

**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Keene School District	*	
	*	
	*	
Complainant	*	
	*	Case No. T-0282-15
v.	*	
	*	Decision No. 2003-146
Keene Education Association	*	
NEA-New Hampshire	*	
	*	
Respondent	*	
	*	

PARTICIPATING REPRESENTATIVES

For the Complainant: John D. Wrigley, Esq.

For the Respondent: Steven R. Sacks, Esq., NEA-NH

BACKGROUND

The Keene School District (hereinafter "the District") filed an unfair labor practice complaint on August 11, 2003 alleging that the Keene Education Association, NEA-NH (hereinafter "the Union") committed an unfair labor practice by demanding arbitration of grievances pertaining to the performance evaluations of two non-tenured teachers and seeking, as relief, their reinstatement. More specifically, the District contends that the grievances are not arbitrable since, as it alleges, the parties' collective bargaining agreement is not susceptible of an interpretation that covers the dispute. Indeed, the District states that the Union's actions violate RSA 273-A:5, II (f) in that the Union has specifically agreed within the terms of parties' collective bargaining agreement ("CBA") that such matters would not be subject to the grievance procedure. In its complaint, the District requested immediate relief, pursuant to RSA 273-A:6 III, in the form of an interim cease and desist order against the Union preventing it from proceeding to arbitration. As further remedies, the District requests that the PELRB find, inter alia, that the grievances are not arbitrable under the parties' CBA and that the Union has committed an unfair labor practice. It also petitions the PELRB to award attorney's

fees and costs to the District that it has incurred as a result of the filing of the instant charge.

The Union filed its response to the District's unfair labor practice complaint on August 26, 2003. The Union denies the District's complaint that it has committed an unfair labor practice and asserts that it is seeking to enforce the contractual rights of both teachers by pursuing the instant grievances to arbitration. It maintains that the grievances present the question of whether the District complied with its procedural obligations under the performance evaluation provisions of the CBA and not the actual content of the performance evaluations themselves. Given the very nature of the contractual violations at issue, the Union states, the reinstatement of both teachers to their former positions is the only practical remedy. The Union requests, inter alia, that the PELRB find that the grievances filed are arbitrable and that it deny the District's requests for immediate injunctive relief and reimbursement of legal costs.

Following a pre-hearing that was conducted on September 29, 2003 the District filed a Motion for Summary Judgment on October 27, 2003 to which the Association objected on November 12, 2003. A hearing was conducted before the PELRB at its offices in Concord at which both parties were in attendance and represented by counsel.

At the outset, the Board heard oral argument on behalf of each party on the District's summary motion and received an "Agreed Statement of Facts" jointly submitted by the parties and also received twelve joint exhibits. The Board held its consideration of that motion in abeyance and proceeded to hear evidence. The District called no witnesses and rested. When the Association called its first witness, the District entered a continuing objection to any testimony that was to be offered by the Association. The Board allowed the Association to proceed with testimony from its sole witness, Brenda Dunn who is the Association's president. The essence of Ms. Dunn's testimony related to procedures involved with the conduct of performance evaluations of the subject teachers. Ms. Dunn testified specifically as to procedural mistakes made in the conduct of Mr. Robert Shalit's evaluation. After some testimony by Ms. Dunn and the District's special stipulation that all applicable evaluation procedures had not been completely adhered to and this same stipulation expressly limited by the District's counsel "for the purposes of this hearing only", the Board questioned the Association's counsel as to the need of continued testimony of similar nature after which it accepted an offer of proof, with the District's objection still standing that Mr. Forrest Patenaude's evaluation procedure was similarly flawed due to the District not following the express procedures for evaluation contained within the "Professional Staff Performance Evaluation Manual for Teachers" (Joint Exhibit #12). No cross examination was undertaken by the District. At the request of the Association's counsel, the record was left open until November 21, 2004 for the purpose of receiving a post hearing memorandum with the express limitation by the Board that any such memorandum would not be accepted as evidence.

## FINDINGS

1. The District is a public employer, and the KEA is the certified bargaining agent for teachers in the District.
2. Two teachers, Forrest Patenaude and Robert Shalit, were employed by the District for the 2002-03 school year. Neither teacher was renominated by the District for the 2003-04 school year.
3. Each teacher was on a "non-continuing contract" in 2003(sic)-03. In other words, neither teacher had acquired "tenure," so called. See RSA 189:14-a.
4. Each teacher has submitted a grievance alleging the District "failed to follow its own evaluation plan" and that such failure "resulted in the failure to provide the grievant with a contract for the 2003-04 school year." Each teacher has submitted the grievance to binding arbitration and claims the dispute is arbitrable. The District asserts the binding arbitration provision in the CBA does not apply to the dispute.
5. The exhibits listed as Joint Exhibits in the September 29, 2003, "Pre-hearing Memorandum and Order" are relevant to the issues for determination by the Board. In addition, the parties will submit as a Joint Exhibit the entirety of the Evaluation Manual. Joint Exhibits 6 and 7 are part of the Evaluation Manual.

## DECISION AND ORDER

The Public Employees Labor Relations Board has primary jurisdiction to determine whether or not a public employer or public employee association has engaged in an improper practice constituting a violation of the provisions of the Public Employees Labor Relations Act RSA 273-A. In this matter the violation alleged by the District to have been committed by the Association is that the Association made a wrongful demand upon the District to arbitrate grievances filed by two teachers. Neither teacher had been re-nominated, *i.e.* employed, for the ensuing school year 2003-04. (Stipulated Fact #2). Each teacher filed a grievance alleging that the District failed to follow the performance evaluation procedures contained within the "Professional Staff Performance Evaluation Manual for Teachers" (Stipulated Facts #4 and #5, and Joint Exhibit #12). Neither of the subject teachers was on a so-called "continuing contract" at the time they were not re-nominated for employment by the District. (Stipulated Fact #3). The District and the Association are parties to a Collective Bargaining Agreement.

Before the Board can consider this case on its merits, we first must determine whether the District's Motion for Summary Judgment should be granted. In the event that it is not granted we will further consider the merits of the Association's assertion that the grievances filed by the subject teachers requires the District to participate in arbitration. In considering the motion, we have reviewed the parties' pleadings and the affidavit of Patricia Trow Parent, and Joint Exhibits #1-#12 and weighed all inferences properly drawn from them, in the light most favorable to the Association to determine the existence of a genuine issue of material fact.

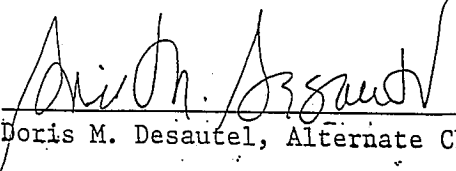
We do not find that there is a genuine issue of material fact presented in this matter. We do find that both teachers were non-tenured teachers considered to be employed on a "non-continuing contract." (Finding of Fact #3). There is clear and unambiguous language in the parties' collective bargaining agreement (Joint Exhibit #2, p.13 Article XI - Grievance Procedure) that "non-renewal for non-continuing contract teachers would be pursued under RSA 189 and shall not be subject to Article XI." Similarly, there is clear and unambiguous language in the parties' "Professional Staff Performance Evaluation Manual for Teachers" expressing that "Procedures set forth in this section [providing for appeals of evaluation] do not apply to staff members not on a continuing contract." (Joint Exhibit #12, p.61).

Presented with such express language, we can say with positive assurance that these two non-tenured teachers who were on non-continuing contracts, are specifically excepted from appealing evaluations under the terms of the Performance Evaluation Manual for Teachers. Also, their non-renewal of employment is specifically excluded from the grievance procedure under the terms of the parties' collective bargaining agreement.

Therefore, the District's Motion for Summary Judgment is granted. The District need not participate in arbitration of the two subject grievances. The final hearing and this decision having been undertaken in a timely fashion and no irreparable harm or allegation of violations of RSA 273-A:5, II(e) having been established, the District's request for interim relief pursuant to RSA 273-A:6(III) is moot.

So ordered.

Signed this 3rd day of December, 2003.

  
Doris M. Desautel, Alternate Chairman

By unanimous decision. Alternate Chairman Doris M. Desautel presiding. Members E. Vincent Hall and Richard W. Roulx present and voting.

Distribution:

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