Appeal of PELRB Decision No. 2016-146 dismissed

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2016-0582, Appeal of Manchester School District, the court on November 22, 2017, issued the following order:

Having considered the briefs and oral arguments of the parties, the court concludes that a formal written opinion is unnecessary in this case. Manchester School District (district) appeals a decision of the Public Employee Labor Relations Board (PELRB), finding that the district engaged in an unfair labor practice by refusing Manchester Education Association's (association) demand for arbitration under the parties' collective bargaining agreement. Because we conclude that the district's appeal is procedurally barred pursuant to RSA 541:4 (2007), we dismiss it.

The pertinent facts are as follows. On October 5, 2015, the association filed an unfair labor practice complaint with the PELRB, alleging that the district violated the parties' collective bargaining agreement by refusing to arbitrate a grievance. The grievance arose from the district superintendent's decision to pursue a teacher's removal initially through dismissal, see RSA 189:13 (2008), but later through contract non-renewal, see RSA 189:14-a (Supp. 2016). Following a hearing, a hearing officer concluded that the grievance was subject to arbitration under either the parties' 2009-2013 or 2015-2018 collective bargaining agreement and, consequently, ordered the district to "cease and desist in its refusal to proceed to arbitration."

In a subsequent pleading captioned "Motion for Rehearing," the district requested the PELRB to review the hearing officer's decision pursuant to New Hampshire Administrative Rule, Pub 205.01(b) and advanced several grounds for reversal. On September 28, 2016, the PELRB issued a two-page decision entitled "Order on Motion for Review of Hearing Officer Decision." In a footnote inserted at the outset of the order, the PELRB provided the following explanation regarding its treatment of the district's motion in light of the motion's substance and the applicable administrative rules:

> Although the District's motion is titled "Motion for Rehearing," in its motion, the District argues that it is "entitled to a review of the hearing officer's decision" under Pub 205.01. See District Motion for Rehearing, page 3. District's "motion for rehearing" is treated as a motion for review of hearing officer's decision because (1) motions for rehearing are governed by Pub 205.02, and not Pub 205.01; and (2) a motion for review of hearing officer's decision

> must precede a motion for rehearing but does not replace it where, like here, the decision on the merits of the case was issued by a hearing officer. See Pub. 205.01(d) and Pub. 205.02.

Due to the district's failure to support its motion with a complete transcript of the proceedings, the PELRB concluded that the hearing officer's findings of fact were not subject to review, see N.H. Admin. R., Pub 205.01(b), and, in turn, unanimously approved the decision and denied the district's motion. Without thereafter filing a motion for rehearing with the PELRB in accordance with RSA 541:4 and New Hampshire Administrative Rule, Pub 205.02, the district appealed to this court.

In its brief and by motion, the association argues that the district's failure to file a motion for rehearing with the PELRB is procedurally fatal to the instant appeal. We agree.

"RSA 541:4 precludes any appeal from an administrative agency to this court by a party who has not applied for a rehearing before the agency." Appeal of White Mts. Educ. Ass'n, 125 N.H. 771, 774 (1984). As we have observed, this statutory prerequisite is grounded in the sound policy that "administrative agencies should have a chance to correct their own alleged mistakes before time is spent appealing from them." Id. Per the PELRB's procedural rules, a party contesting a hearing officer's decision must, in the first instance, request review from the PELRB. See N.H. Admin. R., Pub 205.01. If unsatisfied with the PELRB's order on review, the moving party must then apply to the PELRB for a rehearing before appealing to this court. See id. 205.02.

Although in Appeal of SAU #16 Cooperative School Board, 143 N.H. 97 (1998), we declined to dismiss an appeal despite the appealing party's failure to file a motion for rehearing after the PELRB denied its motion for review, we advised future parties as follows:

> We take this opportunity to clarify that when a party's motion for [review] of a hearing officer's decision is denied by the PELRB, the moving party must still apply for rehearing to satisfy the requirements of RSA 541:4 because a [review] motion relates to errors of the hearing officer while a rehearing motion relates to errors by the PELRB. In the future when a record does not demonstrate that the appealing party has met the requirements of RSA 541:4 we will refuse the appeal or dismiss it on our own motion.

Id. at 101-02 (emphases added) (quotations and brackets omitted) (discussing former version of New Hampshire Administrative Rule, Pub. 205.01(a), which identified a "motion for review" as a "motion for reconsideration"). The PELRB

subsequently amended its rules to also make clear the steps an appealing party must take, and in what order, prior to appealing to this court. See, e.g., N.H. Admin. R., Pub 205.01(d) ("The request for review of the hearing officer's decision shall precede, but shall not replace, a motion for rehearing of the board's decision pursuant to Pub 205.02 and RSA 541[:4].").

The district argues that, because its "motion for rehearing" provided the PELRB with an "opportunity to review and correct all of its alleged mistakes," we should conclude that it complies with the spirit of RSA 541:4. (Emphasis added.) Belying the district's argument, however, is the substance of its motion, which, notwithstanding the caption, asserts the following:

> The District is entitled to a review of the hearing officer's decision where a hearing officer has misapplied applicable law and has made findings of material fact that are unsupported by the record. See [N.H. Admin. R.,] Pub 205.01(b).

The motion goes on to allege a number of errors made by the hearing officer. Consequently, the district's motion did not provide the PELRB with an opportunity to correct its alleged errors, but rather only those of the hearing officer. As a result, the motion fails to satisfy the requirements of RSA 541:4.

Nor, as argued by the district in the alternative, do we construe the PELRB's order to satisfy the requirements of RSA 541:4. As the hearing officer's alleged errors became those of the PELRB when it approved the former's decision, it was incumbent on the district at that time to provide the PELRB an opportunity to correct its own errors. See Appeal of SAU #16 Coop. Sch. Bd., 143 N.H. at 101-02. This included the opportunity to correct the rule violations the district now asserts the PELRB committed in approving the hearing officer's decision, such as allegedly failing to provide a "clear explanation" for its decision. See RSA 273-A:6, IX (2010) (requiring any order or decision issued by the PELRB to set forth the findings of fact and rulings of law on which it is based).

Finally, we disagree with the district that its error should be excused in this case due to the alleged confusing nature of the PELRB's order and its procedural rules. As to the order, we believe the PELRB clearly and concisely set forth its construction of the district's motion as one for review and, importantly, explained that such a motion must precede, but does not replace, a motion for rehearing. Cf. Appeal of SAU #16 Coop. Sch. Bd., 143 N.H. at 101 (declining to dismiss appeal where party "erroneously, but perhaps not unreasonably," assumed it had satisfied RSA 541:4 following PELRB's order summarily affirming hearing officer's decision without offering any additional reasoning). With regard to the PELRB's rules, we believe both this court and the PELRB have adequately clarified the procedure a party must follow to

satisfy the requirements of RSA 541:4. The district has neither demonstrated that it met those requirements, nor established good cause for its oversight.

Accordingly, because the record does not demonstrate that the district has met the requirements of RSA 541:4, we dismiss its appeal. Id. at 101-02.

Dismissed.

DALIANIS, C.J., and HICKS, LYNN, BASSETT, and HANTZ MARCONI, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
New Hampshire Public Employee Labor Relations Board, E-0140-3
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File

STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

Manchester Education Association/NEA

v.

Manchester School District

Case No. E-0140-3
Decision No. 2016-146

Appearances:

J. Joseph McKittrick, Esq.,
McKittrick Law Offices,
Hampton, New Hampshire for the Complainant

James A. O'Shaugnessy, Esq.,
Drummond, Woodsum & McMahon, P.A.
Manchester, New Hampshire for the Respondent

Background:

On October 5, 2015, the Manchester Education Association/NEA (Union) filed an unfair labor practice complaint against that the Manchester School District (District) pursuant to the Public Employee Labor Relations Act, RSA 273-A:1 *et. seq*. The Union maintains that the District has acted in bad faith and wrongfully refused to arbitrate the separation of a teacher (L'Italien) from the District's employment. According to the Union, the District took significant and adverse personnel action against L'Italien during the 2014-15 school year and terminated his employment but has improperly refused to proceed to grievance arbitration over its decision. The Union maintains that the District's characterization of L'Italien's situation as a "non-

renewal" under RSA 189:14-a is factually incorrect and legally invalid given the District's treatment of L'Italien during the 2014-15 school year, the timing of the District's attempt to non-renew L'Italien, and the fact that the District is trying to evade its' obligation to arbitrate L'Italien's dismissal.

The Union requests that the PELRB find that: 1) the District 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) because it has attempted to prohibit L'Italien and members of the Union from exercising their statutory rights; 2) the District violated RSA 273-A:5, I (d)(to discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under this chapter) by discharging L'Italien under the guise of a non-renewal because, in part, he challenged the District's dismissal; 3) the District violated RSA 273-A:5, I (g)(to fail to comply with this chapter or any rule adopted under this chapter) "by failing to adhere to having (and using) a workable grievance procedure;" and 4) the District violated RSA 273-A:5, I (h)(to breach a collective bargaining agreement) "by failing to arbitrate the issues between the parties."

The District denies the charges. The District maintains that: 1) it legitimately proceeded with an RSA 189:14-a non-renewal based upon the results of an additional investigation; 2) the non-renewal decision is not subject to grievance arbitration; 3) the PELRB does not have jurisdiction over any RSA 189:13 or RSA 189:14-a claims; 4) the sole remedy available to L'Italien is an appeal to the State Board of Education per RSA 189:14-b; 5) L'Italien failed to exhaust his available remedies because he did not appeal his non-renewal to the State Board of Education; 6) the complaint fails to state a claim upon which relief can be granted; and 7) the complaint is untimely under the six months limitation period set forth in RSA 273-A:6, VII.

This case was originally scheduled for hearing on November 19, 2015 but the hearing was rescheduled to December 9, 2015 at the District's request with the assent of the Union. At hearing the parties presented evidence and subsequently filed post-hearing briefs on January 29, 2016. The decision is as follows.

Findings of Fact

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

2. The Union is the exclusive representative of teachers in the District like L'Italien.

3. Article 27 of the parties' September 1, 2009 to June 30, 2013 collective bargaining agreement (2009-13 CBA), titled "Duration," provides as follows:

> The provisions of this Agreement shall be effective as of September 1, 2009, unless otherwise indicated within this Agreement, and will continue in full force and effect through June 30, 2013, and thereafter will automatically renew itself each year unless by December 1, 2012, or December 1 of any succeeding year, thereafter, either party gives written notice to the other of its desire to modify or terminate this Agreement for the 2012-2013 school year or thereafter.

4. Article 11 of the 2009-13 CBA, titled "Individual Teacher Contracts," includes the following:

> A. The Board and the individual teachers will enter into individual contracts as set forth in Appendix C 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 first three (3) years of continuous 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 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. For each year for which this contract is renewed, the annual salary of the teacher shall be in accordance with the provisions of the prevailing Master Agreement between the Board and the Association.
>
> B.3. After three (3) years of continuous employment by said Board, the 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 position 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 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 the termination of the Master Agreement.

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

5. Article 25 of the 2009-13 CBA, titled "Grievance Procedure," includes the following grievance definition:

A. 1. 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.

6. Under Article 25 C of the 2009-13 CBA, grievances can proceed from Level One (discussion with teacher's Principal or immediate superior...) through Level Four (binding arbitration, with both parties having a right to appeal to the superior court pursuant to RSA 542:1 *et seq.*). The grievant is required to request that the Chairperson of the Teacher Rights Committee submit the grievance to arbitration, and the Teacher Rights Committee must first

determine that "the grievance is meritorious and that submitting it to arbitration is in the best interests of the school system" before submitting the grievance to arbitration per the Level Four procedures.

7. In early September of 2015, the Board of Alderman approved a successor agreement effective from July 1, 2015 to June 30, 2018 (2015-18 CBA).

8. Article 11 of the 2015-18 CBA, titled "Individual Teacher Contracts," is the same as the earlier version with the exception of the changes indicated below:

A. The Board and the individual teachers will enter into individual contracts as set forth in Appendix ~~C~~ 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 ~~first three (3) years of continuous~~ 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 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. For each year for which this contract is renewed, the annual salary of the teacher shall be in accordance with the provisions of the prevailing Master Agreement between the Board and the Association.

B.3. In accordance with RSA 189:14-a, once an employee has attained "continuing contract" status in the District the employee's ~~After three (3) years of continuous employment by said Board, the~~ 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 position 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 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 the termination of the Master Agreement.

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

9. The provisions of Article 25 C of the 2015-18 CBA, titled "Grievance Procedure," are the same as the corresponding provision in the 2009-13 CBA.

10. In September of 2014, L'Italien was an elementary school music teacher beginning his 11th year in the District.

11. On September 19, 2014 District Superintendent Livingston placed him on paid administrative leave pending an investigation into a co-worker's allegations of inappropriate conduct and possible assault. The Superintendent also barred L'Italien from visiting school district property and from having contact with "anyone in the school district or anyone who is related to this matter other than an MEA Union representative." See Joint Exhibit 2.

12. A "Policy and Human Resources Consultant" from DrummondWoodsum, the District's law firm, conducted an investigation into the alleged misconduct and issued a detailed 13 page report dated October 17, 2014. See Joint Exhibit 3. The investigator concluded that

L'Italien's interactions with students "are wholly inappropriate and potentially damaging to these very young students" and also expressed her opinion that "the physical interventions that occurred during his music class were misguided, unnecessary and violate district policy and state law."

13. On October 22, 2014 the District Director of Human Resources (Pamela Hogan) emailed the investigator's report to Michelle Couture, L'Italien's NEA representative, and stated as follows:

> As requested, attached are the final reports we received relative to the incidents for JL (L'Italien) and MS (a co-worker involved in an unrelated incident or situation). Dr. Livingston (the Superintendent) has asked that we have a decision from them by noon tomorrow as to whether they wish to resign…"

See Union Exhibit 4 (parentheticals added)(emphasis in original).

14. The Superintendent then notified L'Italien by letter dated October 27, 2014 (Joint Exhibit 4) that "[w]e have completed a thorough investigation of this matter." She went on to state that:

> I was prepared to take steps to communicate my final decision. I have been approached by your representative from NEA-NH, Michelle Couture, who has requested we first provide you with time to speak with your Counsel at NEA-NH. I have agreed to do so and will hold off making my decision up through November 3, 2014.
>
> Please know however, that I did inform Ms. Couture that as of Friday, October 24th, your leave status has been changed to unpaid leave pending your decision.

15. On November 3, 2014 Ms. Couture notified the Superintendent that L'Italien was not going to resign and asked "what you intend to do with his case." See Union Exhibit 6.

16. The Superintendent did not make a decision on November 4, 2014 or in the days and weeks thereafter even though the November 3, 2014 deadline she cited in her October 27, 2014 letter date had passed and she knew that L'Italien was not going to resign.

17. In the meantime, the District did not change L'Italien's official status. He remained on "unpaid leave" and subject to the no-contact directive.

18. On November 21, 2014, a frustrated attorney for the Union contacted the District's attorney (DrummondWoodsum) to complain about the District's delay in taking further action on the L'Italien case, stating as follows:

> I really would like to have information to give to [MS] and James L'Italien before Thanksgiving. That seems only fair. Since they have both been on leave for almost two months, and the investigations into the allegations against them concluded some time ago, it is unreasonable to continue to not provide them with information about their future in the Manchester School District. As I have said before, but will say again, this uncertainty is very difficult. I hope the District can come to understand that these teachers need to know what is going on.

See Union Exhibit 8.

19. On November 24, 2014, the District's Director of Human Resources informed the Union's attorney that she would follow up with the Superintendent on the L'Italien situation. See Union Exhibit 9.

20. On November 25, 2014 the Union's attorney confirmed the status of the "L'Italien grievance" over his unpaid leave status and requested a school board hearing. See Union Exhibit 10.

21. By letter dated January 13, 2015 the Superintendent formally notified L'Italien that she was recommending his "immediate dismissal" to the school board per RSA 189:13, that he would remain on unpaid leave pending a school board hearing, and that L'Italien or his representative should contact the District to schedule a school board hearing. See Joint Exhibit 5.

22. On January 22, 2015 the Union responded to the Superintendent's formal termination notice, requested a Board of School Committee (school board) hearing on the Superintendent's termination recommendation, advised that the Union would be filing a grievance over the matter, and informed the Superintendent that the Union attorney who would be handling the hearing would be unavailable until the first week in February. See Union Exhibit 16.

23. On January 26, 2015 the Union filed a grievance, charging that the District violated the collective bargaining agreement, including Section C.1 of Article 15, "when it disciplined James L'Italien by recommending the termination of his employment." Section C.1 of Article 15 provides that "no teacher will be disciplined or reprimanded without just cause." The Union asked that the District return L'Italien to his position and make him whole for losses suffered. See Union Exhibit 16.

24. Sometime after January, 2015 a school board hearing on the L'Italien dismissal was scheduled for May 4, 2015, nearly four months after the Superintendent's termination notice, seven months after L'Italien's status was changed to unpaid leave, and eight months after he was placed on leave and banned from having contact with the school and staff.

25. In mid-April, 2015, the Superintendent decided to investigate additional incidents of alleged L'Italien misconduct which apparently were discussed during preparations for the May 4, 2015 hearing and which pre-dated the 2014-15 school year. These earlier incidents included allegations "regarding screaming/berating students and prohibiting young students from using the bathroom." See Union Exhibits 19 and 20 and Joint Exhibit 8. The Superintendent felt this additional investigation was necessary to "bring all the facts to light."

26. On April 24, 2015 the DrummondWoodsum Policy and Human Resources Consultant issued a supplemental report. It does not provide any date references for the incidents being investigated, but there was hearing testimony suggesting that the conduct under review dated to several years or more prior to the 2014-15 school year. Like the first consultant report this one was also critical of L'Italien's behavior. See Joint Exhibit 8.

27. The Superintendent confirmed at hearing that arbitration cases had resulted in awards in employment cases against the school board during the 2014-15 school. Additionally, the school board had reinstated a teacher that the Superintendent had recommended for termination.

In one arbitration case, the District received an arbitration ruling toward the end of April, 2015 in a case involving another employee in which the arbitrator found that unpaid leave violated the contract. As a result, on April 24, 2015 Ms. Couture noted that the Union would not bring the same unpaid leave issue to arbitration in L'Italien's case and requested that L'Italien's status be changed to paid leave and that he receive back pay. Union Exhibit 23. The District reinstated L'Italien's pay and also had provided full back pay by the end of June or beginning of July, 2015.

28. As of April 27, 2015 the District still intended to proceed with the L'Italien termination hearing and the District's attorney stated that the May 4, 2015 termination hearing "will again need to be rescheduled due to reasons relating to the availability of the employee's attorney and the scope of the allegations leading to the recommendation of dismissal."

29. However, the District abruptly changed how L'Italien's situation was going to be addressed when, in early May of 2015, the Superintendent simultaneously informed L'Italien that, pursuant to RSA 189:14-a, he had not been renominated to his position for the upcoming 2015-16 school year and that she was withdrawing her recommendation "for a dismissal hearing before the school board pursuant to RSA 189:13." See Joint Exhibit 10. She also stated his reinstatement would be addressed by the Director of Human Resources. However, L'Italien was not returned to his bargaining unit teaching position. Instead, per the Superintendent, he was assigned to a non-bargaining unit position in the Information Technology Department. Although the Superintendent denied that the primary reason she decided to treat L'Italien's situation as a non-renewal action was an effort to avoid arbitration, she admitted there was some discussion to this effect.

30. By letter dated May 11, 2015 attorney McKittrick, counsel for L'Italien, requested a hearing on the Superintendent's non-renewal notice and the reasons for this action. He also

requested "the reasons why you have elected, at this late date, to withdraw your Recommendation for Dismissal." See Joint Exhibit 11.

31. By letter dated July 10, 2015, the Superintendent provided L'Italien with a list of the reasons for the non-renewal action. The Superintendent's letter does not explain why the termination action was withdrawn. See Joint Exhibit 12.

32. The School Board held a hearing on August 24, 2015 and upheld the Superintendent's non-renewal action. See Joint Exhibit 13. The hearing concentrated on the September, 2014 incident, and the events chronicled in the second investigation report (concerning school years prior to 2014-15) received a relatively insignificant amount of attention. The school board treated the Superintendent's handling of the L'Italien personnel action as follows:

> Although she [the Superintendent] initially recommended that you be terminated, she eventually took this case off the termination track. This was a lengthy process with many conversations and attorneys involved, and at the point that those conversations ended, she was at the point where she could recommend your nonrenewal rather than your termination. However, in reviewing the initial report, it appeared there were some unanswered questions, and therefore a second investigation was undertaken by Ms. Abbott, and a second report was prepared. See Superintendent Exhibit E. The findings are found on page six and seven, and conclude that you were verbally inappropriate with the student and that your reaction to requests to use the restroom was so hostile that some students were afraid to ask to go. The Superintendent also relied on this report in making her non-renewal decision.

33. By letter dated September 11, 2015 L'Italien's attorney notified the Superintendent that he was "submitting the dismissal of Mr. L'Italien to arbitration in accord with the provisions of Article 25, C.4. The grievance asserts that Mr. L'Italien was dismissed without Just Cause and in violation of the CBA as a whole and in particular Articles 11, 15 and 25." See Joint Exhibit 14. Article 15 of the 2015-18 CBA C.1 states "[n]o teacher will be disciplined or reprimanded without just cause" which, based upon the mark-ups to the 2015-18 CBA (Union Exhibit 1), is the same as the language in the 2009-13 CBA.

34. On September 21, 2015 the District's attorney responded to Mr. L'Italien's attorney, arguing that there was no grievance subject to arbitration because the Superintendent withdrew her dismissal recommendation and instead Mr. L'Italien was non-renewed from his position pursuant to the Superintendent's May 7, 2015 letter (Joint Exhibit 10). See Joint Exhibit 15.

Decision and Order

Decision Summary:

The District's refusal to proceed with grievance arbitration constitutes an unfair labor practice since I cannot find, with positive assurance, that the parties' collective bargaining agreement is not susceptible of an interpretation that covers the disputed L'Italien personnel action. The District is ordered to proceed to grievance arbitration as demanded by the Union.

Jurisdiction:

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

Discussion:

As a preliminary matter, it should be noted that in its answer, the District cited the statute of limitations set forth in RSA 273-A:6, VII, which provides that complaints must be filed within six months of the alleged violation. The complaint in this case was filed on October 5, 2015, and the District declared that it would not proceed to arbitration on September 21, 2015. However, the District never filed a motion to dismiss based upon the limitations period and did not argue that the limitations period barred the complaint in its post-hearing brief. A mere reference to RSA 273-A:6, VII in the answer to the complaint without more is insufficient to give the opposing party notice that the District is requesting a ruling and raise the issue for decision.

The Union argues that the L'Italien personnel action is subject to arbitration regardless of whether it is characterized as a non-renewal (school board decision not to provide an existing teacher with a contract for the upcoming school year) or a termination (school board discharge of a teacher during the term of a contract while the school year is underway). The District does not dispute that a termination during the school year is subject to arbitration. However, the District maintains that this case involves a non-renewal personnel action, and the refusal of the District to extend a contract to a teacher like L'Italien for the next school year (in this case the 2015-16 school year) is not arbitrable under the 2009-13 CBA, during any status quo period, or under the 2015-18 CBA (which the District maintains does not apply to L'Italien).

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

> (1) arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit ...; (2) unless the parties clearly state otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator; (3) a court should not rule on the merits of the parties[']underlying claims when deciding whether they agreed to arbitrate; and (4) under the "positive assurance" standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists, and in the absence of any express provision excluding a particular

> grievance from arbitration,... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail ...

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

> A presumption of arbitrability exists if the CBA contains an arbitration clause, but the court may conclude that the arbitration clause does not include a particular grievance if it determines with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute. Furthermore, the principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties.

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

Finally, "a procedural challenge to arbitrability is a matter to be determined by the arbitrator in the first instance" and therefore the PELRB should not make "a threshold determination as to the procedural arbitrability" of grievances. *Appeal of Hillsborough County Nursing Home,* 166 N.H. 731, 736 (2014).

The first issue is the parties' disagreement over whether the L'Italien personnel action should be classified as a termination or a non-renewal. The District maintains the question of termination versus non-renewal is relatively simple, one which the Superintendent resolved with the stroke of her pen on May 7, 2015. The difficulty with the District's position is that it fails to give appropriate weight to important facts which lead to the conclusion that L'Italien's separation from District employment was, in fact, a termination which the District attempted to reclassify as a non-renewal.

By November of 2014 the District had removed L'Italien from the classroom and his teaching duties, banned him from the premises, issued the "no contact" directive, and terminated his pay. As it turned out, after this the District had no practical incentive to formally complete the termination process, and it failed to do so. When the Union protested and requested action, the District was slow to respond in a meaningful way. Even when the Superintendent finally issued a written termination recommendation in January, four months after the underlying

incident and nearly three months after L'Italien's loss of pay and teaching responsibilities, there was more unexplained delay, despite the Union's notice that it was available for hearing in early February. Instead, due to inexcusable neglect or deliberate inaction, and with continued disregard for the interests of the affected employee, more delay ensued until the District reached the time of year when non-renewals are issued. At that point, with most of these conditions in place for virtually the entire school year, it is hard not to find that a *de facto* termination had already occurred. In substance, at the end of October, 2014 the District placed L'Italien's case on an employment "suspense docket," and he remained in this "employment black hole" for the rest of the school year. This was a perversion of the process to which L'Italien was entitled under both the 2009-13 CBA and the 2015-18 CBA as well as RSA 189:13. He was not an active teacher employed in the District when the Superintendent attempted to rescind the termination action and reclassify him as a non-renewal on May 7. In fact, after May 7 he was never returned to his bargaining unit position as a teacher, but instead was assigned to a non-bargaining unit position in the Information Technology Department. Further, the fact that the District placed L'Italien in this situation without a school board hearing or a Superintendent termination recommendation is a failure which should not provide the District with the option to reclassify his situation to one of non-renewal as the District attempted to do on May 7.

The sequence of events which the District claims explains and justifies the Superintendent's reclassification of the situation to one of non-renewal, including the proximity of the second investigation to the scheduled termination hearing, is perplexing. The District's proffered explanation is that it had overlooked some incidents from past years when preparing for the termination hearing. However, the District had already completed a very comprehensive investigation in October that resulted in a 13 page report. Presumably the same individuals who were contacted and interviewed during the course of the October investigation were contacted to

prepare for the scheduled termination. Why these contacts led to an expanded investigation in April of 2015, but not in October of 2014, was not adequately explained or addressed by the District. Further, it would seem that the results of the second investigation should, if anything, strengthen, not weaken, the District's case for termination.

L'Italien's experience is also inconsistent with the profile of a teacher who is non-renewed. In contrast to L'Italien, non-renewed teachers, by definition, remain active under their contract for the duration of the current school year. They report to work, perform their teaching duties, and are paid for their effort. It is axiomatic that the non-renewal process, whether grounded in RSA 189:14-a or the collective bargaining agreement, does not include, as a prologue, an extended and mandatory hiatus from the employee's bargaining unit position, without pay, together with a "no-contact" directive. Further, every collective bargaining agreement includes an implied covenant of good faith and fair dealing. *Appeal of Sanborn Regional School Board,* 133 N.H. 513, 518 (1990). Overall, the manner in which the District handled L'Italien's case is contrary to this implied covenant, and this also weighs against recognizing the District's attempt to shift to a non-renewal action on May 7 as a legitimate exercise of managerial prerogative. Additionally, the District's failures were not cured by "reinstatement" given the late date of that event, particularly when L'Italien was not actually returned to his, or any other, bargaining unit position. For these and the other reasons discussed, the school board's hearing and decision in August of 2015 must be treated as a termination for purposes of this unfair labor practice charge and the Union's demand for arbitration.

Finally, even if L'Italien's case should, for purposes of the Union's unfair labor practice complaint, be classified as a non-renewal per the Superintendent's May 7, 2015 letter (Joint Exhibit 10), the disputed L'Italien personnel action is still covered by the collective bargaining agreement and subject to grievance arbitration. The law specifically allows for "arbitration or

any other binding resolution" of school board non-renewal decisions in accordance with RSA 189:14-a, 14-b, and RSA 273-A:4. RSA 189:14-a sets forth the procedure for school board non-renewal action. The statute defers to local school boards to determine the grounds. Pursuant to RSA 189:14-b, a teacher facing non-renewal and who, like L'Italien, has the requisite years of experience, is entitled to: 1) seek a review of the school board's action at the state board of education; or 2) request arbitration under a collective bargaining agreement under RSA 273-A:4. The relevant portions of RSA 273-A:4 state that:

> No grievance resulting from the failure of a teacher to be renewed pursuant to RSA 189:14-a shall be subject to arbitration or any other binding resolution, except as provided by RSA 189:14-a and RSA 189:14-b. Any such provision in force as of the effective date of this section shall be null and void upon the expiration date of that collective bargaining agreement. However, after the expiration date of that collective bargaining agreement, nothing in this section shall be deemed to prohibit the school district public employer and the exclusive bargaining representative from entering into a subsequent agreement that may include arbitration or any other binding resolution for teacher nonrenewals pursuant to RSA 189:14-a and RSA 189:14-b. If such grievance procedures become incorporated into a subsequent collective bargaining agreement, those procedures shall become null and void at the expiration of that agreement. "Grievance resulting from failure of a teacher to be renewed" means a grievance that challenges nonrenewal, or that seeks reversal or reinstatement from nonrenewal as a remedy.

The cornerstone of arbitrability analysis in general, and the specific question of arbitrability of teacher non-renewals, is the parties' agreement. Relevant contract provisions in this case are the 2009-13 Article 27 duration clause and Article 11 of both the 2009-13 and 2015-18 CBA. Pursuant to the Article 27 duration clause, the 2009-13 CBA was still in effect for the 2014-15 school year. With respect to Article 11, the 2009-13 CBA and the 2015-18 CBA address the "year to year" contract status of teachers before they achieve "tenured" or "continuing contract" status in sub-section B.2, and after they achieve tenured or continuing contract status in sub-section B.3. Article 11, B.3 of the 2009-13 CBA provides that the contracts of teachers who have achieved tenured or continuing contract status "shall continue in force from year to year subject to the following conditions..." The list of conditions pursuant to

which such teachers' contract will not "continue in force from year to year" is set forth in sub-sections B.3.a, b, and c (both CBAs). The list includes termination by mutual consent (B.3.a), by teacher notice given no later than June 30 that the teacher does not intend to return for the ensuing year (B.3.b), or school board contract termination "at any time for one or more of the following reasons" such as inefficiency, incompetence, insubordination, moral misconduct, disability, position elimination, or other due and sufficient cause (B.3.c). The version of Article 11 in the 2015-18 CBA is to the same effect. Sub-section B.3 states that "[i]n 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:...*" (emphasis added). The listed conditions are the same as in the 2009-13 CBA.

Regardless of whether the disputed personnel action is called a non-renewal or a termination, I cannot find with positive assurance that the dispute is not covered by, and subject to, the provisions of Article 11 (of both CBAs). Under both agreements, a grievance is a claim based upon the interpretation, meaning or application of any provision of the agreement, and the grievance procedure includes binding arbitration. Article 11 B.3 has language which gives a teacher with L'Italien's years of experience a guarantee of year to year employment unless action has been taken under sub-part a, b or c. The way Article 11 is structured, and in particular the division between sub-sections B.2 and B.3 and the substantive language in B.3, is sufficient to encompass and cover non-renewal activity. The Union claims that the adverse personnel action (end of L'Italien's employment in the District) violated Article 11. It is either covered by the 2009-13 CBA by virtue of the Article 27 duration provision or by the 2015-18 CBA, given that the school board did not conduct its hearing and issue a decision until after the July 1, 2015 effective date of the 2015-18 CBA.

Accordingly, the District has committed an unfair labor practice in violation of RSA 273-A:5, I (h)(to breach a collective bargaining agreement) because it has wrongfully refused to proceed to arbitration as demanded by the Union. The District is ordered to cease and desist in its refusal to proceed to arbitration. These findings address the gravamen of the Union's complaint, and therefore any remaining Union claims are dismissed.

So ordered.

Date: June 27, 2016

Douglas L. Ingersoll, Esq.
Executive Director/Presiding Officer

Distribution: J. Joseph McKittrick, Esq.
James O'Shaughnessy, Esq.

Appeal to NH Supreme Court dismissed on 11-27-2017
(NH Supreme Court Case No. 2016-0582)

State of New Hampshire
Public Employee Labor Relations Board

Manchester Education Association/NEA

v.

Manchester School District

Case No. E-0140-3
Decision No. 2016-206

Order on Motion for Review of Hearing Officer Decision

The District filed a motion for review of hearing officer decision No. 2016-146 pursuant to Pub 205.01.[1] Pub 205.01 provides as follows:

> (a) Any party to a hearing or intervenor with an interest affected by the hearing officer's decision may file with the board a request for review of the decision of the hearing officer within 30 days of the issuance of that decision and review shall be granted. The request shall set out a clear and concise statement of the grounds for review and shall include citation to the specific statutory provision, rule, or other authority allegedly misapplied by the hearing officer or specific findings of fact allegedly unsupported by the record.
>
> (b) The board shall review whether the hearing officer has misapplied the applicable law or rule or made findings of material fact that are unsupported by the record and the board's review shall result in approval, denial, or modification of the decision of the hearing officer. The board's review shall be made administratively based upon the hearing officer's findings of fact and decision and the filings in the case and without a hearing or a hearing de novo unless the board finds that the party requesting review has demonstrated a substantial likelihood that the hearing officer decision is based upon erroneous findings of material fact or error of law or rule and a hearing is necessary in order for the board to determine whether it shall approve, deny, or modify the hearing officer decision or a de novo hearing is necessary because the board concludes that it cannot adequately address the request for review with an order

[1] Although the District's motion is titled "Motion for Rehearing," in its motion, the District argues that it is "entitled to a review of the hearing officer's decision" under Pub 205.01. See District Motion for Rehearing, page 3. District's "motion for rehearing" is treated as a motion for review of hearing officer's decision because (1) motions for rehearing are governed by Pub 205.02, and not Pub 205.01; and (2) a motion for review of hearing officer's decision must precede a motion for rehearing but does not replace it where, like here, the decision on the merits of the case was issued by a hearing officer. See Pub 205.01 (d) and Pub 205.02.

of approval, denial, or modification of the hearing officer decision. All findings of fact contained in hearing officer decisions shall be presumptively reasonable and lawful, and the board shall not consider requests for review based upon objections to hearing officer findings of fact unless such requests for review are supported by a complete transcript of the proceedings conducted by the hearing officer prepared by a duly certified stenographic reporter.

(c) Absent a request for review, the decision of the hearing officer shall become final in 30 days.

(d) The request for review of the hearing officer's decision shall precede, but shall not replace, a motion for rehearing of the board's decision pursuant to Pub 205.02 and RSA 541-A:5.

Because the District's motion is not supported by a duly prepared transcript of the proceedings, the hearing officer's findings of fact are not subject to review under Pub 205.01 (b).

We have reviewed the hearing officer's decision in accordance with the provisions of Pub 205.01 and unanimously approve this decision and deny the District's request to overturn it.

So ordered.

Date: 9/28/16

Peter Callaghan, Esq., Chair

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

Distribution: J. Joseph McKittrick, Esq.
James A. O'Shaughnessy, Esq.