This decision was affirmed on appeal per May 26, 2011 Supreme Court order in *Appeal of Matthew Kennedy & a.*, NH Supreme Court Case No. 2011-438.

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

MATTHEW KENNEDY and the HINSDALE FEDERATION OF TEACHERS

COMPLAINANTS

CASE NO. E-0029-4

v.

DECISION NO. 2010-045

HINSDALE SCHOOL DISTRICT

RESPONDENT

APPEARANCES

Representing: Matthew Kennedy and the Hinsdale Federation of Teachers
James F. Allmendinger, Esq., Staff Attorney, NEA-New Hampshire
Concord, New Hampshire

Representing: Hinsdale School District
Paul L. Apple, Esq. and Mark A. Paige, Esq., Drummond Woodsum
Portsmouth, New Hampshire

BACKGROUND

Matthew Kennedy and the Hinsdale Federation of Teachers (Union) filed an unfair labor practice complaint against the Hinsdale School District (District) on September 15, 2009. The Complainants claim that the District violated RSA 273-A:5, I (a), (c), (e), and (h) by non-renewing Mr. Kennedy as a music/band program teacher in retaliation for his union activity, by violating a District's reduction-in-force policy in connection with Mr. Kennedy's non-renewal, and by outsourcing the Hinsdale High School music/band program. As relief, the Complainants

request the PELRB to reverse the non-renewal decision and to order the District to reinstate Mr. Kennedy with no loss of pay or benefits. The District filed its answer to the complaint on September 28, 2009 denying the charge.

On November 3, 2009 the Respondent filed its First Motion to Dismiss on the ground that the Board lacks jurisdiction to determine the issue of whether the District violated the reduction-in-force policy. On November 19, 2009 the Respondent filed its Second Motion to Dismiss contending that the Complainants' claims for relief related to Mr. Kennedy's non-renewal as retaliation should be dismissed because the Complainants had already litigated the issue of non-renewal and it had been decided by the State Board of Education. The Complainants filed objections to the First and Second Motions to Dismiss on November 24, 2009 and November 30, 2009 respectively.

On December 1, 2009 the Public Employee Labor Relations Board (Board or PELRB) conducted an adjudicatory hearing at its offices in Concord. All parties were present and represented by counsel. Each party was given the opportunity to present evidence through exhibits and testimony and to cross-examine witnesses. The parties had stipulated to several facts prior to the hearing and these facts are incorporated in the Findings of Facts below. All of the parties' exhibits were admitted without objection. The parties first presented oral argument on the District's two motions to dismiss after which the Board recessed to consider these motions. The Board took the District's First Motion to Dismiss under advisement and denied the District's Second Motion to Dismiss, finding that the State Board of Education did not address or decide the issue of whether the District violated RSA 273-A:5, I when it terminated Mr. Kennedy's employment through non-renewal. The Board then proceeded to the merits of the complaint. At the conclusion of the evidence the parties requested, and were granted, leave to submit post-

hearing memoranda of law. The record was left open until December 14, 2009 to allow such submissions. The parties filed their memoranda on December 14, 2009 at which time the record was closed.

After considering all of the evidence and the credibility of the witnesses and affording each piece of evidence its appropriate weight, the PELRB finds as follows:

FINDINGS OF FACT

1. The Hinsdale School District is a public employer as that term is defined by RSA 273-A:1, X.

2. The Hinsdale Federation of Teachers is an employee organization certified under RSA 273-A:8.

3. Matthew Kennedy is a public employee and a member of the bargaining unit represented by the Hinsdale Federation of Teachers.

4. The Hinsdale School District and the Hinsdale Federation of Teachers are parties to a Collective Bargaining Agreement (CBA) effective from September 1, 2007 to August 31, 2010.

5. On March 26, 2009 the Superintendent notified Mr. Kennedy that he was not being re-nominated for rehire because of declining enrollment.

6. Mr. Kennedy appealed the non-renewal decision to the Hinsdale School Board pursuant to RSA 189:14-a, the so-called "non-renewal" statute.

7. After the hearing, conducted on May 13, 2009, the Hinsdale School Board voted to affirm Mr. Kennedy's non-renewal.

8. Mr. Kennedy appealed the School Board's decision to the New Hampshire State Board of Education, pursuant to RSA 189:14-b.

9. Following a hearing, the Hearing Officer, appointed by the State Board of Education, recommended that the Board of Education uphold Mr. Kennedy's non-renewal. On November 18, 2009 the State Board of Education reviewed the Hearing Officer's recommendation and affirmed the Hinsdale School Board's non-renewal decision.

10. Mr. Kennedy had been a music teacher in the Hinsdale Middle and High Schools for approximately ten years at the time of his non-renewal.

11. The District has consistently said that Mr. Kennedy's non-renewal was not performance based. The parties agree that Mr. Kennedy is a good teacher.

12. While employed by the District, Mr. Kennedy was the President of the Hinsdale Federation of Teachers for five years and had acted as lead negotiator for the present CBA between the parties.

13. The Hinsdale School District Board Policy Manual provides in relevant part:

> L. Reduction in Staff
> In case of an enrollment decline or diminished resources, the Board before March 31 may declare that staff reductions will be made for the coming school year. Normal attrition will be considered before any staff reductions. The staff will be notified that reductions may be necessary. When the Board deems it necessary to reduce staff, the Board will consider the following items:
> Teaching performance, teaching assignment, and contributions to the school,
> Certification status,
> Years of service in the district,
> Teachers affected by a reduction in staff shall be notified in writing on or before March 31.

14. The District implemented the change to the reduction-in-force policy on April 15, 2008 The changed policy provides in relevant part:

> A. Notice
>
> 1. As soon as a reduction in force is seriously contemplated, the Superintendent shall notify the President of the Teachers' Association. . . .
>
> B. Procedures for Determining Reduction in Force:
>
> 1. If reductions in staff are necessary or desirable, the Board should retain those teachers who, at its sole discretion, will be the best teachers for the School system and the students it serves. . . .
>
> 3. In identifying which teachers to release, the Board shall consider the following factors: certification, academic preparation, professional growth, job performance, experience in certified area and/or job classification, ability, and overall effectiveness. All of the factors being equal, then seniority may be considered in making the final determination. Seniority is defined as the total number of years continuously employed in this School District.

15. Article 5, §P of the parties' CBA provides in relevant part:

> The Board will continue its present policy as stated in Section VI, L of the current Policy Manual with respect to reduction in personnel. The Hinsdale School Board will continue its present policy as stated in Section VI of the current School Board Policy Manual with respect to reduction in personnel [sic].

16. The Union and the District did not reach an agreement regarding the change in the reduction-in-force policy implemented by the District on April 15, 2008.

17. The Union did not file a grievance in connection with the change in the reduction-in-force policy implemented on April 15, 2008.

18. The parties' CBA contains a grievance procedure which provides for binding arbitration.

19. The District attempted to terminate Mr. Kennedy's employment for the year 2008-2009 using the non-renewal procedure but was unsuccessful when Mr. Kennedy challenged that action before the Board of Education and prevailed on the basis that the District failed to provide a timely notice of non-renewal.

20. The reason given by the District for the non-renewal of Mr. Kennedy's contract for the year 2008-2009 was lack of student participation.

21. The Union grieved the District's decision to non-renew Mr. Kennedy's contract for the school year 2008-2009. The grievance did not go through the arbitration process. The Union did not grieve the District's decision to non-renew Mr. Kennedy's contract for school year 2009-2010.

22. The Union did not file any grievances as to the non-renewal of Mr. Kennedy's contract for the school year 2009-2010 or as to the violation of the reduction-in-force policy in connection with Mr. Kennedy's non-renewal.

23. Article VII of the parties' CBA provides:

> The following matters are excluded from the grievance and arbitration provisions of this Agreement:
>
> > Management prerogatives as set forth in this Agreement and as provided and interpreted under RSA 273-A
> >
> > Non-renewal of a teacher which shall be accomplished solely under RSA 189:14.

24. The parties' CBA, Article V, §F, also excludes of the Superintendent's determinations regarding involuntary re-assignment of teachers from the grievance and arbitration provisions.

25. Article II of the parties' CBA, entitled Management Rights, provides:

> A. The parties understand that the Board and the Superintendent may not lawfully delegate powers, discretions and authorities, which by law are vested in them and this Agreement shall not be construed to limit or impair their respective statutory powers, discretions, and authorities.
>
> B. Except as otherwise provided in this Agreement, or agreed to in writing between the parties, the determination of educational policy, the operation and management of schools, the supervision and direction of the staff are vested exclusively in the Board.

26. The parties' CBA does not expressly prohibit or allow subcontracting or outsourcing.

27. The Hinsdale School District had two music teachers prior to the termination of Mr. Kennedy's employment: Mr. Kennedy, who was in charge of the band program and Ms. Royea, who was in charge of the choral program. Ms. Royea has been employed by the District for longer than ten years.

28. Ms. Royea continues to works as a music teacher for the Hinsdale School District.

29. The participation in the Hinsdale High School band program approached seventy students in 1996. The enrollment in the band program has been declining for many years. Since 2001 the District has recognized the problem of decline in enrollment.

30. In the 2007-2008 school year approximately forty students were enrolled in the band program. In the 2008-2009 school year the number of students enrolled in the band fell to twenty, including five students receiving credit and fifteen "drop in" students. "Drop-in" students are those students who could not participate in the band program for credit but would perform in the band.

31. Fourteen Hinsdale students requested to participate in the Hinsdale High School band program in the 2009-2010 school year. Not all of the students that request participation in the band actually register.

32. The Hinsdale School District reached an agreement with Brattleboro Union High School whereby the students from Hinsdale who were interested in band/music could participate in Brattleboro band/music related offerings and receive credit.

33. The enrollment in Hinsdale High School vocational education had also declined. The Hinsdale School District entered into an agreement with the Brattleboro High School whereby the Brattleboro School accepts Hinsdale students who wish to enroll in vocational training courses.

34. Mr. Kennedy first learned about the District's agreement with the Brattleboro High School on May 13, 2009, the day of his non-renewal hearing.

35. When the Union found out about the agreement between the Hinsdale School District and the Brattleboro program, the Union did not file a demand to bargain. The Union filed the present unfair labor practice complaint on September 15, 2009.

36. Currently, one student from Hinsdale participates in the Brattleboro School band program and two students from Hinsdale participate in Brattleboro School music course program. The Hinsdale School District pays tuition to the Brattleboro High School for Hinsdale students participating in Brattleboro band/music program.

37. Under the current Hinsdale School music program, one of the options offered to students interested in taking music classes is Virtual High School program (VHS). No Hinsdale students are currently enrolled in any VHS program.

38. Another option offered under the current Hinsdale School music program is an opportunity to participate in the Winchester community band program. It is an after-school program funded by a grant from the U.S. Department of Education. The participation in the Winchester band is not for credit.

39. The District pays High School students to provide music instruction to Elementary and Middle School students.

40. State of New Hampshire does not require the school districts to offer band programs.

41. After Mr. Kennedy's non-renewal for the 2008-2009 school year was overturned on the ground that the notice of non-renewal was untimely, the Hinsdale School administration reinstated the band program and scheduled it for the eighth period, which began at 2:40 PM, because there was no other time available for the band program as all other classes had already been scheduled. Only the band program out of all classes was scheduled for the eighth period. No transportation was provided by the school to the students who attended the eighth period. The scheduling of the eighth period was negotiated with the Union. The Union and Mr. Kennedy agreed that the band program would be scheduled for the eighth period.

42. No substitute teacher was ever provided for the eighth period band class. If Mr. Kennedy was sick, the band class was cancelled.

43. No time was scheduled by the school administration for the Hinsdale High School band students to take final exams.

44. John F. Sullivan has been the Principal of the Hinsdale Middle and High Schools for three years.

45. Principal Sullivan criticized the Hinsdale High School band's performance, music selection, and ability.

46. During the 2007-2008 school year, the Principal required the Hinsdale High School band to audition twice for the administration before allowing it to participate in the Memorial Day Parade. After the auditions, the Hinsdale High School band was allowed to participate in the Memorial Day Parade.

47. During the 2008-2009 school year, Mr. Kennedy was required to obtain permission slips from parents prior to taking the students a on walking trip. On previous occasions the teachers were not required to obtain signed permission slips prior to the trips.

48. When one of the parents nominated Mr. Kennedy for New Hampshire Teacher of the Year in 2009, the Superintendent, the Principal, and the Assistant Principal refused to sign the paperwork. The Superintendent's and the Principal's signatures were required to process the nomination. The Hinsdale kindergarten teacher was also nominated for New Hampshire Teacher of the Year in 2009. Her documents were signed. Principal Sullivan stated in connection with the nomination that Mr. Kennedy was not the best teacher in the school.

49. During the 2008-2009 school year, the Principal refused to sign Mr. Kennedy's notice for the renewal of his teacher certification. The Principal instructed Mr. Kennedy to contact the previous Principal to get the documents signed. The renewal of certification process follows a three-year cycle. Developing the goals for the three-year period is a part of the recertification process. All teachers are required to complete this process. Principal Sullivan was not the Principal who developed the goals with Mr. Kennedy three years prior. Mr. Kennedy contacted the previous Principal, obtained the signature, and sent the document to the District after which he was informed by the Secretary that Principal Sullivan had already signed the documents.

50. During one of the meetings concerning Mr. Kennedy's performance, Principal Sullivan ordered him to stop taking notes. In the past, other teachers were allowed to take notes.

51. During the 2008-2009 school year, Principal Sullivan conducted two unannounced observations of Mr. Kennedy's performance. No other teacher was observed unannounced. As a result of two unannounced observations, Principal Sullivan determined that Mr. Kennedy's performance was excellent.

52. Principal Sullivan did not conduct any observations of, and did not evaluate, Mr. Kennedy's performance during the 2007-2008 school year.

53. Smart Board is the interactive touch-sensitive peripheral hooked to a PC. The Smart Board was the teaching tool used by Mr. Kennedy in class instructions on a regular basis. The Smart Board was taken away from Mr. Kennedy and given to another teacher. Mr. Kennedy's participation in Smart Board training session was cancelled three times in favor of other teachers.

54. Starting in the school year 2007-2008, Mr. Kennedy, as the Union President, worked with Principal Sullivan to resolve the issues related to building safety which arose during the

school reconstruction process. Among the issues were the following: the teachers did not have keys to lock the doors and the sump-pump was defective causing the bad odor in the rooms. Mr. Kennedy brought these issues to the attention of the administration.

55. Mr. Kennedy was involved, as the Union President, in a dispute with the District's administration that arose out of the non-renewal of another teacher.

56. During one of the meetings with Principal Sullivan, Mr. Kennedy was instructed to turn off the recording device. At that meeting Principal Sullivan yelled at Mr. Kennedy.

57. Mr. Kennedy was one of the organizers of the school's 2008 Christmas concert, which included a college Hip-Hop group's performance arranged by another teacher. The Principal, who attended the concert and found Hip-Hop group's performance inappropriate, informed Mr. Kennedy of the following: 1) he was conducting an investigation into what occurred at the concert; 2) in connection with investigation Mr. Kennedy and Ms. Royea were required to attend a disciplinary meeting; and 3) Mr. Kennedy had a right to have a union representative present at that meeting.

58. Mr. Kennedy's request to have Mary Gaul, the UniServ Director for Monadnock region, as his union representative at the disciplinary meeting was denied. Mr. Kennedy was allowed to have another union member present at the meeting to take notes. As a result of the meeting, Mr. Kennedy received a reprimand. The Union filed a grievance as to the subject matter of the reprimand and as to the violation of Mr. Kennedy's Weingarten rights. The reprimand was removed from Mr. Kennedy's personnel file.

59. Article VII, sec C of the parties' CBA, entitled Right of Representation provides:

> A teacher covered by this Agreement shall, under this Article, have the right to have a Federation representative present at any time, subject to his requesting such representation.

DECISION AND ORDER

DECISION SUMMARY

The District's motion to dismiss the claim of the violation of reduction-in-force policy is granted as the Board finds that the termination of Mr. Kennedy's employment was a non-renewal and not a reduction in force. The Complainants' claim that the District's actions violated RSA 273-A:5, I (a), (c), (e) and (h) is denied. The Board finds that the Complainants' evidence is

insufficient to establish that Mr. Kennedy's non-renewal was caused by anti-union animus or was in retaliation for Mr. Kennedy's union activity. The evidence was also insufficient to show that the elimination of the Hinsdale High School band program and an agreement with the Brattleboro School allowing Hinsdale students to utilize Brattleboro band program constitute impermissible subcontracting or outsourcing.

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. See RSA 273-A:6, I. In this case, the PELRB's jurisdiction is proper as the Complainants' claim that the District violated RSA 273-A:5, I (a), (c), (e), and (h) by discharging Mr. Kennedy in retaliation for his union activity and by outsourcing the Hinsdale High School band program.

DISCUSSION

Before proceeding to the merits of this case, the Board addresses the District's motion to dismiss the claim of violation of reduction-in-force policy. In this motion, the District asserts that the Union's claim for relief relating to the alleged violation of the District's reduction-in-force policy should be dismissed on the ground that Mr. Kennedy's termination was a non-renewal and not a reduction in force. The District further argues that even if the Board were to find that Mr. Kennedy's termination was a reduction in force, the PELRB lacks jurisdiction to hear the reduction-in-force claim because the violation of the reduction-in-force policy is a grievable violation under the parties' CBA, which provides for binding arbitration, and because the Complainants failed to exhaust the contractual grievance process.

The District's motion to dismiss the reduction-in-force claim is granted as the Board finds that the termination of Mr. Kennedy's employment was a non-renewal and not a reduction in force. The Complainants themselves treated Mr. Kennedy's termination as a non-renewal by utilizing an appeal procedure under RSA 189:14-b, the "non-renewal appeal" statute, rather than filing a grievance as to the violation of the reduction-in-force policy, despite the fact that the violations of the reduction-in-force policy are not expressly excluded from the contractual grievance procedure. Accordingly, the Board finds that Mr. Kennedy's termination was a non-renewal and not reduction-in-force and dismisses the Complainants' claim of the violation of reduction-in-force policy.

The remaining issue in dispute in this case is whether the District violated RSA 273-A:5, I (a), (c), (e), and (h) by non-renewing Mr. Kennedy's contract in retaliation for his union activity and by contracting with the Brattleboro Union High School to provide certain music programs for Hinsdale students.

RSA 273-A:5, I provides in relevant part: "It shall be a prohibited practice for any public employer:

> (a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;
>
> (c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization;
>
> (e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations;
>
> (h) To breach a collective bargaining agreement . . . .

The Complainants claim that the District violated RSA 273-A:5, I because it discriminated against Mr. Kennedy and terminated his employment in retaliation for his union

activity. In cases involving alleged retaliatory discharge, the New Hampshire Supreme Court has recognized that a complainant must prove illegal motivation at least to some degree. See *Appeal of Sullivan County*, 141 N.H. 82, 84 (1996). See also *AFSCME Council, Local 863/Rochester Public Works Dept., Buildings and Grounds v. City of Rochester, Dept. of Public Works and Buildings and Grounds*, Decision No. 2009-131. "[T]he union bears the burden to prove some minimal degree of proscribed motivation in order to establish an unfair labor practice under RSA 273-A:5." *Appeal of Sullivan County*, supra, 141 N.H. at 85. "This burden cannot be met simply by the union making a claim of retaliation and producing some evidence to support the claim." *Appeal of Professional Firefighters of East Derry*, 138 N.H. 142, 145 (1994). The Union "must prove by a preponderance of the evidence some element of retaliatory action." *Id.* Furthermore, the employer can meet the union's evidence of retaliatory motivation with its own evidence; and if the Board finds by a preponderance of the evidence that the employer was unlawfully motivated to some degree, an employer can still avoid being adjudicated a violator by proving by a preponderance of the evidence that regardless of the unlawful motivation, the employer would have taken the same action for wholly permissible reasons. See *id.* at 144-45. See also *Hampton Firefighters Local 2664, IAFF, AFL-CIO, CLC v. Town of Hampton*, Decision No. 2008-068.

In the present case, the Complainants offered evidence demonstrating the existence of a conflict and disagreement between the District's administration and Mr. Kennedy; but the Complainants failed to prove by a preponderance of the evidence that the District's decision to non-renew Mr. Kennedy's contract was motivated by anti-union animus or desire to frustrate union activity. Mr. Kennedy had been employed by the District as the music teacher for ten years and served as the President of the Union for five years prior to his termination. Most of the incidents the Complainants offered as evidence of anti-union animus or retaliation occurred

within the last year of his employment. There is no clear correlation between these incidents and the non-renewal of Mr. Kennedy's contract. The Board finds that the Complainants' evidence is insufficient to show the existence of retaliatory motivation or anti-union animus. Accordingly, the Complainants' claim that the District violated the provisions of RSA 273-A:5, I because the District's actions with respect to Mr. Kennedy's non-renewal were motivated by the desire to retaliate or by the anti-union animus is denied.

However, the Board considers the allegations of retaliation in this matter to be very serious and believes that current relationship between the District and the Union falls short of harmonious. Therefore, the Board strongly suggests that the management strive to establish better relations with the Union.

The Complainants also contend that the District violated RSA 273-A:5, I by outsourcing the Hinsdale High School band program to the Brattleboro School during the term the parties' CBA.

The Public Employee Labor Relations Act requires the public employer and the employee organization to negotiate in good faith over the terms and conditions of employment. See RSA 273-A:3. See also RSA 273-A:5, I (e) and *Appeal of Hillsboro-Deering School District*, 144 N.H. 27, 30 (1999). The "terms and conditions of employment" are defined as wages, hours and other conditions of employment "other than managerial policy within the exclusive prerogative of the public employer." See RSA 273-A:1, XI. RSA 273-A:1, XI provides:

> The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

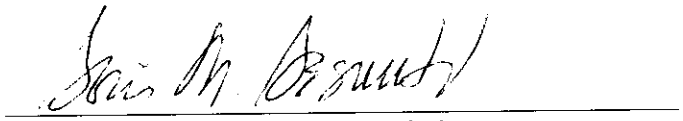
The New Hampshire Supreme Court has previously held that terminating all members of the bargaining unit and subcontracting with private companies to perform the same work duties during the term of a CBA may constitute an unfair labor practice. See *Appeal of Hillsboro-Deering School District*, supra, 144 N.H. at 33. In *Hillsboro-Deering*, the Court found, among other things, that where an independent contractor's employees merely replace the existing employees to do the same work under similar conditions of employment and where the decision to subcontract does not alter the school district's basic operations, the district is required to bargain with the union over the subcontracting issue. See *id.* at 33. The Court also recognized that a true layoff or reorganization does not violate the CBA or constitute an unfair labor practice. See *id.* at 30.

In the present case, the Complainants failed to offer sufficient evidence to show that the District subcontracted or outsourced the Hinsdale High School band program. On the contrary, the evidence demonstrates that the elimination of the Hinsdale band program was a part of a larger school reorganization program which altered the School District's basic operations. Furthermore, the District did not hire a private subcontractor or anyone else to replace Mr. Kennedy as a High School band instructor. Instead, the District eliminated Hinsdale High School band program and attempted to provide the Hinsdale students who were interested in participating in a band program with some alternatives, including the Brattleboro School band program. The school reorganization involving, among other things, the elimination of the High School band program is within the District's managerial prerogative. The Board finds that the Complainants failed to offer sufficient evidence to establish that the elimination of the Hinsdale High School band program and an agreement with the Brattleboro School band program to accommodate some of the Hinsdale students who wished to participate in the band constitute

impermissible subcontracting or outsourcing. Accordingly, the Union's claim that the District violated the provisions of RSA 273-A:5, I by outsourcing or subcontracting the Hinsdale High School band program is denied.

So ordered.

Signed this 3rd day of March, 2010



Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding. Members Carol M. Granfield and J. David McLean present and voting.

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