

Appeal to NH Supreme Court  
withdrawn on September 4,  
1996, Supreme Court Case  
No. 96-386.

**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

_____	:	
KEARSARGE REGIONAL	:	
SCHOOL DISTRICT	:	
	:	
Complainant	:	CASE NO. T-0238:16
	:	
v.	:	DECISION NO. 96-014
	:	
KEARSARGE REGIONAL	:	
EDUCATIONAL ASSOCIATION	:	
	:	
Respondent	:	
_____	:	

APPEARANCES

Representing Kearsarge Regional School District:

David H. Bradley, Esq.

Representing Kearsarge Regional Education Assoc.:

Steven Sacks, Esq.

Also appearing:

- Jean R. Richards, Kearsarge Regional School District
- W.B. Cumings, Kearsarge Educational Association
- Jay Tolman, Kearsarge Educational Association
- Paul Ezen, Kearsarge High School
- Carlton Fitzgerald, Kearsarge Middle School
- Gary W. Wulf, Kearsarge School Board
- Mary Devlin, Kearsarge Regional School District

BACKGROUND

The Kearsarge Regional School District (District) filed unfair labor practice (ULP) charges against the Kearsarge Regional Education Association (Association) on November 13, 1995 alleging violations of RSA 273-A:5 II (f) relating to a wrongful demand to arbitrate. The Association filed its answer on November 28, 1995. This case was heard by the PELRB on February 13, 1996 after a continuance sought and granted for a prior hearing date on December 7, 1995.

#### FINDINGS OF FACT

1. The Kearsarge Regional School District is a "public employer" of teachers and other employees within the meaning of RSA 273-A:1 X.
2. The Kearsarge Regional Education Association is the duly certified bargaining agent for teachers and other employees of the District as identified in the Recognition Clause, Article I, of the parties' collective bargaining agreement (CBA) for school years 1993-94 and 1994-95.
3. Article VI of the aforesaid collective bargaining agreement contains a grievance procedure ending in binding arbitration. Section B of Article VI specifically excludes from the grievance procedure "a complaint of a teacher with less than three years experience within the district which is caused by his/her not being re-employed." Article XII of the CBA addresses teacher evaluation. Pertinent portions provide: "The purpose of evaluation shall be the assessment and improvement of teacher performance [to] maintain a high quality of education." "Each teacher with less than three (3) years experience in the Kearsarge District will be evaluated at least two (2) times each year. Thereafter, evaluations will be made at least once each year." "The School Board reserves the right to withhold a teacher's increase if just cause is demonstrated that his or her work is deficient. The teacher will first be given a verbal notice by their direct supervisor, either their department head or principal, which will include examples or illustrations of their deficiencies, expected corrections and a reasonable period of time in which to make the corrections. If the deficiencies still exist at the end of this time period, then written notice will be given, to the teacher by their principals. A second opportunity

will be given to correct the deficiencies. If after the second opportunity to take remedial action the deficiencies still exist, then the teacher may be notified by the School Board that their increase will be withheld in the next contract year."

4. Nancy Bronder, a teacher in the District, was completing her second year of employment in school year 1994-95. She had previously been employed as a teacher elsewhere in the state for three years. She was first evaluated/observed by her principal, Mary Devlin, on March 21, 1995. District Exhibit Nos. 1 and 2.
5. On March 16, 1995, Supt. Jean Richards sent Bronder a memo telling her that she (Richards) wanted to evaluate her "to determine if you are a professional who[m] I would ask to join the tenured teacher rank of the Kearsarge Regional School District." Richards indicated this observation would occur within the next two weeks. District Exhibit No. 9. The referenced evaluation occurred on March 28, 1995. District Exhibit No. 10. On March 30, 1995, Richards wrote Bronder a letter telling her that her contract would not be renewed for the 1995-96 school year.
6. On or about April 10, 1995, Bronder, Devlin and Richards met, at which time Bronder agreed to additional supervision and observation of her teaching performance. This meeting also set a course of action for two "outside" evaluators from different schools in the District, namely Carl Fitzgerald then from the two elementary schools and Paul Ezen from the high school. Protocols were also agreed to for pre-observation, observation and post-observation activities involving Bronder, Fitzgerald, Ezen and Richards. There is no evidence of Bronder's having complained about the foregoing observations as they were being conducted or about Fitzgerald, Ezen and/or Richards conferring about those observations.
7. On May 5, 1995, Bronder wrote Devlin to "institute a grievance" under Article VI of the CBA. She claimed that Article XII had been breached because the "evaluation process as described in the Agreement was not followed" nor did they "reflect the strengths of the teacher." As a remedy Bronder

sought two new evaluations by members of the "Leadership Team [who] have not been involved with this case, with pre and post conferences and an adequate time in between for the teacher to address any problem areas that might arise during the first evaluation." District Exhibit No. 3. Devlin testified that she granted the requested relief of two new evaluations, to be completed before June 20, 1995. District Exhibit No. 4. Fitzgerald conducted his observation on May 19, 1995 and his post conference on May 26, 1995. District Exhibit No. 5. Ezen conducted his observation on June 5, 1995 and, per testimony, held his post conference on June 14, 1995. District Exhibit No. 14.

8. On June 19, 1995, Richards met with Devlin, Fitzgerald and Ezen to discuss their observations of Bronder. Richards then decided not to change her decision not to offer Bronder a contract for SY 1995-96 because she felt Bronder was teaching at a first year level after five years of experience.
9. On August 5, 1995, Bronder and grievance Chair Jay Tolman instituted a second grievance, again alleging a breach of Article XII, claiming that the remedies agreed to in the granting of her grievance of May 5, 1995 and Devlin's letter of May 12, 1995 were not followed. Bronder claimed, "There was not adequate time for the teacher to address any concerns of the administration. No one in the Administration worked with the teacher on an on going basis to improve her instruction. The teacher's professional reputation has been damaged." District Exhibit No. 6. On August 11, 1995 Fitzgerald wrote Tolman telling him that the grievance was denied. District Exhibit No. 7.
10. Bronder and Tolman took the second grievance to the Superintendent by letter of August 14, 1995, as attached to the District's complaint. Richards responded with a letter to Bronder on August 28, 1995 denying the grievance. Bronder and Tolman then appealed to the Kearsarge Regional School Board by letter of September 8, 1995. Richard Keller, chair of the board, responded by a letter to Bronder dated October 4, 1995, telling her that the board had unanimously denied her request for a hearing under the grievance procedure because her complaint was excluded from the procedure. Bronder and Tolman wrote

a rebuttal to Richards on October 14, 1995 after which the Association filed for arbitration with the American Arbitration Association on or about October 23, 1995. This complaint was then filed by the District on November 13, 1995.

#### DECISION AND ORDER

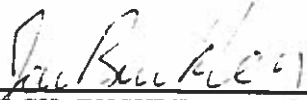
The issue of arbitrability presented to the PELRB concerns whether the District adhered to or followed the evaluation procedures agreed to by the parties as found in Article XII of the CBA and as agreed to when the first grievance, the May 5th grievance, was granted by Devlin. Finding No. 7. As structured, this was not the grievance of a teacher with less than three years of experience in the District who is not being re-employed. Notwithstanding the District's argument that this was the case, we disagree. Instead we see the issue as involving compliance with the evaluation procedures of the CBA. This falls squarely within the definition of a grievance as found in the first sentence of Article VI of the CBA. Thus, under the "positive assurance" test of Appeal of Westmoreland School Board, 132 N.H. 103 (1989), and Appeal of the City of Nashua School Board, 132 N.H. 699 (1990), there is a presumption of arbitrability "in the absence of any express provision excluding a particular grievance from arbitration."

The Association has the right to assure compliance with Article XII of the contract by utilizing the grievance procedure. To the extent it does so, this is neither violative of the CBA nor a ULP under RSA 273-A:5 II (f). This is not to say that either the Association or Bronder can thereafter proceed to process a specific grievance, yet to be filed, concerning Bronder's not being re-employed for the 1995-96 school year. That cause of action is specifically barred by the requisite "positive assurance," referenced in Finding No. 3, above, as the result of the particular exclusion found in Article VI, Section B (2) of the CBA.

We find no ULP to have been committed and dismiss the pending complaint. Having done so and based on the evidence presented during the hearing held on February 13, 1996, we note that there did not appear to be evidence of a violation of Article XII of the CBA based on the manner in which the arbitrability issues were presented to the PELRB. Since we have dismissed the District's complaint, the parties are free to proceed with the arbitration hearing scheduled for March 7, 1996.

So ordered.

Signed this 27th day of February, 1996.

  
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JACK BUCKLEY  
Alternate Chairman

By unanimous decision. Alternate Chairman Jack Buckley  
presiding. Members Richard Roulx and E. Vincent Hall present  
and voting.