



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

BERLIN SCHOOL BOARD	:	
	:	
Complainant	:	
	:	
v.	:	CASE NO. T-0201:12
	:	
DENYS DRAPER MANSFIELD AND THE	:	DECISION NO. 94-110
BERLIN EDUCATION ASSOCIATION,	:	
NEA-NEW HAMPSHIRE	:	
	:	
Respondent	:	

APPEARANCES

Representing Berlin School Board:
Bradley F. Kidder, Esq.

Representing Denys Draper Mansfield and Berlin Education Assoc.:
James Allmendinger, Esq.

Also appearing:

Brian Sullivan, NEA-New Hampshire
Denys Draper, NEA-New Hampshire
Tony Ulbach
Richard Stendle, Berlin School District
Frank Bruney
Beverly Dupont
Corinne Cascadden, Berlin School District
Marion Jeskey

BACKGROUND

The Berlin School Board (Board) filed unfair labor practice (ULP) charges against Denys Draper Mansfield (Mansfield) and the Berlin Education Association (Association) acting through its Uni-Serv Director, Brian Sullivan (Sullivan), on June 24, 1994 alleging a violation of RSA 273-A:5 II (f) relating to a breach of contract as the result of attempting to process non-grievable subject to binding arbitration. Respondents Mansfield and the Association filed their answer on July 8, 1994 after which this case was heard by the PELRB on September 20, 1994.

FINDINGS OF FACT

1. The Berlin School Board is a "public employer" of teachers and other employees of its school department within the meaning of RSA 273-A:1 X.
2. The Berlin Education Association, NEA-New Hampshire, is the duly certified bargaining agent for teachers employed by the Board.
3. Denys Draper Mansfield was employed as a music teacher by the Board for the 1991-92 school year. On March 24, 1992 Superintendent of Schools Richard A. Stendle wrote to her saying "pursuant to RSA 189:14 a, you have not been renominated for the school year 1992-93." Board Exhibit No. 1. In response to a request for a letter of reference received from Mansfield on January 3, 1994, on January 10, 1994 Stendle wrote a "To whom it may concern" general letter of reference which said, in pertinent part, "Her nonrenewal was a result of budget cuts in the Berlin schools, and, as a result, her position as music teacher was eliminated. If, in fact, the music program had not been the victim of financial inadequacies, Ms. Mansfield, in all probability, would have been re-employed." Board Exhibit Nos. 2 and 3. Stendle testified that he knew the music position held by Mansfield in school year 91-92 was being reestablished for school year 94-95 when he wrote the general letter of reference on January 10, 1994.
4. At all times pertinent to these proceedings, the Board and the Association were parties to a collective bargaining agreement (CBA), either in its original term from July 1, 1990 to June 30, 1992 or in an extension thereof. Article 16 of the CBA defines a "grievance" as

". . . a complaint by a teacher that there has been to him/her a personal loss or injury as a result of a violation or misapplication of any of the provisions of this agreement. . . ."

Specifically exempted from the grievance procedure are "complaint[s] by a probationary teacher which arise by reason of his not being re-employed." According to Article I, "Recognition," "the term 'teacher' as used in [this CBA] shall mean a full-time employee of the Berlin Public Schools under contract for the school year whose position required certification by the State Board of Education as a professional

engaged in teaching." Mansfield was such an employee during the 1991-92 school year.

5. Article 20 of the CBA deals with reduction in force. It reserves to the public employer "the right to decrease the number of members in the bargaining unit because of a decrease in the enrollment... a discontinuation or reduction of a program or adjustment in class sizes." Its recall provisions provide, "During a two year period after a lay-off due to a reduction in force, such members of the bargaining unit shall be renominated and reselected, in order of greatest seniority, to fill vacancies for which they are certified."
6. Sometime early in calendar year 1994 school authorities in Berlin decided to reestablish the elementary general music teaching position formerly held by Mansfield. Stendle said the position vacancy was posted on March 7, 1994. The vacancy was advertized in the "Berlin Daily Sun" on March 9, 1994. Association Exhibit No. 6.
7. Mansfield learned of the reestablishment of the position vacancy for school year 1994-95 in the grocery store. She then saw Stendle who told her she had no recall rights. Mansfield then sought assistance from Brian Sullivan, North Conway Uni-Serve Director. Sullivan called and inquired of Stendle. Stendle testified that he told Sullivan that Mansfield could apply as a candidate but that she had no recall rights. Sullivan then initiated and filed a grievance with Stendle on March 15, 1994. Board Exhibit No. 4.
8. On March 23, 1994, Stendle sent a memo to Sullivan saying, "Enclosed is my response for the grievance filed by Denys Mansfield." Board Exhibit No. 6. Attached was a "Notice of Withdrawal of Teacher Posting" dated March 23, 1994 for the position in question. Board Exhibit No. 7. At sometime after the filing of the grievance and before March 28, 1994, Mansfield learned of Stendle's response to her grievance which was that "there is no violation of the contract. The teacher was given a letter of non-renewal on 3-24-92 in accordance with RSA 189:1-a. In addition, the administration has removed the posting and we will not be accepting applications nor conducting interviews for this position in the immediate future." Mansfield rejected this response on March 28, 1994. Association Exhibit No. 7.

9. The Board issued a "Notice of Teacher Opening" for a "District-wide Choral/General Music Teacher" on March 29, 1994. Board Exhibit No. 9. Simultaneously, Stendle sent a letter to Sullivan on March 29, 1994 informing him that the new posting was occurring and that if Mansfield "still wishes to be considered for the position, she must reapply."
10. On April 14, 1994 Stendle wrote Sullivan telling him that he (Stendle) would not process the Mansfield grievance further because Article 16 of the CBA, cited in part in Finding No. 4 above, specifically exempts from the grievance procedure "any matter for which a specific method of review is prescribed and expressly set forth by law or any rule or regulation of the State Commissioner of Education" or "a complaint of a probationary teacher which arises by reason of his not being reemployed." Stendle concluded that Mansfield was non-renewed and, therefore, that the matter is not grievable. Board Exhibit No. 11. Sullivan disagreed and, on May 16, 1994, sought a list of arbitrators from the American Arbitration Association. Association Exhibit No. 8.
11. At no time between her notification of not being renominated for school year 1992-93 on March 26, 1992 (Board Exhibit No. 1) and her seeking to exercise recall rights on or about March 7, 1994 was Mansfield advised by school officials that her non-renomination was caused by anything other than the elimination of her music teacher position. Notwithstanding this and contrary to Association Exhibit Nos. 1 and 3 which they authored, elementary principals Beverly DuPont and Connie Cascadden testified that they recommended Mansfield's non-renewal for performance reasons. Stendle testified that he remembered the negative recommendations and concurred. Conversely and in addition to Stendle's general letter of reference (Board Exhibit No. 3), Mansfield received an "enthusiastic" letter of recommendation from Principal Bruce MacKay on June 5, 1992. Association Exhibit No. 5. All quantitative ratings on her three evaluative documents conducted on November 21, 1991, January 13, 1992 and March 18, 1992, respectively, were rated at maximum, i.e., satisfactory. Association Exhibit Nos. 1, 2 and 3.
12. During the 1991-92 school year Mansfield taught

the elementary general music curriculum, led the junior and senior choral groups, prepared the music portion of a special program for the mayor, city council members, school board members and parents - at the request of DuPont to help save the music and art curricular in the school system, and did the Christmas pageant. She received her notice of non-renomination from then Assistant Superintendent Frank Bruney who was a signatory to that document on March 26, 1992. Board Exhibit No. 1. Mansfield testified that Bruney told her that this and other notices were being delivered to teachers, as required, in March in the event that budget differences were not resolved and her position was not funded for 1992-93. She added that he said this had happened a number of times before in Berlin. No reference to her poor or inadequate performance was made by Bruney. Bruney testified that he delivered the non-renomination letter to Mansfield, that he could not recall discussing any reasons for non-renomination with her, and that neither reduction in force nor performance issues were discussed.

DECISION AND ORDER

This case is complicated by the Board's arguing that it is a non-renewal case under RSA 189:14-a while the Association and Mansfield say that it is a recall case under Article 20 of the CBA. In accordance with the following analysis, we find it is the latter.

First, Mansfield was a "teacher" within the coverage of the contract as defined in Article I thereof and referenced in our Finding No. 4. This coupled with the provisions of Article 20 extends recall rights "during a two year period after a layoff due to a reduction in force" to "teachers" covered by the CBA. There is no restriction in Article I that "teachers" means only "tenured" teachers within the meaning and intent of RSA 189:14-a; therefore, we must read the CBA for what it says.

Second, Appeal of Westmoreland, 132 NH 103 at 106 (1989), indicates that there must be "positive assurance that the CBA is not susceptible of an interpretation that covers the dispute." Exactly the opposite is true here. The parties specifically negotiated language about reductions in force and accorded certain rights for a period of two years following a RIF-induced layoff. Moreover, the definition of grievance, as found in Finding No. 4 above, squarely fits the situation where a teacher -- presumably as defined by Article 1 -- may complain about a "personal loss" resulting from the "misapplication of any of the provisions" of the

CBA. RIF is not a specific exclusion enumerated in Article 16. We conclude the parties intended it to be subject to the grievance procedure.

Third, there is a great difference in the Board's perception of this as a probationary non-renomination case versus the Association's claim that it is a matter of contractual entitlement under Article 20. While we certainly do not find that the Board could not have non-renewed Mansfield under the provisions of RSA 189:14-a in 1992, the contemporaneous documents and behavior indicate that what happened was not a non-renewal but a RIF. Mansfield testified as to her understanding that she was not renominated due to budget uncertainty and position elimination, a fact that was confirmed as recently as January 10, 1994 in Stendle's general letter of reference. Board Exhibit No. 3. It was not until Mansfield sought to exercise her rights under Article 20 that school officials then took the position that her non-renomination was for performance based reasons and was not a reduction in force. We cannot accept this rationale on the part of the Board for two reasons. First, the credibility of the contemporaneous documents (inclusive of Association Exhibit Nos. 1, 2, 3, and 5 and Board Exhibit No. 3) will not permit it. Second, those documents and the contemporaneous behavior surrounding them effectively estop the Board from claiming that what had all the outward appearances of a reduction in force in 1992 was, two years later, really a performance based non-renewal of a probationary teacher. The record simply will not support such a finding.

Fourth and finally, we cannot lose sight of what this case is and how it comes to us. It is a complaint of unfair labor practice filed by the Board because the Association is attempting to process a non-grievable subject to binding arbitration. We find to the contrary; there is and was a clear intent to make recall rights after RIF-induced layoffs subject to the grievance procedure of the CBA. Accordingly, the complaint of unfair labor practice is DISMISSED and the parties are directed to proceed with grievance arbitration as previously scheduled.

So ordered.

Signed this 30th day of NOVEMBER, 1994.


 EDWARD J. HASELTINE
 Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding.
 Members Frances LeFavour and E. Vincent Hall present and voting.