



NH Supreme Court dismissed appeal of this decision on June 3, 1996, Supreme Court Case No. 94-739.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CONWAY SCHOOL DISTRICT

Complainant

v.

CONWAY EDUCATION ASSOCIATION
NEA-NEW HAMPSHIRE

Respondent

CASE NO. T-0221:13

DECISION NO. 94-01

APPEARANCES

Representing Conway School District:

Jay C. Boynton, Esq.

Representing Conway Education Association:

Steven R. Sacks, Esq.

Also appearing:

David Higgins, Fryebury, ME
Brian Sullivan, NEA-New Hampshire
James Sheridan, Conway Education Association
Harry, Benson, SAU 9
Dick Mezquita, SAU 9

BACKGROUND

The Conway School District (District) filed unfair labor practice (ULP) charges against the Conway Education Association, NEA-NH (Association) on August 16, 1993 alleging violations of RSA 273-A:5 II (c), (e), (f) and (g) relative to the Association's attempting to arbitrate non-arbitrable issues concerning two teachers, David Higgins and James Sheridan. The Association filed its answer on August 27, 1993, seeking both the dismissal of the complaint and the denial of a cease and desist order which would preclude it from proceeding to arbitration. The case was then heard by the PELRB on November 2, 1993.

FINDINGS OF FACT

1. The Conway School District is a "public employer" within the meaning of RSA 273-A:1 X.
2. The Conway Education Association is the duly certified bargaining agent for teachers employed by the District.
3. The District and the Association were parties to a collective bargaining agreement (CBA) for the period July 1, 1989 until June 30, 1992. Negotiations for a successor CBA have yet to be concluded; therefore, the parties have been operating and continue to operate under the expired agreement with no enhancement(s) in wages or benefits since its expiration. This is consistent with the PELRB's policy requiring parties to maintain the status quo upon expiration of an existing agreement in order to preserve the balance of power guaranteed by Chapter 273-A. See Appeal of Milton School Dist. 137 N.H. 240, 245 (1993), Appeal of Franklin Education Association 136 N.H. 332, 337 (1992), Town of Conway/Conway School District, PELRB Decision No. 93-76 (August 26, 1993), Conway Administrators/Teamsters Local 633, PELRB Decision No. 93-33 (March 19, 1993) and East Kingston Teachers Association, PELRB Decision No. 92-159 (October 21, 1992).
4. Article III Section 8.2 of the expired contract provides for a grievance procedure which includes final and binding arbitration after earlier reviews by the principal, superintendent and school board. Likewise, Article III, Section 7.2 limits subjects to be considered in arbitration by excluding (1) those matters for which review is prescribed by law, (2) rules and regulations of the Commissioner, (3) matters of internal organization, (4) matters beyond school board authority or reserved to it for unilateral action, (5) complaints from non-continuing contract teachers, and (6) complaints from certified personnel caused by appointment of lack of appointment to or retention in any position for which a continuing contract is either not possible or not required.
5. Article V of the CBA pertains to teacher evaluations. Section 2.3 provides that evaluations which do not adhere to the procedures of Article V shall be subject to the grievance procedure.
6. Article XXVI, Section 1 of the CBA reserves unto the school board the authority to "hire, promote, assign and retain teachers...and, with just cause, to demote,

suspend, discharge or take other disciplinary action against teachers...." thus bringing the issue of "just cause" within the preview of the contract and the grievance procedure.

7. James Sheridan has been employed as an English Teacher in Conway since 1970. He filed a written grievance on May 7, 1993, claiming that a memorandum which placed him on a Level I evaluation was based on incorrect information. He testified that this had not happened to him before in 23 years of employment and that it placed him at risk of non-renewal. Sheridan pursued his grievance that the evaluations were based on incorrect information before the principal, superintendent and school board without obtaining relief. The superintendent's reply, in the form of a memo to Sheridan dated June 3, 1993, summarized Sheridan's position as being that "just cause has not been provided for the disciplinary action taken against you." The Superintendent then concluded that the contract gave the school board sole authority to "hire, promote and retain" teachers whereupon he also concluded that Sheridan's "retention at level and step is not disciplinary action but a prerogative of the Board." Sheridan's typewritten materials for a school board hearing set for July 1, 1993 claim he has been denied a pay increase for the 1993-94 school year. Sheridan's testimony was that this action by the employer would jeopardize his being able to get a step increase (he is at maximum) should a new contract and pay scale be approved for the 1993-94 school year. There is no evidence that any independent forum has ever addressed the issue of incorrect information being contained as part of the evaluations about which he is complaining.
8. David Higgins pursued and now has received a Master in Fine Arts degree while teaching in Conway between 1991 and 1993. In anticipation of completing and receiving his masters degree, Higgins applied for a track change from BA + 6 hours to Masters in the fall of 1992. On October 26, 1992, after the CBA had expired, the Assistant Superintendent approved the track change to be effective in September of 1993. Higgins testified that he relied on this approval in spending money to complete the masters degree program, in deferring other family expenditures and in incurring debt. Higgins has submitted claims and has been reimbursed for courses taken in 1992-93 under Article XIX, "Course Reimbursement," of the expired contract. Overall, Higgins has spent approximately \$20,000 to secure his masters degree. Course reimbursement has covered \$4,000

of that figure. Meanwhile, Higgins has not received compensation for the requested and approved track change. His contract was "level funded" at the BA + 6 track for 1993-94. Superintendent Benson testified that Higgins was not receiving pay at the MA level because the track change would be a "cost item" under RSA 273-A:1 IV and the 1993 school district meeting had approved only the same level of salaries for 1993-94 as were paid for 1992-93. As the result of not receiving his track change when 1993-94 individual contracts were issued in the spring of 1993, Higgins filed a grievance on May 28, 1993 claiming a financial loss of \$6056 and violations of Articles XXV and XXVI. That grievance was denied by the Superintendent in a memo dated June 4, 1993. It was set for hearing by the school board on July 1, 1993. There is no evidence before the PELRB that any independent forum has ever addressed the compensation claim complained of by Higgins.

9. Superintendent Benson raised the collateral issue of whether documentation supplied by Higgins verifying receipt of the masters degree was timely submitted under Article XXV, Section 7 of the contract, namely, by October 1 of the school year in which the track change is effective.

DECISION AND ORDER

Our analysis in this case will be by the individuals involved, Sheridan and Higgins. This is appropriate because the fact situations of their respective cases are unrelated.

As to James Sheridan, we find no bar in Article III which would preclude his proceeding to arbitration on the issue of errors or mistakes in the factual content of his evaluations. Likewise, Article V Section 2.3 of the contract provides that "any evaluation that does not adhere to the procedures set forth in Article V shall be subject to the grievance procedure." Section 1.2 of Article V sets forth five reasons for the evaluation process. Two of those are to identify teachers' strengths and weaknesses and to aide the school board in making a decision in regard to reelection. Inaccurate or erroneous information cannot be allowed to go unchallenged when it is used for such potent purposes., Sheridan, or others similarly situated, must have a means for addressing assessments based on incorrect information. Our analysis of Article III and V, particularly sections 1.2 and 2.3 of Article V, leads us to conclude that the grievance procedure, inclusive of binding arbitration, is the contractually agreed upon means for Sheridan to use to challenge the accuracy of information contained in his evaluations. This conclusion is further substantiated by RSA 273-A:4 which requires that contracts have workable grievance

procedures.

As to David Higgins, we find that he has concluded all the course work for and has been awarded his masters degree. As argued by the District, we are mindful of Appeal of Milton School District, 137 N.H. 240 (1993), and acknowledge that moving him from the BA+6 track to the MA track would cost the district money, thus creating a "cost item" not yet approved by the voters. Accordingly, it would be inappropriate for Higgins to proceed to arbitration on his claim both because he cannot be paid something not yet approved and because approval of spending authority by the voters is "beyond the scope of Board authority" under Article III, Section 7.2 (d) of the contract.

Thus, we DISMISS the ULP as it pertains to the James Sheridan case and direct the parties to proceed forthwith to resolve his complaints of inaccurate information on his evaluation through the binding grievance procedure of the CBA. We AFFIRM the commission of an unfair labor practice with respect to the David Higgins case in violation of RSA 273-A:5 II (f) and direct the Association to CEASE and DESIST in its attempts to process it through the binding arbitration provisions of the CBA.

So ordered.

Signed this 13th day of January, 1994.


EDWARD J. HASELTINE
Chairman

By unanimous vote as to the disposition of the Sheridan case, Chairman Edward J. Haseltine presiding and Members Seymour Osman and E. Vincent Hall present and voting. By majority vote as to the disposition of the Higgins case Chairman Edward J. Haseltine and Member Seymour Osman voting in the majority; Member E. Vincent Hall voting in the minority.

Member Hall's dissenting opinion is as follows:

I dissent from the findings and opinions of my colleagues with respect to the Higgins case on several grounds, each of which, in my opinion, is adequate to substantiate his claim sufficiently to permit it to be adjudicated according to the binding grievance procedure of the contract.

First, I view the circumstances of the Higgins case as a matter of contract, not merely the CBA but also the contract between Higgins and the District which approved his movement from the BA+6 track to the MA track as evidenced by the action of the Assistant Superintendent on October 26, 1992. Finding No. 8. If that were not enough, the uncontroverted record in this case shows that Higgins relied on that commitment, even to his detriment, in making plans, budgeting time and incurring debt to finish his last year (1992-93) of graduate work. I perceive this case as a promise made to Higgins to move him to the MA track upon successful completion of his graduate studies, a "consideration" in exchange for something to be and since accomplished by Higgins. He upheld his end of the bargain; the District reneged.

Second, I believe the District is, or should be, estopped from asserting a Milton defense. The District made a promise to Higgins subject to his completing certain academic requirements which he did. It cannot now be allowed to back out of its commitment which attached in October of 1992 when made and after which Higgins placed reliance on it. For that matter, I believe the District was obligated as of October 26, 1992 to assure that there were sufficient funds for it to meet its commitment to Higgins in September of 1993 as shown on the approval. District Ex. No. 1, page 3. This is a classic estoppel case since the District's own action of approving the track change now prevents it from adopting an inconsistent position or course of conduct to detriment of Higgins. Likewise, under the law of estoppel, where one of two "innocent" parties must suffer, the party who caused the loss must bear it. In this case, that is the District.

Third, the application of equitable standards would cause this case to be decided for Higgins. His are the "clean hands" of performance while the District has the burden of not standing by its promise.

Fourth, the majority's holding is contrary to the disposition of earlier cases in which the PELRB has said that the public employer may not pick and choose which parts of an expired contract it will honor and which it will not in fulfilling the requirements to maintain the status quo. In Alton Teachers Association, Decision No. 92-195 (December 22, 1992) we said that that the contractual obligations "did not contemplate that one party may pick and choose which elements of the incentives it will fund or encourage." Likewise, in Nashua School District, Decision No. 93-138 (October 23, 1993) we again spoke of the PELRB's "reluctance to let one party to a contract pick and choose which parts of a compensation package to honor." In the Higgins case, the District honored its course reimbursement obligations under the CBA; it is illogical that it should dishonor the approved track change under procedures and obligations controlled by the same document.

Fifth and finally, if Higgins is deprived of pursuing this

case to binding arbitration under grievance procedure of the contract, he has been denied access to a "workable grievance procedure" under RSA 273-A:4. I believe his is entitled to such adjudication by independent authority (Finding No. 8) and would direct that his case proceed to arbitration as was done with the Sheridan matter.