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State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Amherst School District	*	
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	*	
Complainant	*	
	*	Case No. T-0299-12
v.	*	
v.	*	Decision No. 2004-022
	*	
Amherst Education Association/NEA-NH	*	
	*	
Respondent	*	
	*	

APPEARANCES

Representing the Amherst School District:

Thomas J. Flygare, Esquire

Representing the Amherst Education Association/NEA-NH:

Philip G. Pratt, UniServ Director, Amherst Education Association, NEA-NH

BACKGROUND

The Amherst School District (hereinafter referred to as the "District") filed an unfair labor practice complaint on August 4, 2003 alleging that the Amherst Education Association, NEA-NH (hereinafter referred to as the "Association") committed an unfair labor practice by seeking to arbitrate an issue that is within the discretionary control of the District. The District alleges that the Association is attempting to arbitrate an issue that arises from a document that is not part of, nor referenced within, the parties' collective bargaining agreement. The District states that the Association's actions violate RSA 273-A:5, II (a), (d) and (f). The District requests, among other things, that the PELRB find that the Union has committed an unfair labor



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APPEARANCES

Representing the Amherst School District:

Thomas J. Flygare, Esquire

Representing the Division of Safety, State of New Hampshire:

Philip G. Pratt, UniServ Director, Amherst Education Association, NEA-NH

BACKGROUND

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practice and that it order the Union to cease and desist in attempting to arbitrate the issue. The District also requests that the PELRB direct the Union to pay the District's legal fees and other costs associated with the instant charge.

The Union filed its response to the District's unfair labor practice complaint on August 19, 2003. The Union denies that it has committed an Unfair Labor Practice by pursuing the instant grievance to arbitration and requests that the PELRB dismiss the District's complaint and order it to participate in the arbitration process. Following responsive pleadings regarding a request for interim relief, the parties reached an agreement that resulted in the District withdrawing its request for interim relief.

An evidentiary hearing was convened at the offices of the Public Employee Labor Relations Board in Concord on December 4, 2003 at which both parties were represented, presented witnesses and exhibits and had the opportunity to cross-examine witnesses. The Board reviewed all filings submitted by the parties and considered all relevant evidence. It accepted the parties' stipulated facts and they are included as #'s 1-13 among its findings listed below. The Board held the record open to allow the parties to submit post-hearing briefs. Upon receipt the Board closed the record, reviewed the cases as submitted and determined the following:

FINDINGS OF FACTS

1. The Amherst School District ("District") employs individuals, including teachers and therefore is a public employer within the meaning of RSA 273- A:1, X.
2. The Amherst Education Association ("Association") is the certified exclusive bargaining representative for all regularly salaried Classroom Teachers, Librarians, Guidance Counselors and Nurses of the Amherst School District.
3. The District and the Association are parties to a collective bargaining agreements ("CBA") for the period July 1, 2001 to June 30, 2004. (Joint Exhibit #3).
4. Prior to November 15, 2002, bargaining unit members LeeAnn Steenhoek and Mary Westwater applied for sabbatical leaves for the 2003-04 school year
5. On November 26, 2002, Superintendent of Schools Michael V. Ananis, Ed.D. informed Ms. Steenhoek and Ms. Westwater that he was "...unwilling to recommend to the Amherst School Board that they fund your sabbatical leave request."
6. On May 5, 2003, Dr. Ananis wrote to Ms. Steenhoek and Ms. Westwater stating that their sabbatical requests had not been funded by the School Board and stating as follows: "I had recommended to the board that, given the fact that the Amherst voters defeated the proposed budget and required the district to go forward with a default budget for FY04, sabbaticals should not be included in the default budget."

7. On May 15, 2003, the Association filed a grievance pursuant to Article XVII of the CBA, on behalf of Ms. Steenhoek and Ms. Westwater. The Association's grievance chairperson Patrick Dubreuil processed the grievance.
8. There was no response from the Superintendent at Level B of the grievance procedure. The grievance was denied by the School Board at Level C of the grievance procedure on or about June 26, 2003.
9. On July 3, 2003, the Association filed a request for arbitration of the grievance with the American Arbitration Association.
10. Section 10.7 of the CBA states in part: Upon recommendation by the Superintendent, the Board may grant sabbatical leaves to full-and part-time teachers for study that will enhance the learning and/or teaching process of both the school system and the teacher....". (Emphasis supplied).
11. Section 17.2 of the CBA defines a "grievance" as "an alleged violation, misinterpretation or misapplication of any term(s) of the Agreement."
12. Section 17.5, Level D, of the CBA states in part that an arbitrator "...shall have no power or authority to do other than interpret and apply the provisions of this Agreement."
13. Section 17.5, Level D, of the CBA also states: "The arbitrator shall have no power to add to, or subtract from, alter or modify, any of the said provisions."
14. Article 10.7 of the parties' CBA provides that " Upon recommendation by the Superintendent, the Board may grant sabbatical leaves". It also establishes a procedure by which such sabbaticals are considered.
15. Michael V. Anannis is the Superintendent of Schools and testified that in 2001 the District promulgated a set of guidelines to clarify the terms and benefits involved with sabbaticals as well as the teachers' expectations regarding them.
16. The Superintendent included funds for the requested sabbaticals in the budget he recommended to the School Board and the School Board approved that budget for submission to the voters.
17. The subsequent rejection of the voters of the proposed budget resulted in the implementation of a "default budget" pursuant to RSA 40:13 X.
18. The parties' CBA is silent on the issue of the effect of the implementation of a "default budget" on the previous "approval" of the School Board of a budget containing funds to support the cost of the requested sabbaticals.

19. The parties' testimony indicates that there were subsequent discussions between the Association and the District which indicate that the parties do not agree as to whether the actions of Dr. Ananis constituted a "recommendation" as used in Article X, § 10.7 of the CBA.
20. The parties' testimony also indicates that the parties do not agree on the interpretation of that point in time when the "grant" of sabbatical leave as used in Article X, § becomes effective in instances where a "default budget" is implemented.
21. The parties' CBA does not address the effect of a "default budget" on teacher sabbaticals. The voters did not approve the initial budget submitted to them and this rejection resulted in the establishment of a "default budget" that would provide for items for which the District had a continuing obligation and this would include those obligations that arose from the parties' CBA.

ORDER

JURISDICTION

The PELRB has exclusive original jurisdiction over the question of whether or not a party to a dispute is entitled to submit an issue to arbitration where the parties have not specifically granted that authority to an arbitrator. This is a threshold consideration often referred to as "determining the arbitrability" of a issue. In this matter, the parties have not granted that authority to an arbitrator within the terms of their CBA or any other writing in evidence. (See Joint Exhibit #3, CBA, §17.5 Level D). Without that specific reservation to an arbitrator, the PELRB generally assumes jurisdiction to refer the matter to arbitration or find that the Association's request for arbitration constitutes a wrongful demand to use that forum and, thereby, constitutes the commission of an unfair labor practice.

DECISION

The parties disagree as to whether the actions of the Superintendent constituted a "recommendation" of sabbatical leaves and disagree as to whether the District's "approval" of sabbatical leaves creates a contractual obligation that withstands the budgetary realignments necessary to establish a "default" budget as required by vote of the school district. Since there is a presumption that disputes involving contractual terms are arbitrable and the Board cannot say with positive assurance that the parties intended to exclude arbitration on the application of terms appearing in the Sabbatical Leave and Grievance provisions of the parties CBA, the District's complaint is dismissed.

DISCUSSION

The parties in this matter have negotiated a collective bargaining agreement that is effective from July 1, 2001 to June 30, 2004. That CBA contains a grievance clause that defines a grievance as "an alleged violation, misinterpretation or misapplication of any term(s) of the

Agreement". (Joint Exhibit #3, CBA, Article XVII, GRIEVANCE PROCEDURE, § 17.2). According to the terms of the CBA, if a grievance "remains unsettled, then the matter may be referred by the Association to binding arbitration. *Id.* The parties agree that a grievance was filed by the Association on behalf of two teachers who had applied for sabbatical leave and that the grievance was denied by the School Board. Following that denial, the Association filed a request for arbitration.

The parties' CBA contains a provision that addresses sabbatical leaves that are requested by teachers. (Joint Exhibit #3, CBA, Article X, LEAVES OF ABSENCE, § 10.7). The Association's assertions raise issues, among others, involving the application of § 10.7 of their CBA and specifically the interpretation of what actions constitute a recommendation by the superintendent and whether or not the actions of the Board constituted a granting of sabbatical leaves as contemplated by the parties in their CBA. When we examine the express terms used by the parties in this clause in light of the CBA as a whole we conclude that the parties have included a substantive clause in their agreement that concerns sabbatical leaves and a valid grievance clause that provides for arbitration in the event that there is a good faith disagreement over the interpretation or application of CBA terms.

While not necessary to our decision, it is noteworthy that the parties also agree that the District promulgated an additional document in 2001, which was in effect at all times relevant to these proceedings, for the purpose of clarifying the sabbatical leave benefit terms and teacher expectations as testified to by the District's superintendent. The contents of this document are not in evidence and therefore the Board is without the ability to determine if the terms of the CBA, as applied in this instance and as brought into question by the Association's grievance, are clarified in this second document. But its existence and recognition by the District that it was done to clarify the CBA benefit contributes to our belief that there is a difference between the parties in their own belief as to whether the CBA language alone was sufficiently clear as applied to the granting of sabbaticals.

When the Board attempts to determine whether or not a party is entitled to utilize arbitration to resolve a grievance it relies upon the so-called "positive assurance standard" as currently applied within New Hampshire. That standard first provides that there is a presumption that arbitrability exists. It next instructs us that "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." See, Appeal of Westmoreland 132 N.H. 103, 105, Appeal of AFSCME Local 3657, Londonderry Police, 141 N.H. 291,293 (1996).

Applying this standard, we cannot conclude that the requisite "forceful evidence" exists to establish that the parties' CBA expresses a purpose to exclude a claim from arbitration that calls into question whether or not a recommendation was made by the Superintendent or calls into question whether or not a grant of sabbaticals was given by the District. We believe that an arbitrator, hearing all the evidence, would be in a position to render an appropriate interpretation of the terms used by the parties.

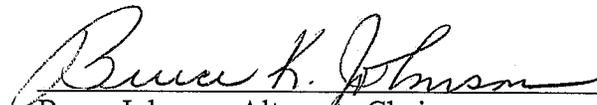
The District's complaint is DISMISSED and the following orders issue:

- (1) The parties shall proceed directly to arbitration as contemplated in the contract,

- (2) Any moving party seeking to proceed to arbitration may provide a copy of this decision to the American Arbitration Association as evidence of the timeliness of such a request,
- (3) Nothing in this order is intended to preclude the parties from resolving this dispute prior to arbitration by any means, compromises or other methods mutually acceptable to both of them,
- (4) The Association shall provide the PELRB with a copy of the arbitrator's decision within ten (10) days of the date thereof, (6) if neither party requests further proceedings before the PELRB within thirty (30) days of the date of the arbitrator's decision, this matter shall thereafter be dropped from the PELRB's docket of cases, and
- (5) If no report on the progress of this case is received by the PELRB within twelve (12) months of the date hereof, this matter shall be considered stale and administratively dismissed from the PELRB's docket of cases.

So Ordered.

Signed this 16th day of March , 2004


Bruce Johnson, Alternate Chairman

By majority vote. Alternate Chairman Bruce Johnson presiding, and voting in the majority with member Richard E. Molan. Member Richard W. Roulx dissenting.

DISTRIBUTION:

Thomas J. Flygare, Esquire
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