Affirms PELRB Decision No. 2005-044

THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2005-490

APPEAL OF WHITE MOUNTAIN REGIONAL SCHOOL DISTRICT
(New Hampshire Public Employee Labor Relations Board)

Argued: May 17, 2006
Opinion Issued: August 29, 2006

Soule, Leslie, Kidder, Sayward & Loughman, of Salem (Michael S. Elwell and Jill A. Desrochers on the brief, and Mr. Elwell orally), for the appellant.

James F. Allmendinger, of Concord, staff attorney, NEA-New Hampshire, by brief and orally, for the appellee, White Mountain Regional Education Association, NEA-New Hampshire.

HICKS, J. The appellant, White Mountain Regional School District (district), appeals a ruling of the New Hampshire Public Employee Labor Relations Board (PELRB) that it committed an unfair labor practice under RSA 273-A:5 (1999). The PELRB ruled that the district breached its collective bargaining agreement with the appellee, White Mountain Regional Education Association (association), when it issued letters of renewal with reservations to several of its teachers and required them to develop improvement plans for the upcoming school year. We affirm.

The record supports the following facts. The association is the exclusive representative of teachers employed by the district. The association and the district were parties to a collective bargaining agreement (CBA) in effect from

July 1, 2002, to June 30, 2004. In April 2004, several tenured teachers employed by the district were given letters of renewal with reservations by the superintendent of schools. These letters informed the teachers that they were renominated for employment for the upcoming school year, but with reservations about their performance. The letters further stated that the teachers were required to prepare improvement plans before the end of the 2003-2004 school year.

The association filed an unfair labor practice complaint with the PELRB, alleging that the district unilaterally changed the procedures outlined in the CBA concerning teacher evaluation and performance reviews. The association relied upon article XVI of the CBA, entitled "Employee Evaluation," which details the procedures for evaluating teacher performance and providing feedback. It provides that tenured teachers are to be observed at least once per year, with discretion to the administration to conduct additional visits. A written evaluation must be prepared and placed in the teacher's file as a result of the observation, and a copy must be provided to the teacher.

The district maintained that its actions were consistent with the terms of the CBA, the past policies of the district, and RSA 189:14-a, III (Supp. 2005), which requires, among other things, notice to teachers that "unsatisfactory performance may lead to nonrenomination." The PELRB disagreed, ruling that the district breached the parties' CBA by using new procedures to communicate teacher deficiencies. It ordered the district to remove all evidence of the letters and improvement plans from the teachers' files. The district redacted certain portions of the teachers' files in accordance with the PELRB order and filed this appeal.

On appeal, the district argues that: (1) the PELRB's decision is contrary to RSA 189:14-a; (2) the CBA impliedly permits it to issue such letters and to require improvement plans; and (3) its actions constituted "managerial policy within the exclusive prerogative of the public employer" under RSA 273-A:1, XI (Supp. 2005).

Our review standard is governed by RSA 541:13 (1997). The PELRB's findings of fact are deemed prima facie lawful and reasonable, and its decision will be set aside only for errors of law or if it is shown to be unjust or unreasonable by a clear preponderance of the evidence. Appeal of State of N.H., 138 N.H. 716, 719 (1994).

Following submission of the briefs but prior to oral argument, the association moved to dismiss this case as moot due to the expiration of the old agreement. Specifically, the association asserted that the case is moot because the teachers affected by the actions of the district were renewed and are under a new CBA that specifically addresses improvement plans. The new CBA, however, does not resolve whether the letters of renewal with reservations and

improvement plans must remain redacted from the teachers' files. Accordingly, we deny the appellee's motion and address the merits of the appeal.

The district first argues that the PELRB's decision is contrary to RSA 189:14-a, III (Supp. 2005) because this statute obligated the district to issue renewals with reservations in order to provide notice to the teachers that they may not be renewed. We disagree.

RSA 189:14-a, III became effective on August 29, 2003, and provides that:

> In cases of nonrenomination because of unsatisfactory performance, the superintendent of the local school district shall demonstrate, at the school board hearing, by a preponderance of the evidence, that the teacher had received written notice that the teacher's unsatisfactory performance may lead to nonrenomination, that the teacher had a reasonable opportunity to correct such unsatisfactory performance, and that the teacher had failed to correct such unsatisfactory performance.

RSA 189:14-a. The district asserts that this statute applied to the CBA on August 29, 2003, and therefore the district was required to take the action it did in order to comply with the terms of the statute in anticipation of the eventual nonrenomination of the teachers. The association counters that the provisions of this statute do not apply because of RSA 273-A:4 (Supp. 2005), which addresses arbitration and other binding resolution provisions under grievance procedures adopted under a collective bargaining agreement.

RSA 273-A:4 provides that:

> Every agreement negotiated under the terms of this chapter shall be reduced to writing and shall contain workable grievance procedures. No grievance resulting from the failure of a teacher to be renewed pursuant to RSA 189:14-a shall be subject to arbitration or any other binding resolution, except as provided by RSA 189:14-a and RSA 189:14-b. 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.

RSA 273-A:4. The "effective date of this section" was August 29, 2003. See Laws 2003, 204:5. The association asserts that the last sentence of this statute precluded application of RSA 189:14-a until the CBA expired on June 30, 2004.

While RSA 189:14-a is not directly applicable to this case because the teachers were all renominated, we recognize the district's concern that were the

teachers not renominated for the following school year, the renewals with reservations policy would be evaluated to determine if it complied with the requirements of the statute. However, we hold that the notice provisions of RSA 189:14-a did not apply to the parties' CBA, which was already in existence at the time the notice provisions became effective. This dispute arose in April 2004, while the 2002-2004 CBA was in effect. An amendment to an existing law that affects existing contract rights is presumed to operate prospectively unless the language of the amendment or surrounding circumstances express a contrary legislative intent. Hayes v. LeBlanc, 114 N.H. 141, 144 (1974). We find no such language or circumstances here indicating that RSA 189:14-a was intended to affect existing contract rights. Indeed, the companion amendment to RSA 273-A:4 demonstrates the legislature's intent not to affect existing contract rights – the amendment specifically provides that its prohibition of arbitration or other binding resolutions does not apply to existing CBAs prior to their expiration dates. Therefore, we conclude that the language in RSA 189:14-a regarding procedures for notifying teachers of unsatisfactory performance did not apply to the district until the expiration of the CBA in June 2004. Accordingly, the district was under no obligation to comply with its provisions.

Next, the district argues that the PELRB's decision was contrary to the parties' CBA because letters of renewal with reservations and improvement plans are impliedly permitted by its provisions. Article XVI of the CBA requires tenured teachers to be observed at least once per year, allows multiple observations at the administration's discretion and requires a written evaluation document to be prepared within ten days following such observations. The district contends that because this provision does not expressly preclude "the use of improvement plans and notices of reservations," it is free to utilize such measures. The PELRB disagreed, ruling that: "[W]e do not see a negotiated right flowing to the District to unilaterally abandon the multiple observation device and instead issuing a conditional renewal and, in addition, adding the requirement of participation in an undefined improvement plan that is not allowed under the terms of the CBA." We agree with the PELRB.

The terms of the CBA are clear regarding the procedures to be used when evaluating teachers and communicating teacher deficiencies. When the district issued letters of renewal with reservations and required improvement plans, it failed to follow the procedures of the CBA, which already provided procedures for teacher recommendations and improvement.

Once parties to a CBA have chosen to bargain over matters not otherwise prohibited from negotiation, the parties must abide by the agreement entered into during the term of the CBA. Appeal of Pittsfield School Dist., 144 N.H. 536, 540 (1999). In Pittsfield, we held that the Pittsfield School District was bound to follow the ten procedures laid out in the CBA regarding teacher

evaluations and could not unilaterally adopt and enforce a new plan. Id. We reach the same conclusion here because the record supports the PELRB's finding that the terms of the CBA did not reserve to the district the right to implement different procedures for addressing teacher performance and evaluations. By doing so, the district failed to follow the express provisions of the CBA.

Similarly, the savings clause of the CBA cannot be used by the district to support its actions. The savings clause provides that school board policies in use as of the effective date of the CBA are applicable so long as the policies are not restricted by provisions of the CBA. The record supports the PELRB's ruling that the savings clause does not apply because the CBA provides for the procedures to be followed when addressing teacher evaluations and performance reviews. Letters of renewal with reservations issued directly by the Superintendent without any warning or feedback from the teachers are contrary to the evaluation and recommendation procedures identified in the CBA. Accordingly, we reject the district's argument that its conduct can be justified by past policies.

Finally, the district asserts that the letters of renewal with reservations and required improvement plans fall within the managerial policy exception defined in RSA 273-A:1, XI, thereby permitting the district to unilaterally implement these procedures without negotiation. The association counters that teacher evaluation procedures affect the terms and conditions of employment, which is a mandatory subject of bargaining.

RSA 273-A:1, XI exempts managerial policy from mandatory negotiation. The statute provides:

> "Terms and conditions of employment" means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

RSA 273-A:1, XI. In Appeal of State of N.H., we clarified the managerial policy exception and established a three-part test to determine whether negotiation of a proposal is mandatory, permissible or prohibited. Appeal of State of N.H., 138 N.H. at 722. In order for a proposal to be a prohibited subject of bargaining, and therefore fall under the managerial policy exception, the

subject matter of the proposal must be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation. Id.

The PELRB ruled, without discussion, that the conduct of the district does not fall under the managerial policy exception. We agree. RSA 273-A:1, XI does not expressly except from bargaining teacher evaluation and performance review procedures. See Pittsfield, 144 N.H. at 539-40. The renewals with reservations and required improvement plans do not involve procedures for hiring teachers or the standards by which teacher improvement will be assessed and therefore do not affect matters of managerial policy. Id. at 540. Accordingly, we reject the district's argument that its actions are within the "exclusive prerogative of the public employer" affecting the "selection" and "direction" of its personnel. RSA 273-A:1, XI.

The district further argues that even if its actions are not considered managerial policy, the procedures at issue are not mandatory subjects of bargaining and that since the CBA is silent on the matter, the district is permitted to implement them. The association counters that the procedures involve "terms and conditions of employment" which are mandatory subjects of bargaining that cannot be unilaterally implemented without negotiation. Appeal of State of N.H., 138 N.H. at 722.

On the record before us, we decline to decide whether the procedures at issue in this case are "terms and conditions of employment." As we stated above, the CBA expressly provides for teacher evaluation and performance review procedures. By utilizing new procedures in this area, the district breached the specific provisions of the CBA. Because the procedures at issue are not prohibited subjects of bargaining under the managerial policy exception, and the parties chose to negotiate in this area, they are bound by the terms of the CBA. Pittsfield, 144 N.H. at 540. Thus, the PELRB correctly applied applicable precedent. See id.; see also Appeal of State of N.H., 138 N.H. at 722.

Accordingly, we uphold the PELRB's ruling that the district breached the parties' CBA and that the April 2004 letters of renewal with reservations and improvement plans must be removed from the teachers' files.

Affirmed.

BRODERICK, C.J., and DALIANIS and GALWAY, JJ., concurred.

NH Supreme Court affirmed this decision on 8-29-2006, Slip Op. No. 2005-490.
(NH Supreme Court Case No. 2005-490)

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

White Mountain Regional Education Association, NEA-New Hampshire Complainant v. White Mountain Regional School Board Respondent	*	Case No: T-0210-15 Decision No. 2005-044

REPRESENTATIVES

For the Complainant: Jay Tolman, UniServ Director, NEA -NH

For the Respondent: Michael S. Elwell, Esq., of Soule, Leslie, Kidder, Sayward & Loughman

BACKGROUND

The White Mountain Regional Education Association, NEA-New Hampshire, (hereinafter "Association") filed an unfair labor practice complaint on October 8, 2004 alleging that the White Mountain Regional School Board (hereinafter "District") committed unfair labor practices in violation of RSA 273-A:5 I (c), prohibiting discrimination "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 organizations", and (h), prohibiting a party "[t]o breach a collective bargaining agreement." The Association alleges that on or about April 14, 2004 the District sent several teachers a letter stating that they had been "re-nominated, with reservation, to a teaching contract…for the 2004-2005 school year." The Association also

alleges that the letter explained that an improvement plan for the individual teachers must also be in place before the end of the school year. According to the Association, the parties' collective bargaining agreement (hereinafter "CBA") does not provide for the placement of teachers on an "improvement plan." It claims that the District's actions violated Article XVI (Employee Evaluation), Article XIII (Fair Treatment), Article XXVIII (Savings Clause) and Article XXVI (General Provisions) of the CBA by its untimely evaluation of teachers, insufficient notice of discipline and unilateral altering of evaluation language.

It also alleges that based upon the fact that one recipient teacher is president of the Association and another is a past president, the District's actions are discriminatory and committed with the intention of intimidating Association members and interfering with union activity. The Association contends that such conduct by the District therefore constitutes violations of RSA 273-A:5 I (c) and (h). As remedies, the Association requests that the PELRB, among other things, (1) find that the District has violated the parties CBA; (2) order that the letters of "reservation" be rescinded; (3) and order that the 2003-2004 evaluations at issue be expunged.

The District filed its answer denying the Union's charge on October 25, 2004. While the District admits that the employment of several teachers was renewed "with reservation" for the 2004-05 school year, and that those teachers were required to participate in the development of performance improvement plans, it denies that it has committed any improper labor practice. It states that its actions with respect to evaluations, improvement plans and renewals are not prohibited by, but are consistent with, and are required by Articles XII and XXVII of the CBA, past practices, the District's "Observation and Evaluation Guide" and policies which predate the CBA, as well as RSA 189:14-a. By way of further answer, the District asserts that the "renewal with reservation" does not constitute discipline, that improvement plans have been the practice of the District for some time, and that given that multiple teachers, not just current or past union officials, received the same letter of renewal with reservation, this is evidence that the District's actions were non-discriminatory. The District also initially raises procedural arguments, including jurisdiction, timeliness, accord and satisfaction, mootness, and waiver and estoppel, based upon its contention that certain teachers on whose behalf grievances were filed have either retired, left the bargaining unit, or otherwise withdrawn or settled their grievance. Accordingly, the District requests that the PELRB (1) deny the relief sought by the Association; (2) dismiss the instant improper practice charge and (3) grant such other relief as may be appropriate and within the PELRB's jurisdiction.

A pre-hearing conference was conducted on November 4, 2004 that resulted in the Association withdrawing charges related to four of the original eight individuals to whom the letters of re-nomination with reservations were sent. An evidentiary hearing was conducted at the offices of the Public Employee Labor Relations Board in Concord on January 4, 2005 at which both parties were represented. Each was provided the opportunity to present witnesses and exhibits and had the opportunity to cross-examine witnesses. The parties' also submitted a Statement of Agreed Facts that was made a part of the record and are incorporated below as Findings #1 through #22. Prior to the hearing on the merits, the District's counsel represented that as a result of the Association withdrawing charges related to four of the eight original subject teachers it was withdrawing several of the procedural defenses it initially raised,

including the doctrine of accord and satisfaction, estoppel and mootness. The parties also agreed to submit sixty-one joint exhibits and without objection, the Board accepted all as part of the record. At the conclusion of evidence, the parties waived closing arguments and elected to submit legal memoranda in support of their respective positions. The record was held open for that purpose as requested for a period of thirty (30) days and, as references had been made to select portions of the District's policy book during the hearing, the Board reserved its right to request that the District make available to it the entire policy book, if the Board deemed it necessary as later determined by the Board's legal staff.

FINDINGS OF FACT

1. The School Board is a public employer within the meaning of RSA 273-A:1, X.

2. The Association is the exclusive bargaining representative of the teachers employed by the School Board.

3. The School Board and the Association are parties to a collective bargaining agreement ("CBA"), effective July 1, 2004 to June 30, 2006.

4. By letters dated April 14, 2004, the following employees were renewed with reservations for 2004-2005 school year:

Gary Arsenault	Ann Griffin
Cheryl Meehan	Ann Miller
Regina Turner	Paul Ouimet
Rhonda Weeks	Kevin Teehan

5. Each of the employees listed in paragraph 4 were required to participate in the development of performance improvement plans.

6. On April 23, 2004, Mr. Teehan sent a letter to Dr. Timothy Markley, the Superintendent of Schools.

7. The Association sent a letter dated May 7, 2004, on behalf of each employee listed in paragraph 4, to each employee's immediate supervisor which alleged violations and misinterpretations of (1) Article XVI, Evaluation; (2) Article XIII, Fair Treatment; (3) Article XXVII, General Provisions; (4) Article XXVII, Savings Clause; and (5) all other pertinent articles of the CBA between the Parties due to the renominations with reservation and improvement plan requirements. The remedies sought by the Association's grievances were to expunge the employees' notices of renewal with reservations from their personnel files, to expunge the employees' performance evaluations for 2003-04 from their personnel files, and to renominate the employees and make them whole.

8. Peter Mortenson, the former Principal of White Mountains Regional High School, was the immediate supervisor of Mr. Arsenault, Ms. Miller, Mr. Teehan, and Ms. Turner. Marie Fay, Director of Special Student Services, was the immediate supervisor of Ms. Meehan, Mr. Ouimet, and Ms. Weeks. Barbara Baker, the Dalton School Administrator, was Ms. Griffin's immediate supervisor.

9. By letters dated May 14, 2004, each of the Associations' grievances was denied by each employees' immediate supervisor.

10. By letters dated May 17, 2004, on behalf of each employee listed in paragraph 4, the Association appealed the immediate supervisors' denials of each of the association's grievances to the Superintendent of Schools.

11. By letters dated May 21, 2004, the Superintendent of Schools denied each of the Association's grievances.

12. By letters dated May 27, 2004, on behalf of each employee listed in paragraph 4, the Association appealed the Superintendent's denials of the Associations grievances to the School Board.

13. On June 28, 2004, the School Board held a hearing on each of these grievance appeals, except for Mr. Teehan's grievance appeal. Mr. Teehan's appeal hearing was held before the School Board on August 23, 2004.

14. By letter's (sic) dated July 2, 2004, each of these grievance appeals was denied by the board, except for Mr. Teehan's appeal.

15. By letter dated August 24, 2004, the Board sustained Mr. Teehan's grievance.

16. Article III(E) of the parties' CBA states: "If the employee is not satisfied with the decision of the School Board, then the employee or the Association may take whatever action they may deem appropriate."

17. On October 8, 2004, the Association filed the Unfair Labor Practice Charge in this case.

18. Ms. Miller's position as JROTC Instructor is not a position in the Association's bargaining unit.

19. The grievance concerning Mr. Ouimet has been withdrawn.

20. Ms. Griffin resigned from employment by the School District in or about June 2004, and the grievance concerning her has been withdrawn.

21. At the prehearing conference in this matter on November 4, 2004, the Association withdrew the unfair labor practice charge to the extent that is pertained to Mr. Teehan, Ms. Miller, Mr. Ouimet and Ms. Griffin.

22. Therefore, the only disputes remaining between the School Board and the Association are regarding Mr. Arsenault, Ms. Meehan, Ms. Turner and Ms. Weeks.

23. The District did not undertake an evaluation of Mr. Arsenault for the school year 2002-2003.

24. The first evaluation undertaken of Mr. Arsenault in two years was conducted in or about March 2004 on the day before he was to have a medical operation and would be out on sick leave for an extended period of time.

25. Mr. Arsenault and the Association representative met with Superintendent Markley and Assistant Superintendent Dean Cascadden on April 26, 2004 at which time Mr. Arsenault testified that Superintendent Markley was informed that the Association would be going forward with grievances on his behalf and on behalf of the other teachers regarding the letters of renewal with reservation and requirement of developing an improvement plan.

26. Mr. Arsenault did not receive his so-called "Feedback Report" within the ten days required by the CBA. It was mailed to him as he was home on sick leave.

27. Mr. Arsenault considered Superintendent Markley his immediate supervisor for purposes related to the letter of renomination, with reservation issue as Superintendent Markley was the signatory to those letters to all of the teachers affected.

28. Regina Turner is a long time math teacher who was scheduled to be evaluated by Principal Mortenson during her 1:15 PM class and instead he appeared, previously unannounced, to evaluate her during her 11:15 AM class.

29. Ms. Turner received her feedback report because she sought it out and made a copy of it on or about April 23rd or 24th. She received her letter before she received her feedback report. She did not receive her feedback report within the ten (10) days required by the parties' CBA. The report was dated March 23, 2004 although it was not signed until June 8, 2004 as she had held on to it.

30. Neither Mr. Arsenault nor Ms. Turner received an oral or written warning prior to the receipt of the letter renewal with reservation.

31. Under cross-examination the District established that Ms. Turner had received an unsatisfactory rating on four of twenty-one topics in her previous 2002-2003 feedback report although the evaluation was satisfactory overall.

32. Notwithstanding the District showing evidence that Ms. Turner had been rated unsatisfactory in four of the twenty-one topics included in her 2002-2003 evaluation, she was not untruthful when she testified that she had never had an unsatisfactory evaluation in her career since the 2002-2003 overall evaluation was not unsatisfactory.

33. Mr. Mortenson left the District's employment after his second year.

34. Mr. Mortenson indicated on Ms. Turner's feedback report that she "cared too much for the kids".

35. Kevin Teehan is an experienced teacher of twenty-two years and over that time had not had any problems with his evaluations until Mr. Mortenson's evaluation for the school year 2003-2004.

36. Mr. Teehan wrote a letter of complaint, dated April 23, 2004, regarding his evaluation addressed to the Superintendent as it was the Superintendent that authored the letter to him indicating that he was being re-nominated, with reservation. (Joint Exhibit #54).

37. Mr. Teehan never discussed his grievance with his immediate supervisor as stated in the parties' CBA.

38. The post evaluation conference with Mr. Teehan was not conducted within the ten (10) days required of the CBA.

39. Marie Fay is the Director of Special Student Services for School Administrative Unit #3 which includes the District and in that capacity acted as supervisor and undertook the evaluations of Cheryl Meehan and Rhonda Weeks.

40. Ms. Fay observed Ms. Weeks on November 7, 2003. She did not confer with Ms. Weeks within the ten (10) day period required of the CBA based upon conflicts in schedule of both herself and Ms. Weeks.

41. Despite many opportunities to speak with Ms. Weeks, Ms. Fay did not inform her that as a result of her evaluation, Ms. Weeks was going to lose pay by being "kept at step."

42. C. Peter Mortenson was the principal at White Mountain Regional High School within the District for the school years 2002-2003 and 2003-2004 and in that capacity was the immediate supervisor of Mr. Arsenault, Mr. Teehan and Ms.Turner.

43. Mr. Mortenson undertook Mr. Arsenault's evaluation on or about March 10, 2004 and provided it to Mr. Arsenault by mail. He was unsure whether he mailed it within the ten (10) day period required of the CBA. He did not sign his copy of the feedback report until May 18, 2004 because he was waiting for Mr. Arsenault to return his own, signed copy of the report.

44. Finding replacement substitutes is not a condition of work for Mr. Arsenault although he did produce at least two names to Mr. Mortenson

45. Timothy Markley has been the Superintendent of White Mountain Regional School District since June 2003 and before that had accumulated fifteen years of experience within education, most recently in Fayettville, North Carolina.

46. He is familiar with the processing of grievances and of the contents of the parties' CBA's since 1998.

47. He considered Mr. Teehan's April 23, 2004 letter as the beginning of his grievance, however, since none of the other teachers subject of these proceedings wrote anything until the Association representative wrote letters on their behalf on May 7, 2004, he considers that date the initiation of those teachers' grievances .

48. Mr. Markley agreed that as he was the signatory to the April 14, 2004 letters of renewal, with reservation letters that emanated from his office this would give the recipients the impression that responses would be directed to him.

49. The Association representative wrote formal letters of grievance following an April 26, 2004 meeting with management representatives Mr. Markley and Mr. Cascadden, Association president Arsenault and himself at which the Association representatives made their dissatisfaction regarding the letters and teacher evaluation procedures were discussed.

50. Mr. Markley characterized the April 26, 2004 meeting as a general discussion about evaluations and did not recall discussion of these teacher's specific evaluations or anticipated grievances based upon those evaluations or his letter of qualified renomination. He also testified that he understood the Association's point in that discussion to be that the evaluations were arbitrary and that the Association did not like the tone of them and wanted to let the teachers withdraw those evaluations from their files.

51. Mr. Markley testified that the subject teachers could be terminated if they didn't follow the improvement plan and agreed that one of them, namely Ms. Weeks, did receive discipline as a result of the evaluation process in the form of a lost pay increase that she would have otherwise received as a result of a step increase.

52. The Association did complain about the evaluation procedures and issuance of renewal letters at the April 26, 2004 meeting.

53. The parties' CBA provides, in part, that "A grievance to be considered under this article must be initiated within twenty calendar days of its occurrence." ARTICLE XXX – GRIEVANCE PROCEDURE, Section A. (Joint Exhibit #1).

54. The parties' CBA provides, in ARTICLE XXVII – SAVINGS CLAUSE,

> C. The terms of this Agreement shall not be modified, amended, or alteredin any way, unless made in writing and signed by both parties.
>
> D. Except as this Agreement shall otherwise provide, all terms and conditions as dictated by School Board policy applicable as to the effective date of this Agreement shall continue to be so applicable during the terms (sic) of this Agreement." (Joint Exhibit #1)

55. School policy existing at the time of the parties' CBA provided, in part, that "Teachers are expected to give careful attention to suggestions [by supervisors] to insure improvement in classroom instruction." (Joint Exhibit #3)

56. When the grievances were appealed to the School Board level, Mr. Markley forwarded information, including the exchanges of correspondence, to the Board members by means of a confidential envelope prior to the meeting. There is no evidence that such information was ever presented at the Board meeting as part of that proceeding prior to the Board sustaining the Superintendent's denial of the grievances of the teachers at issue here. Separately, the Board granted the grievance of Mr. Teehan.

57. Brian Fogg was Chairman of the School Board and presided over these grievances. He testified that Mr. Teehan's grievance was not deemed untimely by the Board because of his letter to Mr. Markley, dated April 23, 2004.

58. The District did not adhere to the requirements regarding "Feedback" reports as called for by the parties' CBA.

DECISION AND ORDER

DECISION SUMMARY

The Association filed an improper practice complaint against what it alleged were actions undertaken by the District that constituted a statutory breach of the parties' collective bargaining agreement and discriminated against certain teachers because of their leadership positions with the Association. The board found that there was insufficient evidence offered to establish that the District's actions were discriminatory and dismissed the complaint alleging violations of that provision of the statute. Some of these actions involved the manner and timeliness of the conduct of performance evaluations of teachers. Since these actions occurred greater than six months before the Association filed its complaint, consideration of them is time-barred. Other actions complained of involved the Superintendent issuing letters of "renewal with reservation" and imposing the mandatory development and submission of an improvement plan by recipients of his letters that were issued within the six-month statute of limitations for such matters. The board

therefore examined whether or not the District violated the statute prohibiting a party from breaching the terms and conditions of a collective bargaining agreement and found that the District had violated that provision of the statute.

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate claims between the duly elected "exclusive representative" of a certified bargaining unit comprised of employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I).

In this case, the Association has complained that actions of the District constitute violations of RSA 273-A:5,I (c), involving discriminatory actions and (h) involving a breach of the parties' collective bargaining agreement (CBA). By reason of these alleged violations of the statute, we accept jurisdiction of the Association's complaint.

DISCUSSION

At the outset, we address an evidentiary issue concerning an attachment that accompanied the submission of the Association's post-hearing memorandum to which the District has filed its objection. Our administrative rules allow the record to remain open under limited circumstances (See Pub 203.04(b) but, we do not find that they permit us to examine the evidentiary document submitted by the Association which is an evaluative "Feedback Report" regarding one of the subject teachers named in the Association's complaint. The Association did not request that the record remain open for the filing of this specific evidence and the Board did not request this evidence. Further, as the feedback reports were described in testimony at the hearing and could reasonably have been anticipated to have been the subject of testimony, the Association could have had it available prior to and at the hearing. In addition, the Board does not feel that this document "is necessary to a full consideration of the issues raised at the hearing." Id. We, therefore, grant the District's objection to this untimely proffer of evidence, refuse its admittance into the record, and dismiss the document from our consideration of this case.

Having dealt with that evidentiary matter, we focus on the Association's complaint and the allegations of improper practices committed by the District in violation of the Public Employee Labor Relations Act. The parties have mutually agreed upon certain terms and conditions of work as provided in their collective bargaining agreement (Joint Exhibit #1) and to which they have both obligated themselves to adhere. The alleged violations stem from procedures utilized by the District in connection with teacher performance evaluations. Article XVI, Section B of the parties' CBA provides that:

> "All teachers with more than three year's experience in the White Mountain Regional School District shall be observed for the purpose of evaluation at least once during the

school year. Where the building Principal or the Superintendent feel more visits are necessary, he/she has the right to exercise this discretion."

(Joint Exhibit #1 - CBA, p.11)

The parties have included a workable grievance procedure into their CBA as required by RSA 273-A:4 (See Article III, pp.4-5). In the event of a complaint regarding the evaluation process, the parties' have agreed to adhere to the procedures for resolution described in their CBA, in relevant part, as:

ARTICLE III – GRIEVANCE PROCEDURES:

A. 'Grievance' means an alleged violation, misinterpretation, or misapplication with respect to one or more members in the bargaining units as defined in Article I of the Association or any provisions of this Agreement. Only claims based on interpretation, meaning an application of any provisions of this Agreement, shall be construed grievances under this article. A grievance to be considered under this article must be initiated within twenty calendar days of its occurrence. A grievance may be started at the level of occurrence, but in no case shall it be started higher than the level of the Superintendent.

B. Level I – Principal
The Grievant shall discuss the matter with his/her immediate Supervisor, with the aim of resolving the grievance informally at that level. If the grievance is not resolved, or if no decision is forthcoming from the Supervisor within seven (7) days, the Grievant may reduce the grievance to writing, detailing the nature thereof, any action taken thus far regarding it, his/her reasons for pursuing it further, and submit his/her appeal to the proper Building Principal within seven (7) calendar days; otherwise, the grievance shall be considered withdrawn. The Building Principal shall meet with the Grievant to seek resolution of the grievance within seven (7) calendar days of receipt of the written appeal and shall convey his decision in writing to the Grievant within seven (7) days thereafter.

E. If the employee or the Association is not satisfied with the decision of the School Board, then the employee or the Association may take whatever action they may deem appropriate.

The Association alleges that the District's conduct breached the parties' CBA and resulted in several violations of the Public Employee Labor Relations Act (RSA 273-A). Specifically, the Association alleges that by taking actions not in conformance with the procedures and obligations described in Article XVI – Employee Evaluation, the District's actions specifically violate RSA 273-A:5.I(h) that provides that a public employer commits an improper practice if it breaches provisions of the parties' collective bargaining agreement (CBA). The Association also alleges that some of the District's actions were discriminatory and therefore the District's actions constitute a violation of RSA 273-A:5,I(c) as well.

Regarding the complaint alleging discriminatory conduct by the District against the Association's leadership, the Association filed its original complaint charging that the District's actions directly affected eight individuals. It later withdrew four of these individuals from consideration. There is no evidence before the board as to whether any of those four individuals were officers of the Association or otherwise were distinguished as Association activists. The evidence did show that of the remaining four individuals, three are members of the Association leadership or have been part of past leadership teams. The Association claims that the acts of the District to which they complain, specifically the manner of conduct of evaluations, the addition of a requirement for participation in an improvement plan, and the issuance of certain letters of "renewal with reservation," amount to discriminatory treatment in violation of RSA 273-A:5, I (c). That provision of the statute states it is a prohibited practice for a public employer,

> "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."

Of the four individuals remaining at issue in the Association's complaint by reason of their being subjected to an evaluation process alleged to be flawed and being the recipients of the conditional letters of renewal to their positions, the fact that three, at some point, held leadership positions in the Association is, without more, insufficient to establish that the District acted for the discriminatory purpose "of encouraging or discouraging membership in any employee organization" *Id.* We do not find that the District committed a violation of this provision of our statute.

Much of the focus of the District has been on a time line of events undertaken by parties relating to the application of the grievance procedure to their respective actions. When we review this timeline it appears to us that the Superintendent issued his letters of "renewal with reservation" to the subject teachers on April 14, 2004. (See Exhibits #'s 6, 26, 27, 40). One of the recipients, Kevin Teehan, issued a responsive letter indicating that he wished to contest the decision and informing the Superintendent that he had contacted the Association representative for assistance in seeking "relief and remedy", on April 23, 2004 (See Exhibit #64). The Association representative and the Association's president, Gary Arsenault, who was another recipient of the subject letter, met with the Superintendent on April 26, 2004. While testimony was in conflict on the substance of that meeting, we believe that testimony supporting discussion amounting to the Association complaining of the issuance of the letters to be credible given the uniqueness of the content of Superintendent's letters, the prior letter of Teehan to the Superintendent, the demand in the Superintendent's letter for

participation in producing an improvement plan, and the multiple letters issued by the Association on May 7, 2004 (See Exhibit #'s 7, 29, 42, 55) expressing the intent of the Association on behalf of the subject teachers who had received the "renewal with reservation" letters. The object of this focus appears to be based upon the belief that the Association is prohibited from bringing their complaint to the PELRB because it has not strictly adhered to a procedure contained within the parties' grievance provision in the CBA.

This focus is misplaced in these proceedings because these proceedings embody the Association asserting not a grievance, but a statutory violation. If the parties had a grievance process that provided for final and binding arbitration, then unless the parties' had otherwise provided, the PELRB's role would be more limited in scope and, after a determination of whether or not the mater was arbitrable, it would defer interpretation and order the parties to arbitration, if appropriate. The parties have not incorporated a final and binding arbitration clause into their CBA. Therefore, there is no arbitrator to refer this matter to nor have the parties named this board to act as an arbitration panel as the last step in its grievance process. Instead, the parties have provided that an aggrieved party may "take whatever action they may deem appropriate." (See Joint Exhibit #1 – CBA – Grievance Procedure, p5). The Association apparently deemed it appropriate to utilize the protections afforded to public employers and employee associations under our statute and filed a complaint alleging improper practices in violation of RSA 273-A:5, I (c), and (h).

The statutory limitation of actions governed by RSA 273-A:1 *et seq* is six months. RSA 273-A:6,VII. In its' complaint, the Association alleges that evaluations were not properly conducted because feedback reports were not timely. We find that to the extent that the feedback reports were not timely provided, the acts of the District that resulted in what might otherwise be a breach of the parties' CBA occurred more than six months before the Association filed their complaint with the PELRB on October 7, 2004. Therefore, complaints for this action or inaction by the District is time-barred from our consideration and we dismiss the Association's complaint related to the so-called "feedback report" submissions to the subject teachers.

However, the Association's complaint also alleges that the Superintendent's issuance of the letters of "renewal with reservation" and requirements related to the development and submission of an improvement plan by the subject teachers violates the statute. These letters were written on April 14, 2004 and presumably received by the subject teachers on or after that date. We find the issuance of these letters to constitute the "triggering" act from which the timely filing of an unfair labor practice complaint must be measured pursuant to RSA 273-A:6, VII. The Association's complaint was filed within the permissible six-month period when it arrived at the PELRB on October 8, 2004 complaining of the Superintendent's letter. We proceed then to further examine the District's actions not as a participant in the grievance process, but as adjudicators of statutory violations.

The allegation that the District's actions violated RSA 273-A:5,I(h) because those actions constituted a breach of the parties' CBA requires an analysis of several issues. First, did the District follow the terms of Article XVI – Employee Evaluation when the Superintendent issued the April 14, 2004 "renewal with reservation" letter requiring the recipient to participate in an "improvement plan"? When we examine the provisions of the terms of evaluation upon which the parties' had mutually agreed, it is obvious that the parties negotiated and assigned a right of discretion to the District's Superintendent or Building Principal to conduct multiple observation visits if they felt "more visits are necessary." (Article XVI, B.). As to non-probationary teachers, as are those at issue here, we do not see a negotiated right flowing to the District to unilaterally abandon the multiple observation device

and instead issuing a conditional renewal and, in addition, adding the requirement of participation in an undefined improvement plan that is not allowed under the terms of the CBA.

The fact that the parties' CBA addresses the topics of evaluations and the procedure to be followed by the parties in addressing performance removes consideration of the issue from the scope of the reservation found in ARTICLE XXVII – SAVINGS CLAUSE because that clause stipulates that school board policy, in order to control an issue, must have been in existence on July 1, 2002, the effective date of the CBA, and the issue must not be otherwise provided for by the CBA. (Joint Exhibit #1, ARTICLE XXVII – SAVINGS CLAUSE, §D).

We believe that the actions taken by the District alter what the parties each bargained for in mutually agreeing to the terms of their CBA. We further find that this conduct is not reserved by "managerial policy within the exclusive prerogative of the public employer" as contemplated in RSA 273-A:1, XI nor has it been reserved to the District by terms of the CBA. For the reasons stated, we conclude that the District did breach the parties' collective bargaining agreement that constitutes an improper practice under the laws of the State of New Hampshire.

Therefore, the District shall rescind the "renewal with reservation" letters issued to Gary Arsenault, Cheryl Meehan, Reginald Turner, and Rhonda Weeks, remove evidence of their issuance from all related personnel files, expunge each teacher's personnel record, and cease and desist from further actions that breach the parties' CBA.

So ordered.

Signed this 1st day of April, 2005.

Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Members James M. O'Mara and E. Vincent Hall also voting.

Distribution:
Jay Tolman, UniServ Director
Michael S. Elwell, Esq.

NH Supreme Court affirmed decision No. 2005-044 on 8-29-2006, Slip Op. No. 2005-490
(NH Supreme Court Case No. 2005-490)

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

White Mountain Regional Education Association, NEA-New Hampshire Complainant v. White Mountain Regional School Board Respondent	Case No. T-0210-15 Decision No. 2005-063

ORDER ON MOTIONS FOR REHEARING

The Board conferred for the purpose of considering the Complainant's and Respondent's respective Motions for Rehearing and took the following actions:

1. Pursuant to RSA 541 and N.H. Admin R. Pub 205.02, it reviewed the White Mountain Regional School Board's Motion for Rehearing filed on April 29, 2005 and the White Mountain Regional Education Association's Motion for Rehearing filed [1]May 3, 2005 and White Mountain Regional Education Association's objection thereto filed on May 16, 2005 and the White Mountain Regional School Board's objection thereto filed on May 18, 2005.

2. It examined its previous Decision No. 2005-044, issued on April 1, 2005.

3. It reviewed the previous filings of the parties in this matter.

4. It DENIED the White Mountain Regional School Board's Motion for Rehearing. It DENIED the White Mountain Regional Education Association's Motion for Rehearing.

So ordered.
Signed this 10th day of June, 2005.

DORIS M. DESAUTEL
Chair

By unanimous decision. Chair Doris M. Desautel presiding. Members E. Vincent Hall and James M. O'Mara, Jr., voting.

Distribution:
Michael Elwell, Esq.
James Allmendinger, Esq.

[1] The Board considers the Association's Motion for Rehearing to be filed in a timely manner given that it was initially received electronically on May 2, 2005.