



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Bow School District *

Complainant *

v. *

Bow Education Association, NEA-NH *

Respondent *

Bow Education Association, NEA-NH *

Petitioner *

v. *

Bow School District *

Respondent *

Case No's. T-0265-14
T-0265-15

Decision No. 2003-060

APPEARANCES

Representing Bow School District

Thomas Barry, Esquire

Representing Bow Education Association

Steven Sacks, Esquire

Also Appearing:

Elaine Meilcarz	BEA	Diane Gerhardt	BEA
Patricia Bechard	BEA	Anne P. Baier	District
Michele A. Waldron	District	Ralph Minichiello	Superintendent

Bob Wester	District	Paula V. Bailey	BEA
Wendy Steff	BEA	James Vulgamore	BEA
Debbie Gibbens	District	Donna Girard	District
Kathryn Ford	District	Wally Cumings	NEA-NH
Betsy Miller	District		

BACKGROUND

The Bow School District ("District") filed unfair labor practice (ULP) charges on January 29, 2003 against the Bow Education Association, NEA-New Hampshire ("Association") alleging violations of RSA 273-A:5 II (f) for breach of contract resulting from lack of standing to bring a grievance and a wrongful demand to arbitrate. The Bow Education Association filed its answer on February 10, 2003 followed by its own ULP filed on February 19, 2003 against the District alleging violations of RSA 273-A:5 I (a) (e) (g) and (h) for breach of contract, refusal to bargain and coercion of employees resulting from not processing grievances at the superintendent's and school board's level as required by the CBA. The District filed its answer to these charges on March 6, 2003.

The parties, both represented by counsel, participated in a pre-hearing conference as memorialized in Decision No. 2003-023 dated March 21, 2003. This document contained a description of nine (9) joint exhibits and nine (9) stipulations of facts as well as a PELRB hearing date of May 8, 2003. On April 21, 2003, the District filed a motion for summary judgment, a memo supporting that motion, three affidavits and exhibits denominated A through G. The Association filed its objections thereto on May 2, 2003. On April 25, 2003, the District also filed a Motion in Limine relative to certain notes of a negotiations meeting. The Association filed its objections thereto on May 2, 2003. Thereafter, this case proceeded to hearing before the PELRB on May 8, 2003 and concluded on that date with the parties agreeing to file post-hearing memoranda on or before May 22, 2003, subsequently extended to close of business on May 27, 2003. Those memoranda were duly filed on May 27, 2003 after which the record was closed.

FINDINGS OF FACT

1. The Bow School District, through the Bow School Board, employs teachers and other professional personnel in the operation of the Bow School system (SAU 67) and thus is a "public employer" within the meaning of RSA 273-A: I, X.
2. The Bow Education Association is the certified bargaining agent for:

"all full-time and half-time teachers (half-time teachers are defined as only those teachers working at least one-half of the day for the entire school year or at least one-half of the days of the school year), including art, music, physical

education, media generalist, guidance counselor, speech therapist, health educator and nurse¹ employed in that capacity; excluding the superintendent, assistant superintendent, principals, assistant principals, administrative assistant and all other administrative personnel, all clerical, custodial and lunch staff, part-time employees, teachers aides and all other employees of the Bow School District."²

3. The District and the Association are parties to a collective bargaining agreement for the period July 1, 2000 through June 30, 2003. That agreement addresses the issues of management rights, teacher evaluations, and grievance procedure as follows:

MANAGEMENT CLAUSE

Section 1.

The Association agrees that, except as specifically and expressly abridged or limited by the provisions of this Agreement or any supplementary agreement that may hereafter be made, all of the rights, powers and authority of the Bow School District and its employees in all its phases and details shall be retained by and are vested solely, exclusively and without limitation in the Board and its agents and the exercise of any such right or function shall not be subject to the grievance or arbitration provisions of this Agreement.

Section 2.

The parties agree that neither the Board nor the Superintendent may lawfully delegate powers, discretion and authorities which by law are vested in them.

TEACHER EVALUATION

Section 1.

All monitoring or observation of the work performance of a teacher will be conducted openly and with full knowledge of the teacher. Persons employed as of July 1, 1994 of this agreement shall not be subject to unscheduled observations, all others shall be subject to alternating scheduled and unscheduled observations.

Section 2.

Teachers will be given a copy of any report prepared by their superiors relating to monitoring, observation or written complaint relating to that

¹ Nurses were added by court decision in 1991. See Appeal of Bow School District, 134 N.H. 64 (1991), preceded by PELRB Decision No. 1989-056.

² The recitation of the bargaining unit composition comports with the certification document on file at PELRB Decision No. 1989-056 dated August 21, 1989. It has not been updated to be consistent with the unit described in the recognition clause (Article 1) of the CBA.

teacher. No such report shall be submitted to Central Administration, placed in the teacher's file or otherwise acted upon without a prior conference with the teacher, who may comment on the contents of such report on a separate document, which comments shall be placed in the teacher's file. There shall be no obligation on the part of the Administration or Board to respond to the teacher's comments and if no response is made, it shall not be deemed or construed to be an acceptance of or agreement with the teacher's comments. A teacher shall sign a separate statement that the teacher has been given any such report referred to in the first sentence of this Section 2. If a teacher refuses to sign such separate statement, that refusal shall be noted on the statement and the President of the Association shall be advised of such refusal. Any such report or document referred to in the first two sentences of this Section 2. and the statement relating to the refusal will then be submitted to Central Administration, placed in the teacher's file or otherwise acted upon.

GRIEVANCE PROCEDURE

A. For the Purpose of this contract, a "grievance" is defined as a complaint or claim by a teacher in the bargaining unit which arises under and during the term of this Agreement. Grievances are limited to matters of interpretation and/or application of specific provisions of this Agreement. The following procedure shall be utilized in the handling of a grievance:

1. (a) A teacher with a grievance shall first discuss the grievance with his immediate supervisor in an attempt to resolve the matter informally at that level.
- (b) If, as a result of that discussion, the matter is not resolved to the satisfaction of the teacher within five (5) school days after the discussion with the immediate supervisor, the teacher shall present the grievance in writing to the principal specifying:
 - (1) nature of the grievance, (2) the particular section of the agreement by page and heading that is in question, and (3) the remedy requested. A grievance must be reduced to writing in the form set forth above and presented to the principal within thirty (30) school days of the date of the event which gives rise to the alleged grievance or that specific grievance shall be deemed waived.

Also, the aggrieved teacher must present the written grievance to the principal within ten (10) school days after the discussion with the teacher's immediate supervisor or that specific grievance shall be deemed waived.

2. If the teacher is not satisfied with the disposition of the grievance by the principal or if no decision has been rendered within five (5) school days after the written presentation of the grievance, the teacher may file the grievance in writing with the Association within five (5) school days after the principal's decision or within ten (10) school days after the grievance was presented to the principal, whichever is sooner. Within five (5) school days after receiving the written grievance, the Association may refer it to the Superintendent of Schools. Within ten (10) school days after receipt of the written grievance by the Superintendent, the Superintendent will meet with the aggrieved teacher in an effort to resolve the grievance. If the Association does not present the written grievance to the Superintendent within fifteen (15) school days after written presentation to the principal, that specific grievance shall be deemed waived.

3. If the aggrieved teacher is not satisfied with the disposition of that specific grievance by the Superintendent or if no decision has been rendered within fifteen (15) school days after the aggrieved teacher has first met with the Superintendent, the Association may refer the grievance to the Board. Within thirty (30) school days after receiving the written grievance, the Board will meet with the aggrieved teacher for the purpose of attempting to resolve the grievance. If the Association does not present the written grievance to the Board within fifteen (15) school days after the meeting with the Superintendent, that specific grievance will be deemed waived.

4. If the Association is not satisfied with the disposition of the grievance by the Board or if no decision has been rendered by the Board within ten (10) school days after the Association's meeting with the Board, the Association may submit a written request to the American Arbitration Association to appoint an arbitrator to resolve said grievance in accordance with the rules and regulations of the American Arbitration Association. If the Association fails to submit such written request for the appointment of an arbitrator to the American Arbitration Association

within fifteen (15) school days after the Board's written decision, that specific grievance shall be deemed waived.

B. The decision of the arbitrator shall be binding upon both parties. However, both parties shall have a right to appeal to the New Hampshire Superior Court under the provisions of New Hampshire RSA chapter 542, as amended. It is hereby specifically agreed by the Board and the Association that this contract and grievance procedure clause are subject to the provisions of New Hampshire RSA Chapter 542, as amended.

4. Already of record by virtue of the parties' stipulations during the pre-hearing conference (Decision No. 2003-023) are the following nine items:
 1. The Bow Education Association ("Association") and the Bow School District ("District") entered into a Collective Bargaining Agreement ("CBA") for the period of July 1, 2000 through June 30, 2003.
 2. On October 2, 2002 Deborah Gibbens, Bow Elementary School Principal, distributed an e-mail dated October 2, 2002.
 3. On October 29, 2002 Principal Gibbens denied each grievance.
 4. On November 8, 2002, District Superintendent Ralph J. Minichiello received a grievance and request for hearing from three teachers employed by the District: Patricia Bechard, Diane Gerhardt and Elaine Meilcarz.
 5. Superintendent Minichiello responded to the grievances by letter dated November 18, 2002.
 6. On November 26, 2002 the Association referred the grievance to the Bow School Board.
 7. The Bow School Board voted to deny the teachers['] requested hearings.
 8. On January 10, 2003 the Association filed a demand for arbitration with the American Arbitration Association on the consolidated evaluation grievances of the three teachers.
 9. Diane Gerhardt was observed on November 15, 2002; Patricia Bechard was observed on November 19, 2002; and Elaine Meilcarz was observed on December 6, 2002.

5. The Gibbens e-mail of October 2, 2002 (Finding No. 4 Item 2) read, "It's time again. Donna [Girard] and I will be starting observations. To start the year, we will be observing teachers together. Remember, the goal of observations is to support you in your teaching." This prompted three written grievances, all dated October 21, 2002, from teachers Patti Bechard, Diane Gerhardt and Elaine Meilcarz all of which read the same, namely, "The random use of multiple administrators sitting in on a teacher's observation violates past practice." This caused Gibbens, the school principal, to meet with the three grievants on October 29, 2002 to discuss their grievances. Upon learning that none of these three grievants had been observed by multiple administrators (their observations did not occur until November 19, 2002, November 15, 2002 and December 6, 2002, respectively in the order their names appear above, per Exhibit No. 9 and Finding No. 4, Item 9), Gibbens denied their grievances, also on October 29, 2002, because none was an "aggrieved teacher." Exhibit No. 4.
6. After Gibbens denied the grievances, the three grievants appealed to Superintendent Ralph Minichiello on November 5, 2002, with the language of the grievances remaining unchanged. Exhibit No. 5 and Finding No. 4, Items 4 and 5. On November 18, 2002, Minichiello responded by letter to each of the three grievants, saying in pertinent part, "It is my understanding that you are grieving something that did not happen to you. Therefore, I am denying your request for a hearing as you had no standing. You cannot grieve something that did not happen to you." Exhibit No. 6.
7. Ralph Minichiello has been superintendent in Bow for 11 years. He confirmed that the three grievants were not observed until November 15, 19 and December 6. When the grievants were observed, they were not observed by multiple administrators. Two teachers, not among the grievants, were observed by multiple administrators, however. One of these was Lisa White who grieved being observed by two administrators. Minichiello met with her and the school board held a hearing on her grievance. Minichiello reports that that grievance is awaiting an arbitration hearing. The other teacher (Blough) who was observed by multiple administrators did not file a grievance. During his testimony, Minichiello offered his opinion that "past practice" is not grievable under the definition of "grievance" in the contract (Article XIX), that the evaluation clause (Article XIII) contemplated the use of multiple observers by the use of the plural in "will be given a copy of any report prepared by their supervisors..." and that the use of multiple observers is protected by the management rights (Article IV) clause of the contract.
8. After the grievances were denied by Minichiello, the three grievants appealed to the school board, to the attention of its chairman, Robert Wester, using the same language which appeared in their original grievance documents. This occurred on November 26, 2002. Exhibit No. 7. By textually identical letters to each of the three grievants dated December 9, 2002, Wester denied their

grievances saying, in part, “[Y]ou do not have a grievance under Article XIX of the collective bargaining agreement and therefore, have no standing to file the grievance.” Exhibit No. 8. In his testimony, Wester distinguished these three grievances from the Lisa White case where there were admittedly multiple observers and where White was given a hearing before the school board. On cross-examination, Wester acknowledged that Article XIX, A. 3 of the CBA provides that “within thirty school days after receiving the written grievance, the Board will meet with the aggrieved teacher for the purpose of attempting to resolve the grievance.” Noting that such a hearing was not accorded to the three grievants here, Wester distinguished the cases by saying that the White case had the factual background while these three grievants lacked standing to pursue their grievances.

9. On January 10, 2003, the Association filed a demand for arbitration with the American Arbitration Association on the consolidated grievances of the three grievants herein. Finding No. 4, Item 8. This was followed by the filing of the first of the two ULP’s under consideration herein by the District on January 29, 2003.
10. Donna Girard, currently the Assistant Principal, testified about how she accompanied Gibbens on two observations, those of White and Blough. Girard also did the Gerhardt and Meilcarz observations, but by herself. Exhibit No. 9. In the cases of the White and Blough observations, Girard took notes of what Gibbens did, “debriefed” with Gibbens after Gibbens had concluded and signed her written evaluation of the two teachers, and shredded her notes after the process was completed. She stated that her notes were not used in formulating the observation reports for either White or Blough and that Gibbens, when she met with the three grievants on October 29, 2002, told them that the joint observations to which she made reference in her e-mail of October 2, 2002 were for training purposes because Girard had not previously done teacher observations.

DECISION AND ORDER

Preliminarily, we look to the District’s Motion for Summary Judgment which is predicated on Bechard, Gerhardt and Meilcarz, identified in Finding No. 4, Item 4, not having a reason to complain about being observed by multiple administrators which, consequently, denies them “standing” to pursue a grievance for something which has not happened, or did not happen, to them.

The District relies on Appeal of Berlin Board of Education, 120 N.H. 226, 228 (1980) in raising its issue of standing. District’s Supplemental Memorandum, p. 3. In the broader sense, Appeal of Berlin Board of Education, at page 228, says that, “The question whether...the school board had committed an unfair labor practice turns on whether [the grievants] had standing to bring the grievance. If [they] did not, the school board had no obligation or authority to hear the grievances.” The Association argues that the situation

here is distinguishable from Berlin because the contract language in the Bow CBA is far less restrictive when defining a grievance, i.e., "a complaint or claim by a teacher in the bargaining unit which arises under and during the term of this agreement." Finding No. 3, "Grievance Procedure," above, and Association's Objection to Motion for Summary Judgment, p. 7. Thus, the Association claims the "complaint or claim" language of the Bow CBA is far more pliant than the "personal injury" language found in the Berlin teachers' contract, as scrutinized in the 1980 decision.

While we recognize the distinction between the two varying contract provisions in Bow and in the Berlin case, we are ever mindful that RSA 273-A: 4 requires every CBA to "contain workable grievance procedures." We find the interpretation of the Berlin case, as it requires "standing," to be compelling for two reasons. First, the grievance and arbitration process is a serious one, based on serious needs and desires to achieve closure on "complaints or claims" arising under the CBA. It is not an abstract mechanism designed to address advisory opinions or events which might happen. It would discredit both the functioning and veracity of the arbitration process to utilize it in the abstract, with the less than full commitment to that process, and then impose a *laissez-faire* decision on "real life" circumstances. Second, and referencing those "real life" circumstances, the District did accord full hearing rights in the Lisa White case before both the superintendent and the school board where she did have standing. She had been evaluated by multiple administrators.

We think the concept of "standing" is germane to these proceedings. We do not support the concept of persons without a real "complaint or claim" pursuing grievances for which they need no remedy because they have not been harmed by the conduct about which they are complaining. Thus, we grant the District's Motion for Summary Judgment and direct that the Association cease and desist from pursuing the grievance claims brought by teachers Bechard, Gerhardt and Meilcarz.

Having disposed of this matter based on the District's Motion for Summary Judgment, we do not address other arguments raised by the parties, nor do we have any need to address the "positive assurance" test referred to by the Association. (Objection to Motion, p. 10). The parties are not to infer from this decision that we have validated, rejected or otherwise ruled upon arguments relating to past practices, the breadth and/or meaning of provisions of the "management clause" of the CBA, or the justification, or lack thereof, of the District's rationale, as conveyed by its administrators, to move to a protocol of multiple observers at teacher evaluations.


The parties are reminded, however, that they do have a history relating to the evaluation process, inclusive of a detailed arbitration decision dated November 29, 1993 (AAA Case No. 11-390-00863-93, Exhibit No. 15) which refers, in detail, to PELRB cases such as Laconia Association of Support Staff, Decision No. 1985-086, Laconia Education Association, Decision No. 1984-075 and Conway Administrators Association, Decision No. 1993-033. This series of cases was followed by Appeal of Pittsfield School District, 144 N.H. 536 (1999) which chronologically followed the three part test in Appeal of State, 138 N.H. 716 (1994). All of these should be instructional to the parties

relative to their on-going obligations to each other. Our decision in this case is not intended to alter or reduce those obligations, or to adjudicate what may or may not have been, or might have become, a "past practice," as was keenly contested by the parties in their memoranda, and not withstanding that thorough and excellent explanations of this concept may be found in Robert's Dictionary of Industrial Relations, Elkouri and Elkouri's How Arbitration Works, Fifth Edition, published by the Bureau of National Affairs in cooperation with the American Bar Association, and Labor and Employment Arbitration, Second Edition, published by Matthew-Bender/Lexis Nexis.

In granting the District's Motion for Summary Judgment, we find the Association to have violated RSA 273-A: 5 II (f) by pursuing the three grievances to arbitration, as per Finding No. 4, Item No. 8. The Association is directed to cease and desist from this process forthwith. All other requests for relief are denied.

So ordered.

Signed this 23rd day of June, 2003.


DORIS M. DESAUTEL
Alternate Chairwoman

By unanimous decision. Alternate Chairwoman Doris M. Desautel presiding. Members E. Vincent Hall and Richard Roulx present and voting.

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