State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

KEARSARGE REGIONAL SCHOOL DISTRICT Complainant v. KEARSARGE REGIONAL EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE Respondent	CASE NO. T-0238:13 DECISION NO. 95-57

APPEARANCES

Representing Kearsarge Regional School District:

Gary W. Wulf

Representing Kearsarge Regional Education Association:

Wally Cumings, UniServ Director

Also appearing:

Mary E. Devlin, Kearsarge School District
Jean Richards, Superintendent, Kearsarge School District
Jay Tolman, NEA-New Hampshire

BACKGROUND

The Kearsarge Regional School District (District) filed unfair labor practice (ULP) charges against the Kearsarge Regional Education Association (Association) on April 7, 1995 alleging a violation of RSA 273-A:5 II (d) relating to a refusal to bargain by attempting to grieve a non-grievable subject. The Association filed its answer on April 18, 1995 after which this matter was heard by the PELRB on May 16, 1995.

FINDINGS OF FACT

1. The Kearsarge Regional School District (District) is a "public employer" within the meaning of

RSA 273-A:1 X.

2. The Kearsarge Regional Education Association, NEA New Hampshire (Association) is the duly certified bargaining agent for teachers employed by the District.

3. The District and the Association are parties to a collective bargaining agreement (CBA) for the period July 1, 1993 through June 30, 1995. Article II (D) of that agreement says, "It is agreed that terms and conditions of employment shall not be changed or implemented without prior negotiations." Article VI (a) of the contract says, "A grievance means an alleged violation, misinterpretation or misapplication of any provision of this Agreement."

4. Mid-term through the 1994-95 school year, the District made certain unilateral changes in the work schedule of unified arts (art, music, physical education, industrial arts and home economics) teachers. According to the middle school principal, Mary Devlin, these changes caused five (5) unified arts teachers to teach one additional eighth grade class per day for four out of six days. (District Exhibit No. 2). Superintendent Jean Richards testified that these changes were based on needs for learning and safety of students and, simultaneously, addressed parental concerns that some students had too many or too large study halls on certain days. The District claims it had the flexibility and authority to make these changes under authority conferred in RSA 273-A:1 XI and in Section 3 of individual teacher contracts (District Exhibit No. 1). Section 3 of individual contracts provides, "The right is reserved to the District to make such changes in the Teacher's assignment as unforeseen conditions may require for the best interest of the school system...."

5. The unilateral changes referenced in Finding No. 4 were announced prior to the commencement of the spring semester in January of 1995. According to testimony from Superintendent Jean Richards, they were then implemented on March 6, 1995. They were not previously negotiated. Those changes did not extend teachers' work days, i.e., the times they reported to an left from their place of employment. Conversely, the did, in some instances, increase the time the teacher spent in instructional duties and/or decrease the amount of preparation time the teacher had before the change. Unified arts teachers went from 5.3 instructional periods and 1.7 preparation periods to 6 instructional periods and 1 preparation period.

(District Exhibit No. 3 paragraph 7). The Association relies on Hudson Federation of Teachers, Decision No. 86-64 (October 14, 1986) to support its position on the issue of unilateral changes. In that case the PELRB found that a unilateral change from a 6 period day to a 7 period day, without lengthening the overall length of the work day, was a ULP in violation of RSA 273-A:5 1 (e). Also cited was Board of Trustees, New Hampshire State Prison, 118 NH 466 (1978).

6. The complained of changes prompted the filing of a class grievance by six unified arts teachers on February 20, 1995 in the form of a letter to Principal Devlin. It claimed that there was a unilateral change in work obligations resulting in their teaching 36 out of 42 classes instead of the prior practice, as recently as the first half of the school year, of teaching 32 of 42 classes. Article II (D) was cited as having been violated. (Joint Exhibit No. 2). Principal Devlin denied the grievance on February 24, 1995. Superintendent Richards then denied the grievance at her level on March 16, 1995. Both Devlin and Richards claimed the change to have been a matter of "administrative prerogative." Likewise, G. Richard Keller, Chair of the School Board, denied the grievance on March 31, 1995 at that level. (Joint Exhibit No. 2). The Association filed a demand for arbitration dated April 13, 1995. (Joint Exhibit No. 3).

7. The letter from Superintendent Richards to Robert Ragazzo on March 16, 1995 denying the grievance noted "the procedure we use relative to the assignments has been a topic of negotiations. That matter will be settled in factfinding scheduled for May 2, 1995." In that letter Richards articulated the District's position that "assignments, within that time you are paid for, do not increase teacher workload" and that "teachers, as salaried personnel, are compensated to work throughout the day with students."

8. The impact of the complained of changes caused the unified arts teachers, collectively, to teach more students in more instructional periods and to prepare, distribute and evaluate more student work product while suffering a loss in preparation time for this increased student load.

DECISION AND ORDER

The District would have us find that the Association committed an unfair labor practice by filing the above grievance last

February and would have us enjoin the further processing of that claim. It relies on statutory authority in RSA 273-A:1 XI, language in individual teacher contracts and Appeal of State, 138 NH 716 (1994).

Appeal of State, 138 NH 716 at 722 (1994), sets forth a three step test to determine if a given subject is negotiable: (1) not reserved to the exclusive managerial policy of the public employer, (2) primarily affecting the terms and conditions of employment rather than matters of broad managerial policy, and (3) non-interference with public control of governmental functions under RSA 273-A:1 XI. When we look to the complained of schedule changes, they appear to pass these tests, i.e. there is no challenge to the public employer's setting of "hours of operation," only to the "hours of work" during those of operation. The offering of the service, as determined by the District, is not in peril. Second, the change in contact, working or preparation hours is more akin to terms and conditions of employment (e.g. wages) than to a determination of a particular matter of broad managerial policy. Third, there is no shown or alleged interference with public control of governmental functions. The affected employees continue to work and to provide the level of educational services determined by the public employer. By the pending grievance they seek only to determine if the unilateral changes in workload are violative of their CBA.

As for the language in individual teacher contracts, those agreements are between individual teachers and the District. The CBA, on the other hand, is between the Association and the District. It is the CBA, not the individual teacher contracts, which contains the grievance procedure. That procedure, then, cannot be blocked by individual teacher contracts signed months or years after the execution of the CBA. The right or obligation to process grievances belongs to the parties to the CBA.

Finally, the parties obviously have been negotiating assignments, as per the Richards letter in Finding No. 7. They were prepared to address that topic in fact finding. One side cannot now unilaterally claim an unwillingness to continue to talk about those assignment issues merely because a grievance has been filed or an unwillingness to process that grievance.

Having arrived at this point in our analysis, we look to the issue of whether the grievance process should be terminated by the board. New Hampshire has adopted the "positive assurance" test for such determinations. In Westmoreland School District, 132 NH 103 (1989), the test was that there must be "positive assurance" that the CBA is not susceptible of being read to cover the dispute. Likewise, in Appeal of the City of Nashua, 132 NH 699 (1990), courts will not set aside an order to arbitrate unless there is "positive assurance" that the arbitration clause cannot be read to cover the dispute. It is clear that Article II (D) was intended to

stabilize terms and conditions of employment absent a negotiated agreement to change them. Also, Article VII (A) defines a grievance (Finding No. 3) in terms which conform completely with the contents of the February 20, 1995 letter to Principal Devlin. Thus, we conclude not only that the Association did not commit a ULP by bringing this grievance but also that the parties should continue with the processing of that grievance.

Accordingly, we direct that the District's charge of unfair labor practice be DISMISSED, that the parties attempt to negotiate their differences on the issue of the complained of unilateral schedule changes for a period of sixty (60) days from the date of this decision, and that, if these differences are not resolved through negotiations in the foregoing sixty day period, the parties shall then continue with the processing of the instant grievance through the arbitration process as requested April 13, 1995 (Joint Exhibit No. 3).

So ordered.

Signed this 29th day of JUNE, 1995.

EDWARD J. HASELTINE
Chairman

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