Appeal to NH Supreme Court withdrawn on May 21, 1996, Supreme Court Case No. 96-043.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CONCORD SCHOOL DISTRICT

Complainant

v.

CONCORD EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE

Respondent

CASE NO. T-0220:17 S/B case T-0220:27

DECISION NO. 95-95

APPEARANCES

Representing Concord School District:

Edward Kaplan, Esq.

Representing Concord Education Association:

Wally B. Cumings, UniServ Director

Also appearing:

Bob Silva, Concord School District
Kerry L. Clock, Concord Education Association

BACKGROUND

The Concord School District (District) filed unfair labor practice (ULP) charges against the Concord Education Association (Association) on July 18, 1995 alleging a violation of RSA 273-A:5 II (f) relating to a breach of contract caused by the Association's attempting to arbitrate a matter outside the definition of a grievance as found in the CBA. The Association filed its answer on August 3, 1995. This was followed by the District's filing a Motion for Summary Judgment on September 8,

1995. This matter was then heard by the PELRB on September 12, 1995. After that, at the request of the Association, the record was held open until September 25, 1995 so that it might file a written response to the District's Motion for Summary Judgment.

FINDINGS OF FACT

1. The Concord School District is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Concord Education Association is the duly certified bargaining agent for teachers, nurses and others employed by the District.

3. The District and the Association are parties to a collective bargaining agreement (CBA) for the period September 1, 1993 to August 31, 1996. Article IV (A) of that agreement defines "grievance" as "a claim based on 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." The grievance process ends with final and binding arbitration whereby "the arbitrator is limited in his/her authority to interpret the contract in the resolution of the issue submitted to him/her by the parties and has no authority to alter, change or modify any provisions of this Agreement." Teachers and "degreed nurses" are covered by salaries set forth in Appendix C to the CBA while non-degreed nurses are covered by salaries set forth in Appendix I.

4. Article VI (G) of the CBA contains a layoff procedure which provides, in pertinent part:

> "Whenever it is necessary for the District to layoff certified personnel, the layoff procedure will assure all such personnel rights of seniority in the area of certification for which they were employed within the District and rights to reemployment should positions open for which the laid-off employees are qualified....The District shall layoff personnel in inverse order of their year of full-time service in the

> District...and must reinstate them in inverse order of their being laid off....Certified
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> personnel laid off must annually, by March 1, or such other times as appropriate, advise the Superintendent's office in writing of their current address and availability for employment. If a laid-off employee refuses an offer for reemployment in an area for which she/he is qualified, this employee shall forfeit his/her rights to reemployment under the conditions of this section."

5. Notwithstanding the language of Article VI (G), there is no provision in the CBA which specifically prevents the District from subcontracting for services with outside providers.

6. During the second half of the 1994-95 school year, the District devised a plan to reorganize health care services throughout the school department. Part of this plan involved subcontracting nursing duties to the Concord Visiting Nurses Association (VNA) as school nurses (degreed and non-degreed) resigned, retired or transferred to teaching positions. This matter was not discussed or negotiated with the certified bargaining agent nor did the District make any attempt to change the composition of the bargaining unit on file with the PELRB or as recited in the "Recognition Clause" of the CBA.

7. By the pleadings, the parties agreed that on June 5, 1995, the District executed an agreement with the VNA which contracted for nursing services at Conant Elementary School and for substitute nursing services.

8. On June 7, Kerry "K.L." Clock, grievance committee chair, filed a grievance complaining that the foregoing contract with VNA violated the CBA because "it fails to uphold the right of nurse personnel who have been laid off pursuant to the terms of the Agreement."

9. By their pleadings, the parties agreed that Luann Bruggemann, nurse at the Conant School, announced her retirement on June 14, 1995. This retirement was anticipated since Asst. Superintendent Silva testified

that other nurses, then in the employ of the District, were asked if they wanted to transfer to Conant School before the District contracted with VNA as described in Finding No. 7.

10. On July 13, 1995, W.B. Cumings, UniServ Director for the NEA-New Hampshire, filed a demand for arbitration with the American Arbitration Association claiming that the District's contract with the VNA violated the CBA. No specific or individual grievant was noted; however, Silva's testimony before the PELRB indicated that a nurse, Eileen Jones, had been reduced-in-force (RIFed) sometime earlier and had kept current in her notification requirements to the Superintendent's Office, as recited in Finding No. 4, above. There is no evidence that an offer of re-employment was made to and rejected by Jones before the District concluded its agreement with VNA. Likewise, there is no evidence that the District ever gave notice of a position vacancy created by Bruggemann's retirement [CBA Article VI H (3)] before contracting to fill same with VNA.

11. The duties expected to be performed by nurses providing services under the District's contract with VNA do not differ from services performed by nurses in the direct employ of the District. Both types of nurses attend staff and faculty meetings. The former nurse and the future VNA-obtained nurse at Conant School both were/ will be evaluated and supervised by the principal in that building, directly in the former practice and by input to the VNA in the future practice. VNA obtained nurses, unlike direct employ nurses, will receive over-time compensation if they are required to work beyond the number of contracted hours agreed to between the District and VNA.

12. The Association believes the District's actions violate the contract and seeks redress through the grievance procedure of the CBA. The District believes the pending grievance is outside the definition of "grievance" in the contract, infringes on its manage-ment prerogative found in RSA 273-A:1 XI, and should be barred by a cease and desist order from the PELRB.

DECISION AND ORDER

Our role in this case is a narrow one, namely, to determine if the Association's conduct constitutes an unfair labor practice under RSA 273-A:5 II (f) as alleged by the District. We find that it did not.

After examining the parties' CBA, we find several clauses which compel the conclusion that no ULP has been committed as alleged. First, the parties, of their own volition, negotiated the layoff clause found at Article VI (G) of the CBA and referenced in Finding No. 4, above. In essence, the layoff language which was negotiated provides a means for reorganizing seniority and establishes an order of recall. Such language, while not a mandatory subject of collective bargaining, is not a prohibited subject of bargaining. See Appeal of State, 138 NH 716 at 727 (1994). Thus, there is no cause to invalidate this permissively negotiated contract language.

Second, the parties have negotiated a final and binding grievance procedure at Article IV (A) of the CBA which covers the personnel in question. It broadly defines "grievance" as explained in Finding No. 3, above. That definition includes the claim at hand which involves a question concerning the "meaning and application" of the layoff provisions of Article VI.

Third, notwithstanding the District's positions that this is a subcontracting case and that no vacancy existed, the record is uncontroverted that the District contacted other nurses already in its employ to determine if any of them wanted the position at Conant School. Finding No. 9. Likewise, there is no evidence that any notice of vacancy was given under Article VI B (3) of the CBA.

Upon review of the facts presented and the contract language, we conclude that the actions being questioned by the Association fall within the broad definition of "grievance" as found in the CBA. For us to find otherwise requires "positive assurance" that the arbitration clause cannot be read to cover the dispute. Appeal of City of Nashua, 132 NH 699 at 701, (1990) and Appeal of Westmoreland School Board, 132 NH 103 (1989). Such simply is not the case here; the subject matter falls within the authority of the grievance procedure.

Accordingly, there is neither cause for us to find that the Association committed an unfair labor practice under RSA 273-A:5 II, (f) nor to issue a cease and desist order or orders as sought by the District. We direct that the unfair labor practice charges be DISMISSED and, having so ruled, further direct the parties to proceed with the grievance arbitration procedure contemplated by the contract. Given our directive to proceed to arbitration, we make no ruling on the merits of the grievance.

So ordered.

Signed this 19th day of October, 1995.

EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members E. Vincent Hall and William F. Kidder present and voting.