State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Amherst School District Complainant v. Amherst Education Association, NEA-New Hampshire Respondent	*	Case No. T-0299-10 Decision No. 2002-150

APPEARANCES

Representing Amherst School District:

Daniel Schwarz, Esq.

Representing Amherst Education Association:

Steven Sacks, Esq.

Also appearing:

Richard Lalley, Former Superintendent Amherst School District
Philip Pratt, UniServ Director, Amherst Education Assoc.
Peter Desnoyers, Amherst Education Assoc.
Pat Dubreuil, Amherst Education Assoc.
Mike Ananis, Superintendent Amherst School District
Jim O'Mara, Amherst School Board

BACKGROUND

The Amherst School District (District) filed unfair labor practice (ULP) charges on August 12, 2002 against the Amherst Education Association, NEA-New Hampshire (Association) alleging violations of RSA 273-A:5 II (a), (d) and (f) resulting from interference with the public

employer, refusal to negotiate and breach of contract by attempting to compel the grievance processing and arbitration of an issue not covered by the collective bargaining agreement (CBA), namely, to compel referral to and processing by the Teacher Evaluation and Assistance Program (TEAP). The Association filed its answer on August 27, 2002. On or about September 10, 2002, the District filed a motion seeking an interim cease and desist order to stay arbitration proceedings which had already been sought by the Association through the American Arbitration Association (AAA). The Association filed its objections to that motion request on September 25, 2002. On September 30, 2002, the parties were sent a letter from the PELRB Executive Director saying that "based on the information submitted, interim relief will not be granted." In the meantime, representatives of the parties attended a pre-hearing conference in this matter on September 18, 2002, the results of which are memorialized in Decision No. 2002-109 dated September 19, 2002. On October 11, 2002, the parties, through counsel, filed a stipulation of facts and request for an evidentiary hearing on arbitrability, set to have been held on October 16, 2002 but subsequently postponed to and heard by the PELRB on December 3, 2002. At the conclusion of those proceedings, the parties agreed to file post-hearing briefs with the PELRB on or before December 17, 2002, both of which were timely filed.

FINDINGS OF FACT

1. The Amherst School District, by virtue of its operation of the Amherst School Department and direction of the employees therein, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Amherst Education Association, NEA-New Hampshire, is the 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, 2001 to June 30, 2004. Pertinent among its provisions are:

   Article 1.2, in part, provides "existing policies, rules, regulations, practices and procedures which are consistent with this Agreement are not modified."

   Article 9.1: Methods of evaluation will be refined through ideas and recommendations jointly submitted to the Board by the teachers, building administrators and Superintendent. The Board shall have sole responsibility to determine the means and methods of teacher evaluation.

   Article 17.2 defines "grievance" as "an alleged violation, misinterpretation or misapplication of any term(s) of the Agreement."

   Article 17.5 (d) provides for binding grievance arbitration but places certain limitations on the arbitrator, namely, "The best efforts of the arbitrator shall be used to arbitrate the grievance, but shall have no power or au-

thority to do other than interpret and apply the provisions of this Agreement. The arbitrator shall have no power to add to, or subtract from, alter or modify any of the said provisions."

4. In addition to the CBA, the parties have jointly formulated, although Association negotiator Dubreuil used the term "negotiated," a parallel document to the CBA called the "Teachers Evaluation and Assistance Plan" or "TEAP." (Association Exhibit No. 1.) In the mid-1980's, the Association sought to negotiate the terms and methodology of the Teacher evaluation process into the CBA. This effort was resisted by the District with the parties ultimately compromising on the creation of a separate document, the TEAP, outside the CBA, which detailed the scope, phases, philosophy and progression of evaluation and assistance measures, as is exemplified by the Table of Contents to the TEAP.[1] There are multiple instances where the TEAP has quoted contract language pertaining to evaluations found at Article 9 of the CBA, e.g. sections 9.2, 9.3, 9.4, 9.5, 9.6 and 9.7. The converse, however, is not true; the CBA does not reference the TEAP.

5. Patrick Dubreuil has been a faculty member in Amherst since 1983 and has served on all negotiating committees from the mid 1980's to the present contract (Joint Exhibit No. 1). He stated that the TEAP joint committee consisting of teachers, school board members and administrators dated as far back as 1986, was created because teachers "wanted to be assured how they will be evaluated" and that the TEAP was "put together to be sure administrators used the same methods, same time frames" in evaluating teachers. He described Article 9 of the CBA as being the evaluation policy while the TEAP was the "implementation plan." Dubreuil said that language was "bargained into the TEAP" and that he had been assured it had the "full force and effect" of the CBA. Thus, he concluded that issues under the TEAP could be grieved and arbitrated under the CBA. Likewise, he said that Rick Lalley, superintendent from 1984-2000, indicated teachers would be treated fairly under TEAP. According to the copy of the TEAP submitted as Association Exhibit No. 1, it was last amended in 1990.

6. Richard Lalley, Amherst superintendent from 1984 to 2000, had no recollection of ever bargaining that the TEAP would be subject to the grievance and arbitration procedures of the CBA or that he had made such a representation to Dubreuil. On the other hand, he did recall how the Association originally wanted the evaluation procedures covered by and put in the CBA and how the joint labor-management committee crafted and subsequently reviewed the TEAP every two years. It was his testimony that the parties agreed that the specifics and procedures associated with evaluations would be covered by the TEAP, with it being the "implementation plan." By way of example, he explained that the "remedia-

[1] The TEAP was created by a joint labor –management committee consisting of teachers, administrators and board members and, according to testimony from former Superintendent Lalley, is reviewed every other year by a similarly constituted group which considers if any updates are required.

tion plan" was a creature of the TEAP, not the CBA. Likewise, Lalley characterized the TEAP as a policy which, unlike the bi-lateral CBA, could be unilaterally passed, implemented or modified by the school board. Lalley testified that he had no expectation that TEAP disputes could be arbitrated. If challenged, TEAP disputes would, in his perception, follow an appeal trail from the superintendent, to the school board, to the school board as a hearing entity, and, if there were a statutory entitlement thereto, to further and final review by the N.H. Department of Education. This sequence was hypothetical inasmuch as Lalley explained there were no appeals of process under the TEAP during his tenure as superintendent.[2]

7. The triggering event for this ULP was the District's notification to Michele Deschenes, a non-tenured teacher, on or about April 11, 2002 that she would not be renominated for the 2002-03 school year. On or about May 16, 2002, the Association, on behalf of Deschenes, filed a Level A grievance because Deschenes was "not afforded an opportunity to use the TEAP school board policy [found in CBA] (Article 1.2, 9.1) for remediation." The grievance was then denied by current Superintendent Michael Annis on May 28, 2002, appealed to the Amherst School Board on May 28, 2002, denied by the Amherst School Board on June 20, 2002, and arbitration requested of the AAA on June 28, 2002 by the Association. The case is now before the PELRB on the issue of whether the Association may properly use the grievance arbitration provisions of the CBA for the adjudication of the Deschenes claim.

DECISION AND ORDER

The history of the parties' relationship to the TEAP is insightful in this case. Initially they negotiated or formulated, as the case may be, the provisions of the TEAP consciously outside the provisions of the CBA. The two documents have had separate existences since then. While the CBA has been quoted and referenced in the TEAP, the converse is not true. Likewise, the TEAP has never been incorporated into the CBA by reference. We do not find the language of CBA Article 9.1 strong enough or explicit enough to make this the case. To the contrary, the language of Article 17.2, cited in Finding No. 3, suggests to us that the CBA excludes from the definition of grievance those acts complained of unless they assert a "violation, misinterpretation or misapplication of any term(s) of the [collective bargaining] Agreement."

The parties' experience with the TEAP has apparently been both positive and effective. It has been invoked by directive of the superintendent to principals (Association Exhibit No. 4) yet has never reached a level of controversy beyond the superintendent. Thus, this marks a case of first impression where a contracting party has sought to apply contract grievance and arbitration provisions to the use and implementation of the TEAP. Testimony presented to us suggested that the Association was assured that the TEAP had the "full force and effect" of the CBA. While it is commendable that the parties have lived successfully under the TEAP with all

[2] This being the case, there is no evidence of past practice, formed or accepted, with respect to the arbitrability of TEAP disputes.

disputes since its inception having been settled at the superintendent's level or lower, we cannot vest the "full force and effect" utterance of the administration to be the equivalent of an agreement to arbitrate TEAP disputes under the CBA. Testimony from former Supt. Lalley was credible that no such meeting of the minds occurred. The Association's expectations of such a route of recourse does not reach the level of being a meeting of the minds.

It is axiomatic that an essential ingredient in any valid arbitration clause is the parties' agreement to arbitrate. More than sixteen years ago in another case involving an issue of arbitrability, the New Hampshire Supreme Court observed that "the extent of an arbitrator's jurisdiction depends upon the extent of the parties' agreement to arbitrate. Nashua School District #42 v. Murray, 128 N.H. 417 at 420 (1986) citing to Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). The facts presented to us suggest that such an agreement is lacking here.

By 1986, the U.S. Supreme Court reiterated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit" in AT & T Technologies v. Communications Workers of America, 475 U.S. 643 (1986). Three years later the New Hampshire relied on both Warrior and Gulf and AT & T Technologies when it examined the "positive assurance" test and the implicit presumption of arbitrability which accompanies that test. "In the absence of any express prevision excluding a particular grievance from arbitration,...only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Appeal of Westmoreland School Board, 132 N.H. 103 at 106 (1989). We believe the lack of a mutual agreement to arbitrate TEAP disputes coupled with the parties' history as to the genesis and operation of that plan provide, with the requisite positive assurance, express, unequivocal and convincing evidence that there has never been a contractual obligation to process and arbitrate TEAP disputes under the grievance provisions of the CBA.

We find the Association's persistence in pursuing the TEAP dispute to arbitration to be beyond the scope of the CBA and a violation thereof as provided under RSA 273-A:5 II (f) and direct that they cease and desist therefrom forthwith.

So ordered.

Signed this 23rd day of December, 2002.

JACK BUCKLEY
Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.