrary in this case.

renewal action is a perfunctory process, and there is no opportunity under these laws for hearing or review. There is also an interplay between the statutory non-renewal process and the collective bargaining law which permits parties like the District and the Association to offer non-renewed teachers with the requisite creditable years of service (like Maloney) access to arbitration as an alternative to review by the state board of education. How this is accomplished is at the heart of this case, and the relevant statutory provisions provide limited guidance as to the mechanics of such an arrangement. In other words, these statutory provisions do not prescribe any particular language, form or other substantive requirement that must be employed in a collective bargaining agreement in order to activate this arbitration option.<sup>4</sup> For example, RSA 273-A:4, "Grievance Procedures," states, in part, 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....*"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.

(emphasis added). The relevant language in RSA 189:14-a and b, cited in RSA 273-4, provide as follows:

189:14-a Failure to be Renominated or Reelected.

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...

.....

I (c) Any such teacher who has taught for 5 consecutive years or more in the teacher's current school district, or who taught for 3 consecutive years or more in the teacher's current school district before July 1, 2011, and who has been so notified may request in

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<sup>4</sup> Nor do they substantively alter the existing legal framework within which we must decide the current arbitrability dispute, notwithstanding the District's argument to the contrary.



writing within 10 days of receipt of said notice a hearing before the school board and may in said request ask for reasons for failure to be renominated or reelected....The school board, upon receipt of said request, shall provide for a hearing on the request to be held within 15 days. The school board shall issue its decision in writing within 15 days of the close of the hearing.

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IV. In all proceedings before the school board under this section, the burden of proof for nonrenewal of a teacher shall be on the superintendent of the local school district by a preponderance of the evidence. Except as provided in paragraph III, the grounds for nonrenomination and nonreelection shall be determined at the sole discretion of the school board.

189:14-b Review by State Board.

*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...(emphasis added).*

Under the relevant legal standard, the presumption of arbitrability applies to this case given the Article 25 grievance procedure, which includes binding arbitration. In the normal course of events, the recourse for a bargaining unit employee who wishes to contest action taken by the school board under an Article of the contract is the prosecution of a grievance under the Article 25 grievance procedure up to, and including, binding arbitration. It is true, as emphasized by the District, that the 2015-18 CBA does not expressly state that school board non-renewal actions, like the Maloney action at issue in this case, are subject to arbitration under the grievance procedure. However, the omission of such language is not dispositive for the reasons mentioned. Moreover, it should also be noted that nothing in the 2015-18 CBA provides that disputes over the administration of Article 11 B.3 are exempt from the grievance procedure. This is in contrast to, for example, Article 13 F (limiting grievances over involuntary transfer actions).

Although not required to do so, the parties did elect to include in their collective bargaining agreement a contractual version (Article 11 B.3) of the non-renewal process

applicable to teachers like Maloney. Under this contract provision, once Maloney achieved "continuing contract" status, her right to continued employment in the District is determined by Article 11 B.3. The school board is only entitled to terminate Maloney's contract for one or more of the reasons specified in sub-section c (1) through (6) of Article 11 B.3.<sup>5</sup> We find that the District did not present, as required, the "most forceful evidence of a purpose to exclude" the Maloney grievance, based upon an alleged violation of Article 11 B.3, from the Article 25 grievance procedure, inclusive of binding arbitration. To the contrary, we conclude that by agreeing to the placement of the non-renewal process in Article 11 B.3, the school board rendered its non-renewal decisions with respect to teachers like Maloney into contractual activity subject to the contractual grievance procedure in Article 25, which includes binding arbitration.

In accordance with the foregoing, we cannot find, with positive assurance, that the 2015-18 CBA is not susceptible of an interpretation that covers the dispute. Disputes concerning the school board's administration of Article 11 B.3, just like disputes which arise under other 2015-18 CBA Articles, are subject to the Article 25 grievance procedure, including binding arbitration. The District's unfair labor practice complaint is dismissed. The parties shall proceed to arbitration as demanded by the Association.

So ordered.

Date: 3/27/17

  
Peter Callaghan, Esq., Alternate Chair

By unanimous vote of Alternate Chair Peter Callaghan, Esq., Board Member James M. O'Mara, and Board Member Senator Mark Hounsell.

Distribution: James A. O'Shaughnessy, Esq.  
Steven R. Sacks, Esq.

<sup>5</sup> Neither RSA 189:14-a nor b provide an equivalent or similar list of grounds. Instead, RSA 189:14-a states that the grounds "shall be determined at the sole discretion of the school board," subject to exceptions not applicable here.