STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

Concord School District

v.

Concord Education Association, NEA-NH

Case No. E-0206-1
Decision No. 2017-172

Appearances:

Edward Kaplan, Esq., for the Complainant

James Allmendinger, Esq., for the Respondent

Background:

On March 28, 2017, the Concord School District (District) filed an unfair labor practice complaint alleging, among other things, that the Concord Education Association, NEA-NH (Association) breached the parties' collective bargaining agreement (CBA) in violation of RSA 273-A:5, II (f) when it filed a grievance relating to the dismissal of a teacher which led to a demand for grievance arbitration. The District argues that the grievance is based on the Superintendent's letter recommending dismissal to the school board and, therefore, is outside the scope of the CBA because "no language in the [CBA] … can be reasonably interpreted to allow the Union to challenge a letter prepared by the Superintendent pursuant to RSA 189:13." The District requests that the PELRB: (1) "stay any action pending a decision in this matter"; (2) rule that "the act of filing the grievance constituted an unfair labor practice"; and (3) direct the Association to withdraw the grievance.

The Association denies the charges and asserts, among other things, that the District's complaint is barred by the doctrine of res judicata because this matter has already been decided in *Concord School District v. Concord Education Association*, PELRB Decision Nos. 89-70 and 90-29. The Association requests that the PELRB dismiss the complaint.

On April 11, 2017, the District filed an "emergency motion to stay arbitration proceedings" pending resolution of this matter by the PELRB. The Association objected to this motion. The Board denied the District's motion without prejudice. See PELRB Decision No. 2017-062 (April 17, 2017).

The Board held a hearing on the District's complaint on July 25, 2013. At the hearing, the Association represented that it would not renew its request for arbitration until the PELRB issued its decision in this case and that it was willing to work with the District to resolve any procedural issues. Based on the Association's representation, the District withdrew its claims concerning alleged procedural irregularities with the Association's request for arbitration. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. Both parties filed post-hearing briefs, their 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:I, X.

2. The Association is the certified exclusive bargaining representative for all certified personnel, school psychologists, nurse, and occupational therapists.

3. The District and the Association are parties to a CBA effective from September 1, 2015 through August 31, 2018.

4. The CBA contains a grievance procedure at Article IV, which culminates in final and binding arbitration. That Article also defines a grievance as follows:

1. A "grievance" is a claim based upon the interpretation, meaning, or application of any of the provisions of the Agreement. Only claims based upon the interpretation, meaning, or application of any of the provisions of this agreement shall constitute grievances under this Article. Any claims based upon the non-renewal of a non-tenured teacher as defined by RSA 189:14-a and RSA 189:14-c shall be executed [sic] from the arbitration provisions of this grievance procedure.

See Joint Exhibit 1 and Statement of Uncontested Facts at 6.

5. Article IV.B, Section 3, provides as follows:

If the Grievance Committee is not satisfied with the disposition of the grievance by the Superintendent or Director of Human Resources, or if no decision has been rendered within ten (10) school days after the Grievance Committee's first meeting with the Superintendent or Director of Human Resources, the Grievance Committee may file the grievance in writing with the School Board Communications Committee (SBCC) within ten (10) school days. A meeting between the Grievance Committee and the SBCC to examine the facts of the grievance shall be held within fifteen (15) school days after receiving the written grievance. The SBCC will render a written decision with [sic] fifteen (15) school days after such meeting.

See Joint Exhibit 1 and Statement of Uncontested Facts at 7.

6. Article IV.B, Section 4 provides as follows:

If the Grievance Committee is not satisfied with the disposition of the grievance by the SBCC, the Grievance Committee may submit the grievance to arbitration and will notify the SBCC in writing of its intent to do so within ten (10) school days. If the parties fail to agree upon an arbitrator within fourteen (14) days after the Grievance Committee has notified the SBCC, then either party may apply to the American Arbitration Association for designation of an arbitrator.

The arbitrator shall proceed forthwith to make a final and binding disposition of the grievance by such means and methods as he/she may determine to be necessary. The arbitrator is limited in his/her authority to interpret the contract in the resolution of the issue submitted to him/her by the parties and has no authority to alter, change, or modify any provision of this Agreement.

See Joint Exhibit I and Statement of Uncontested Facts at 8.

7. CBA Article VI.F, titled Discharge, Discipline or Reprisal, provides that "[n]o certified employee will be discharged or reprimanded except for just cause, as long as this

provision does not violate state tenure law." See 2015-18 CBA, page 13.[1] This language has been in the parties' successive CBAs since at least 1978. See Association Exhibit 4. The 2015-18 CBA does not contain any provision which expressly excludes Article VI.F from the grievance procedure or arbitration. See Joint Exhibit 1.

8. The District has adopted a Physical Restraint Policy, Policy No. 430, and a CPI Participant Workbook/Training Manual to train individuals in appropriate restraint procedures. See Statement of Uncontested Facts at 9 and 10.

9. Lori Fosdick was employed by the District as a tenured elementary school teacher. See Association Exhibit 2. Ms. Fosdick's position is within the bargaining unit represented by the Association and is covered by the parties' CBA. See Joint Exhibit 1.

10. On December 2, 2016, Superintendent Terri Forsten wrote to Ms. Fosdick advising her that the Superintendent was recommending her dismissal from her employment with the District. See Statement of Uncontested Facts at 1. The December 2, 2016 letter provides in part as follows:

> Please be advised that in accordance with the provisions in New Hampshire RSA 189:13, I will recommend that the Concord School Board dismiss you from your teaching position in the Concord School District…
>
> I am making this recommendation based on information I learned through conversations with Principal Lauze on October 28; after review of your personnel file; and after review of an investigation report into the events occurring on October 26-28 at Broken Ground School. This investigation was conducted by counsel retained by the Concord School District to evaluate events surrounding the allegations of improper use of physical force on October 26, 2016 and whether or not your conduct complied with district policies.
>
> At the hearing, evidence will be presented that supports the following:
>
> - You used physical force to change a child's mindset and behavior:

[1] A copy of the parties' 2015-18 CBA is on file with the PELRB pursuant to RSA 273-A:16, I.

- You applied a physical restraint, as defined by Policy 430 and RSA 126-U, that does not follow district protocol as outlined in the CPI Training Manual;
- You directed an educational assistant not to tell anyone about the physical restraint;
- The restraint was not necessary nor was it permitted under Policy 430.

This event, and a similar event from May 2015 when you also used physical force to move a child, leads me to believe that you pose an unreasonable risk to students in our school district…

See District Exhibit 11.

11. On January 13, 2017, the Association submitted the following grievance to Principal Susan Lauze:

> Superintendent Terri Forsten advised Ms. Fosdick in a letter dated December 5, 2016 that she would recommend that the school board dismiss her from her teaching position in the Concord School District. The evidence listed in superintendent's letter is in dispute. This action is in violation of collective bargaining agreement section VI.F (Other Benefits) and does not meet the standard for "Just Cause."
>
> Action requested:
>
> 1) The CEA requests that the District reinstate Ms. Fosdick to her teaching position in the Concord School District.
>
> 2) Ms. Fosdick should be made whole for any losses sustained because of the District's actions.

See Association Exhibit 1-a & b and District Exhibit 7.

12. On January 31, 2017 and February 16, 2017, the School Board conducted non-public hearings (pursuant to RSA 91-A:3, II(a)) concerning Ms. Fosdick's matter. See Statement of Uncontested Facts at 2.

13. On February 23, 2017, the School Board issued its decision terminating Ms. Fosdick's employment based upon its conclusion that she failed to conform to District's regulations. See Statement of Uncontested Facts at 3.

14. On March 2, 2017, Association Representative Robert Whitehead sent the following email message to Superintendent Forsten and Attorney Kaplan, the District's counsel:

> On behalf of the Concord Education Association NEA-NH Grievance Committee, I am submitting this demand for arbitration, as a result of the School Board's decision to uphold the dismissal of Lori Fosdick. Attached is the Lori Fosdick grievance. This is in accordance with Article IV Section 4 of the Collective Bargaining Agreement. I would appreciate you forwarding this communication to the Concord School Board or reply to me with the appropriate address for me to send this appeal. According to the grievance level 4 provision, the parties can agree upon a mutually acceptable arbitrator before submitting the request to AAA.
>
> I would be willing to offer the services of Gary Altman and Michael Ryan for this purpose.
>
> Please let me know if either are acceptable or, if the District has a potential list of suggestions that we may agree upon.

See Association Exhibit 1-b.

15. On March 28, 2017, the District filed the current unfair labor practice complaint alleging, among other things, that the Association breached the parties' CBA in violation of RSA 273-A:5, II (f) when it filed a grievance disputing the content of the Superintendent's letter.

16. On April 4, 2017, the CEA filed an Amended Grievance stating as follows:

> Superintendent Terri Forsten advised Ms. Fosdick in a letter dated December 5, 2016, that she would recommend that the school board dismiss her from her teaching position in the Concord School District. The evidence listed in superintendent's letter is in dispute. This action is in violation of collective bargaining agreement section VI.F (Other Benefits) and does not meet the standard for "Just Cause."
>
> **This grievance amends the grievance dated January 13, 2017, by adding the following paragraph, in accordance with the email forwarding the original grievance to Supt. Forsten dated March 2, 2017**:
>
> On February 23, 2017 Ms. Fosdick was dismissed from her professional position by the Concord School District, upon recommendation of the superintendent, without just cause. This action is in violation of Collective Bargaining Agreement section VI.F (Other Benefits) and does not meet the standard for "Just Cause."
>
> Action requested:

1. The CEA requests that the District reinstate Ms. Fosdick to her teaching position in the Concord School District.

2. Ms. Fosdick should be made whole for any damages sustained because of the District's action.

See Statement of Uncontested Facts at 5 (emphasis in original).

Decision Summary:

The District's claim is not barred by the res judicata doctrine because this claim did not arise out of the same transaction or occurrence as the claim in *Concord School District v. Concord Education Association*, PELRB Decision No. 89-70. However, we find that RSA 189:13 does not by itself prohibit a CBA from including a "just cause" standard for discipline or termination, and we conclude, based on the parties' CBA and case law, that the Association did not commit an unfair labor practice when it filed a grievance on behalf of Ms. Fosdick and requested arbitration of that grievance. The District's complaint is dismissed and its requests for relief, including its renewed request to stay arbitration, are denied.

Jurisdiction:

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

Discussion:

The District claims, among other things, that the Association breached the parties' CBA in violation of RSA 273-A:5, II (f)[2] when it filed a grievance disputing the content of the Superintendent's letter which notified a bargaining unit employee that the Superintendent was recommending that the School Board terminate her employment with the District. The District argues that the Association's grievance is outside the scope of the CBA and that "no language in

[2] RSA 273-A:5, II (f) provides that "[i]t shall be a prohibited practice for the exclusive representative of any public employee … [t]o breach a collective bargaining agreement."

the [CBA] ... can be reasonably interpreted to allow the Union to challenge a letter prepared by the Superintendent pursuant to RSA 189:13." The Association argues, among other things, that the District's claims are barred by the doctrine of res judicata or claim preclusion because the parties have already litigated the matter in *Concord School District v. Concord Education Association*, PELRB Decision Nos. 89-70 and 90-29 (1989 *Concord School District* case).

In the 1989 *Concord School District* case, the District filed an unfair labor practice complaint against the Association "charging the Association with filing a grievance on behalf of a teacher who allegedly used improper physical force in disciplining a student." See PELRB Decision No. 89-70 (October 19, 1989). The teacher was first suspended and then discharged under RSA 189:13. See *id.* The District, in its complaint, argued that the action taken against the teacher was not grievable under the CBA. *Id.* The CBA contained a grievance procedure culminating in final and binding arbitration and a provision entitled Discharge, Discipline or Reprisal stating as follows: "No certified employee will be discharged or reprimanded except for just cause, as long as these provisions does [sic] not violated state tenure law." *Id.*

In the 1989 *Concord School District* case, the PELRB found as follows:

> The CBA contains section IV entitled Grievance Procedure [which provides] as follows:
>
> A "grievance is a claim based upon the interpretation, meaning or application of any of the provisions of this Agreement. Only claims based upon the interpretation, meaning or application of any of the provisions of this agreement shall constitute grievances under this Article.
>
> ... Clearly the CBA in existence deals with Discharge, Discipline or Reprisal...
>
> The question of disciplinary action taken within the terms of the CBA, whether justified or not should be first explored thru [sic] the grievance procedure.

Id. The PELRB found no unfair labor practice and ordered the parties to process this case in accordance with the CBA grievance procedure. See *id.*

To determine whether the doctrine of claim preclusion or res judicata applies here, we employ the following well-established test:

> The doctrine prevents parties from relitigating matters actually litigated and matters that could have been litigated in the first action, if three elements are met: (1) the parties are the same or in privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment on the merits.

412 South Broadway Realty, LLC v. Wolters, 169 N.H. 304, 313 (2016) (citation and quotation marks omitted). The term "cause of action" is defined as "the right to recover, regardless of the theory of recovery... Generally, in determining whether two actions are the same cause of action for the purpose of applying res judicata, we consider whether the alleged causes of action arise out of the same transaction or occurrence." *Id.* (Citation and quotation marks omitted).

As almost thirty years separate the 1989 *Concord School District* case and the current case, we find that the two cases did not arise out of the same transaction or occurrence. Therefore, the cause of action in this case is not the same as the cause of action in the 1989 *Concord School District* case and the doctrine of res judicata does not apply here.

Notwithstanding the foregoing, we find, for the reasons set forth below, that the Association did not commit an unfair labor practice when it filed a grievance on behalf of Ms. Fosdick and demanded arbitration of this grievance.

"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 CBA 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*, supra, 153 N.H. at 293 (citations omitted).

It is well settled that the grievance is arbitrable "unless we can say with positive assurance that the CBA's arbitration clause is not susceptible of a reading that will cover the dispute." *Appeal of City of Concord*, 168 N.H. 533, 536 (2016). 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 that it has not agreed 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.

Id. "Under the positive assurance standard, we may conclude that the arbitration clause does not include a particular grievance only if we determine with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute." *Id.* "To determine whether the subject grievance is arbitrable, we first examine the relevant language of the CBA as that language 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." *Id.* (Citation and quotation marks omitted).

The Supreme Court has addressed the issue of arbitrability, similar to the issue in this case, in several decisions. Specifically, in *Appeal of Lincoln-Woodstock Coop. Sch. Dist.*, the Supreme Court addressed the issue of whether a superintendent's letter recommending a teacher for renomination "with reservations" was arbitrable. See 143 N.H. 598, 601 (1999). In that case, the parties' CBA contained a provision which stated that "[a]ll reprimands, suspensions,

discharges, or disciplinary action shall be for just cause..." *Id.* The superintendent, in a renomination letter, warned a teacher that if he did not improve to an "acceptable standard," he would not be renominated beyond next year. *Id.* at 599. The union filed a grievance on the ground that the recommendation for renomination "with reservation" was without just cause. *Id.* The district refused to recognize the union's grievance as "grieavable" and, after the union had informed the district of its intent to seek arbitration of the grievance, filed an unfair labor practice complaint. *Id.* at 599-600. On appeal from the PELRB decision finding that the grievance was subject to the contractual arbitration procedure, see PELRB Decision No. 1996-01 (January 15, 1996), the Court found, in part, that "through the nomination process, the superintendent ... ha[d] authority effectively to terminate" a teacher and, therefore, the Court could not say with positive assurance that this threat of consequences did not constitute a disciplinary action under the CBA. *Id.* at 602-603. The Court held that, to the extent the teacher had alleged that the warning contained within his renomination letter was without just cause, he was entitled to have the issue proceed to arbitration. *Id.*

Similarly, in *Appeal of City of Nashua, School District #42*, 132 N.H. 699, 705 (1990), the Supreme Court held that the failure of a school district to rehire a teacher for excessive sick days when the sick days were not in excess of rights granted under the parties' CBA was subject to the contractual arbitration provision. The Court agreed with the PELRB that the school board, "in supporting its decision not to renominate ... on the fact that an employee used twenty-six sick days in two and one-half years ... alleged an abuse of Article VI of the CBA, governing sick leave" and that "[s]uch an alleged abuse of a term or condition of employment requires resolution by the grievance process." *Id.* The district in *Appeal of City of Nashua* argued that it had a statutory authority not to retain non-tenured teachers and that such authority was not limited by the requirement of the just cause language of the CBA, while the union maintained

that the just cause provision limited the district's authority not to renominate a teacher. *Id.* The Court held that this issue was for the arbitrator to decide, stating that the district's arguments "would require us to go beyond determining whether the parties agreed to arbitrate this dispute and would require us to interpret the substantive provisions of the contract... Such a practice would undermine the effectiveness of the arbitration clause." *Id.* at 705-706.

In addition, in the 1989 *Concord School District* case, the PELRB found that "the question of disciplinary action taken within the terms of the CBA, whether justified or not should be first explored thru [sic] the grievance procedure" and ordered the parties to process this case in accordance with the CBA grievance procedure. See PELRB Decision No. 89-70 (see description of this case on page 8 of this decision). Although res judicata does not bar the District's complaint (see above), the 1989 *Concord School District* case is still a prior decision of this Board on a similar issue and it, therefore, guides our analysis in this case.

In contrast, in *Appeal of Westmoreland Sch. Bd.*, 132 N.H. 102, 109 (1989), the Supreme Court held that the failure of the school board to renominate or re-elect a non-tenured teacher in her second year was not grievable pursuant to the CBA. The rationale behind that decision was that the school board, "in failing to renominate or re-elect pursuant to RSA 189:14-a, did not implicate a contractual dispute or an alleged violation, misinterpretation, or misapplication of the collective bargaining agreement." See *Appeal of City of Nashua, School District #42*, 132 N.H. 699, 704-705 (1990) (summarizing *Appeal of Westmoreland School Board* decision).

We find that the present case is akin to *Appeal of Lincoln-Woodstock Coop. Sch. Dist.*, *Appeal of City of Nashua, School District #42*, and the 1989 *Concord School District* case rather than to *Appeal of Westmoreland Sch. Bd.* The CBA in the present case contains a "just cause" and arbitration provisions similar to those at issue in the *Lincoln-Woodstock, Nashua, and Concord* cases, and, contrary to *Appeal of Westmoreland Sch. Bd.*, the termination in this case

implicates a contractual dispute. In this case, the parties' CBA contains a grievance procedure culminating in final and binding arbitration. Therefore, under the "positive assurance" standard, the 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." See *Appeal of City of Concord,* 168 N.H. at 536. The parties' CBA defines a grievance as "a claim based upon the interpretation, meaning, or application of any of the provisions of the Agreement." Here, the subject grievance involves the interpretation and application of CBA Article VI.F (Other Benefits). This Article, titled Discharge, Discipline or Reprisal, provides that "[n]o certified employee will be discharged or reprimanded except for just cause, as long as this provision does not violate state tenure law"[3] and has been in the parties' CBAs for over 30 years without any change in language. Nothing in the parties' CBA provides that disputes over the application of Article VI.F are exempt from the grievance procedure or arbitration. In contrast, Article IV expressly excludes "[a]ny claims based upon the non-renewal of a non-tenured teacher as defined by RSA 189:14-a and RSA 189:14-c" from the arbitration provisions of the grievance procedure. The CBA contains no such express language excluding teacher dismissals from arbitration.

We otherwise find a lack of any "forceful evidence" of a purpose to exclude the Fosdick grievance from arbitration. The District argues that, with respect to teacher dismissals, CBA Article VI.F (just case) is unenforceable because, among other things, RSA 189:13 gives school boards the right to dismiss teachers. The District asserts that, under RSA 189:13, the school board has a responsibility to control teacher dismissals which cannot be delegated to an arbitrator. In other words, the District argues that a dismissal of a teacher is a prohibited subject of bargaining despite the inclusion of the Article VI.F language in the parties' successive

[3]This provision does not violate the state tenure law in this case as Ms. Fosdik is a tenured teacher.

contracts for the past 30 years. The determination of whether a particular matter is a prohibited subject of bargaining is governed by the three-part test adopted by the Supreme Court 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 public employer is prohibited from bargaining a proposal that does not meet the first step. A public employer has authority to bargain a proposed contract provision that passes the first step ... but the employer is not obligated to bargain unless the proposal satisfies all three steps.

138 N.H. 716, 722-23 (1994) (citations omitted). Moreover, a party asserting that a particular subject matter is a prohibited subject of bargaining under the three-part test must identify an "*independent* statute, or any constitutional provision or valid regulation, that reserves to the [employer] exclusive authority" over the subject matter. See *Appeal of City of Nashua Bd. of Educ.*, 141 N.H. 768, 774 (1997) (emphasis in original). The RSA 273-A:1, XI "managerial policy exception" cannot be used as the statute that reserves such exclusive authority to the employer. See *Appeal of Town of North Hampton*, 166 N.H. 225, 230 (2014) (rejecting employer's "bootstrapping attempt" to find such reservation of authority in RSA 273-A:1, XI itself). See also *Appeal of Hillsboro-Deering Sch. Dist.*, 144 N.H. 27, 33 (1999) (rejecting school district's "bootstrapping attempt to use the statutory managerial policy exception as the statute that determines the scope and applicability of the managerial policy exception.").

Under *Appeal of State*, the mere existence of a statutory provision or a rule, addressing a subject like employee discipline and dismissal, does not establish that such subjects are prohibited subjects of bargaining which cannot be included in a CBA. See 138 N.H. at 722. For

example, even though RSA 194-C:5, III gives school boards the right to "fix the salaries of all school administrative unit personnel," it does not negate a union's right under RSA 273-A to negotiate over personnel's salaries, which are indisputably a mandatory subject of bargaining. See RSA 273-A:1, XI. See also *Appeal of Berlin Educ. Ass'n, NHEA/NEA*, 125 N.H. 779, 783-84 (1984). Similarly, despite a school board's obligation to adopt a teacher performance evaluation system under RSA-189:1-a and N.H. Admin. Rules, Ed 303.01(a), performance evaluation procedures are not a prohibited subject of bargaining. See *Appeal of White Mountain Regional Sch. Dist.*, 154 N.H. 136, 141 (2006). See also *Appeal of Pittsfield Sch. Dist.*, 144 N.H. 536, 539 (2000). In *Appeal of State*, the Court held that, under the three-part test, discipline, including dismissal, was a permissive and not a prohibited subject of bargaining despite the existence of personnel rules giving the employer the right to discipline employees. See 138 N.H. at 722-23.

Here, we find that the District has failed to identify an "*independent* statute, or any constitutional provision or valid regulation, that reserves to the [District] exclusive authority" over teacher dismissals. The District cites RSA 189-13 and RSA 189-14 to support its argument. RSA 189:13, titled Dismissal of Teacher, provides as follows:

> The school board may dismiss any teacher found by them to be immoral, or who has not satisfactorily maintained the competency standards established by the school district, or one who does not conform to regulations prescribed; provided, that no teacher shall be so dismissed before the expiration of the period for which said teacher was engaged without having previously been notified of the cause of such dismissal, nor without having previously been granted a full and fair hearing.

RSA 189:14 provides that the "district shall be liable in the action of assumpsit to any teacher dismissed in violation of the provisions of RSA 189:13, to the extent of the full salary for the period for which such teacher was engaged."

Nothing in RSA 189:13 or RSA 189:14 expressly precludes a school district from entering into a CBA which includes a "just cause" standard for dismissal or which makes dismissal decisions subject to review via a contractual grievance procedure, inclusive of final and binding arbitration. We reject the District's argument that teacher dismissals in general, or the inclusion of "just cause" language in the CBA in particular, is a prohibited subject of bargaining. Like the personnel rules in *Appeal of State*, RSA 189:13 gives the school board the right to dismiss a teacher but does not grant to the school board the "exclusive" authority to do so or provide that such matters are within the "sole prerogative"[4] of the school board. In contrast, the statute concerning an appeal of teacher non-renewals, RSA 189:14-b, expressly provides that a non-renewed teacher may "either petition the state board of education ... or request arbitration under the terms of a collective bargaining agreement ... but may not do both... The petition for review under this section shall constitute the *exclusive remedy* available to a teacher on the issue of the nonrenewal of such teacher." See RSA 189:14-b (I) (emphasis added).

Based on the foregoing, we find that the dismissal of a teacher in this case implicates the CBA "just cause" provision and is not a prohibited subject of bargaining; and we cannot say with "positive assurance" that the parties' CBA is not susceptible of an interpretation that covers the dispute. Therefore, the Association did not commit an unfair labor practice when it filed the Fosdick grievance and requested arbitration of this grievance. The District's motion to stay arbitration, renewed at the hearing, is denied as the Association is entitled to proceed to grievance arbitration for the reasons stated in this decision.

[4] See *Appeal of State*, 138 N.H. at 723 ("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.").

Accordingly, the District's complaint is dismissed and its requests for relief, including its request to stay arbitration, are denied.

So ordered.

Date: October 18, 2017

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

By unanimous vote of Chair Andrew Eills, Esq., and Board Members James M. O'Mara, Jr. and Richard J. Laughton, Jr.

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