State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Pittsfield School District Petitioner v. Education Association of Pittsfield NEA-New Hampshire Respondent	*	Case No. T-0250-21 Decision No. 2004-087

Representatives:

For the Petitioner: Jay C. Boynton, Esquire

For the Respondent: James F. Allmendinger, Esquire, Staff Attorney, NEA-NH

BACKGROUND

This case results from the filing of a Petition for Declaratory Ruling by the Pittsfield School District (hereinafter "the District") requesting the Public Employee Labor Relations Board (PELRB) to determine whether a teacher performance evaluation plan adopted by the District's School Board on October 2, 2003 falls within the definition of a "managerial prerogative" as that term is applied in RSA 273-A:1, XI. The Education Association of Pittsfield, NEA-NH (hereinafter the "Association") filed its answer to the District's petition on October 22, 2003. The District has developed a new performance evaluation plan and avers that it would not serve a public purpose to implement the plan until the PELRB determines to what extent, if any, this new plan is subject to an obligation to bargain with the Association over changes in the evaluation plan, especially in light of the finding by the court in *Appeal of Pittsfield School District,* 144 N.H. 536 (1999). In that case, the same two parties were before the court on an appeal by the District of a prior decision by the PELRB that the unilateral implementation of a new evaluation plan developed by the District in 1996 constituted an unfair labor practice. The

Association asserts that the instant matter has already been litigated before the PELRB and the New Hampshire Supreme Court, and that the arguments proffered by the District now are the same as those that were rejected in the earlier dispute. The court affirmed the PELRB's cease and desist order barring the District from utilizing the procedures included in the new 1996 plan because they conflicted with evaluation procedures previously bargained by the parties and included in their collective bargaining agreement (CBA). The court determined that "[A]s a subject matter that has been bargained by the parties, the teacher evaluation procedures in Article VIII (of the CBA) must stand...unless modified by agreement of the parties. The court limited its decision to the "procedural changes adopted in the 1996 plan" and did not extend its finding "to all future changes in teacher evaluations".

The Association also moves to dismiss the District's petition on the grounds that it is neither ripe for the PELRB's consideration, nor appropriate for ruling under the terms of ADMIN R. PUB 206.01(c)(2), as it alleges that circumstances have not changed substantially since the prior ruling on the merits. The Association requests, among other things, that the PELRB dismiss the District's petition and issue an order directing the District to bargain with the Association over implementation of the proposed evaluation policy. The District objects, asserting that the facts presented in the instant case present a new matter for consideration and that its actions are a legitimate exercise of a management prerogative exclusively reserved to public employers.

An evidentiary hearing was convened at the offices of the Public Employee Labor Relations Board in Concord on January 27, 2004 at which both parties were represented by counsel, presented an agreed partial statement of facts, presented witnesses and exhibits and had the opportunity to cross-examine witnesses. The record was left open to allow the parties to submit post-hearing memoranda and upon receipt from both parties the record was closed on February 17, 2004. The Board then reviewed all filings submitted by the parties and considered all relevant evidence after which it determined the following:

FINDINGS OF FACTS

1. The Pittsfield School District, through the Pittsfield School Board, employs teachers and other professional personnel in the operation of the Pittsfield School system (SAU 51) and thus is a "public employer" within the meaning of RSA 273:1:I, X.

2. The Education Association of Pittsfield is the certified bargaining agent for all certified classroom teachers, nurse, librarian and reading teacher.

3. The District and the Association are parties to a collective bargaining agreement for the period August 25, 2003 through August 31, 2006. The agreement addresses the issues of teacher evaluations as follows:

"ARTICLE VIII

EMPLOYEE EVALUATION

8.1 Observation of the work performance of an employee certified to be represented by the Association will be conducted openly. Formal observation sessions shall be with the full knowledge of the employee. All other observations of the employee's work performance which are to be made part of his file will be made known to the employee.

8.2 An employee shall be given a copy of any evaluation report prepared by his evaluators before or during any conference held with him to discuss it. If the employee is dissatisfied with this evaluation conference, he may request additional conference time.

8.3 The importance and value of a procedure for assisting and evaluating the progress and success of both newly employed and experienced personnel for the purpose of improving instruction is recognized.

8.4 No written evaluation report shall be placed in the employee's file or otherwise acted upon without affording the employee an opportunity for a prior conference thereon. The employee shall sign such report in acknowledgement that the employee has read it, but in no way to indicate agreement with the contents thereof.

8.5 Those comments or reports regarding an employee made to any member of the administration by a parent, student or other person which are used in evaluating an employee shall have been promptly investigated as to their accuracy. An employee shall be given, to the extent practicable, an opportunity to respond and to meet with a person making a derogatory or degrading comment or report for purpose of rebuttal. Where such opportunity cannot practically be afforded, the record thereof shall be so noted and the comment or report given such minimal weight, if any, as the circumstances accord.

8.6 The employee shall acknowledge that he has had the opportunity to review such comment or report by affixing his signature to the copy to be filed, with the expressed understanding that such signature in no way indicates agreement with the contents thereof. The employee shall also have the right to submit a written answer to such comment or report or to any material filed in his personal file and his answer shall be reviewed and commented upon in writing by the Superintendent or his designee and both answer and comment thereon attached to the file copy.

8.7 All documents shall be filed, signature notwithstanding, and such action shall be so indicated by the employee's supervisor. The Association shall be informed if any such employee has refused to sign derogatory or evaluation material that is being placed in his file.

8.8 Each employee shall be entitled to knowledge of and access to supervisory records and reports of his competence, personal character and efficiently as are maintained in his personal file in evaluation of his performance as an employee of the District.

8.9 In the event the Board removes from the teacher's file any materials, a dated notation shall be placed in the file stating what materials have been removed.

8.10 Upon twenty-four (24) hours' notice, each employee shall have the right to review and reproduce material in his personal file to which he is entitled."

4. Beginning in the spring of 2001, Pittsfield teachers and administrators met to work on a new evaluation system, and the School Board adopted a new evaluation policy on October 2, 2003.

In addition to the above facts stipulated by the parties, following the evidentiary hearing, the board also finds:

5. The Association, the exclusive representative of the bargaining unit consisting of those employees that would become subject to the provisions of the District's proposed plan, did not participate in the development of that plan although individual employees were invited to do so and did participate in meetings leading to the completion of the proposed plan.

6. The proposed plan at issue in these proceedings contains different provisions from that plan proposed in 1996 which was the subject of earlier litigation and rulings from this board and the court.

7. The proposed plan, read in its entirety, if implemented would alter the existing terms and conditions that the parties have previously and mutually agreed to through the collective bargaining process and as embodied in their collective bargaining agreement and the provisions of the status quo performance evaluation 1981 handbook.

ORDER

JURISDICTION

When petitioned by a public employer under the provisions of RSA 541-A the PELRB has jurisdiction to render a declaratory ruling regarding the applicability of any statute within the jurisdiction of the board to enforce, or regarding any rule or order of the board. ADMIN RULE PUB 206.01(a). In this matter, the District has filed such a petition requesting that the board find that the evaluation plan adopted by the School Board on October 2, 2003 is within the definition of managerial prerogative and is not substantively inconsistent with the parties collective bargaining agreement ("CBA"). The Association has also invoked another aspect of the PELRB's jurisdiction by filing a motion to dismiss the District's Petition for Declaratory Ruling. If the board finds that the matter raised in the District's petition was the subject of a previous ruling on the merits it shall dismiss the petition, absent a showing that the circumstances attending the previous ruling or dismissal have changed substantially in the intervening period." ADMIN RULE PUB 206.01(c)(2).

DECISION

This case requires the PELRB to first determine whether the District's Petition for Declaratory ruling should be dismissed because the merits of subject matter raised is alleged to have been decided by a previous decision on its merits. In the previous decision, Appeal of Pittsfield School District, (1999) 144 N.H. 536, the Supreme Court reversed that portion of the PELRB decision that had required the District to negotiate "any future changes in the evaluation plan or its implementation with the certified bargaining agent." (PELRB Decision No. 97-071). *Id.* at 540. The board interprets this part of the court's decision to require a case-by-case examination of changes or, in the case of a request for a declaratory ruling, proposed changes to a public employer's employee evaluation plan. The board further finds that there is a sufficient showing that the circumstances attending the 1999 decision have substantially changed in the proposed actions in this instant matter and therefore denies the Association's Motion to Dismiss.

The board's approach and analysis of the facts and arguments made in considering the merits of the previous 1999 case and the instant one are consistent. In the previous case the board found the provisions implemented by the District in 1996 not sufficiently similar to the terms of the parties' collective bargaining agreement or the then existing evaluation plan embodied in the so-called "1981 Handbook". A review of the changes now proposed by the District reveals that these proposed changes also are similarly not in conformity with the status quo present between the two parties. The proposed changes are not allowable under the "managerial policy exception" provided by statute. The changes proposed are not prohibited subjects of bargaining between the parties, they are permissible subjects of bargaining and, as the parties have successfully incorporated evaluation procedures into their previous collective bargaining agreement, if there are to be any such changes as those that are proposed, then the parties should do so again. For the District to implement the proposed plan without negotiating with the Association those provisions that would alter the existing terms and conditions of employment would constitute an improper practice violative of RSA 273-A:5, I (e), (g), (h) and (i).

DISCUSSION

Motion to Dismiss

In the board's previous decision addressing the issue of teacher evaluations we stated that the issue was not new to the board's consideration citing several prior board decisions. (See PELRB Decision No. 97-071, 1997). That decision involved these same two parties and arose because the District changed certain provisions affecting teacher evaluations that the board found dissimilar to either the provisions of the parties collective bargaining agreement or the handbook being utilized within the District at that time, the so-called "1981 Handbook." *Appeal of Pittsfield School District*, 144 N.H. 536, 539. In that case, the District argued that it had undertaken certain "procedural changes" to teacher evaluations and that it's action "constituted a managerial policy" therefore not requiring it to negotiate the modified evaluation plan prior to its adoption. In the instant case, the District has proposed a teacher evaluation system that is substantially different than the plan it attempted to implement that was subject to the previous litigation before this board and appealed to the court. (Compare School District Exhibit #2 – Proposed Teacher Evaluation System and Association Exhibit #2 – Pittsfield School District Plan for Conducting Observations and Evaluations).

The District also argued in the previous case that rules promulgated by the New Hampshire Department of Education reserve to the District the authority to adopt evaluation policies under N.H. ADMIN. RULE Ed 303.01(a). The court has rejected that argument and found that while the district is required to adopt evaluation "policies", the District does not have exclusive power to do so as a management prerogative. *Id.*, citing *Appeal of State of N.H.*, 138 N.H. at 723. In the instant matter, the District again cites a Department of Education regulation relating to requirements for the preparation of a 5 year master plan that includes actions relating to teacher evaluation. (District Exhibit #5 - ADMIN. RULE Ed 512).

We find, in light of the court's partial reversal of the board's earlier decision that limited the board's more broadly stated order requiring that "the district negotiate any future changes in teacher evaluation procedures" (*Ibid. Appeal of Pittsfield School District*, at 540) that (1) the differences in the teacher evaluation provisions proposed by the District in the instant case from those at issue in the previous 1996 action; (2) the additional requirements promulgated under the Department of Education regulations regarding creation of a master plan and relating to re-certification; and, (3) the subsequent completion of negotiations between the parties resulting in a new collective bargaining agreement between the parties represent a change in circumstances sufficient to avoid the mandatory dismissal requested by the Association pursuant to ADMIN. RULE PUB 206.01 (c)(2).

Declaratory Ruling

With the District's petition having survived the Association's request for dismissal, the board examines the District's actions in the instant case in light of its long held support of terms and conditions of employment that have been mutually agreed to by the parties and in light of the court's finding in the appeal by the District of our earlier decision. (See *Appeal of Pittsfield School District*, 144 N.H. 536 and PELRB No. 97-071).

The District contends that it does not have to negotiate the changes that it proposes to the teacher performance evaluation process because such changes constitute an exercise of its managerial policy prerogative. This managerial prerogative springs from an exception contained in the definition of "terms and conditions of employment" in RSA 273-A:1, XI.

> "Terms and conditions of employment means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer..."

That same statute explains that,

> "The phrase 'managerial policy within the exclusive prerogative of the public employer' shall be construed to include but not be limited to the functions, programs and methods of the public employer, including ...the selection, direction and number of its personnel, so as to continue public control of governmental functions." *Id.*

Article III of the parties' CBA (Joint Exhibit #1), expresses a recognition by the parties that the District, "retains and reserves to itself ... all jurisdiction, powers, right, authority, duties and responsibilities by law conferred and vested in it". There is no further contractual language that would expand the rights exclusively reserved to management beyond those provided generally by law. What is not reserved to the exclusive authority of the public employer by law or agreement of the parties may be subject to negotiations.

The court has formulated a three-pronged test to resolve issues of negotiability, that is, to determine whether or not an issue is to become part of the collective bargaining process between the parties. *Appeal of State of N.H.*, 138 N.H. 716, 722. The court has also applied this test to the issue of changes to teacher performance evaluation procedures in the earlier cited case between these same two parties. *Appeal of Pittsfield, Ibid.* We repeat that test here.

> "First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation." *Id.* "Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy." *Id.* "Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1,XI." *Id.* at 538-39.

"A matter that fails step one is a prohibited subject of bargaining. A matter that satisfies step one but fails either step two or three is a permissible topic of negotiations. A matter that satisfies all three steps is a mandatory subject of collective bargaining. *Appeal of New Hampshire Troopers Association*, 145 N.H. 288, 292, citing *Appeal of City of Nashua Board of Education*, 141 N.H. 768, 774.

Considering the first step of this analysis, we do not find that the authority to change the procedures and methods of teacher performance evaluations is exclusively reserved to the District by law. This is true, as it was previously, despite the District's reliance on a State education regulation,

ADMIN RULE Ed 512.02. The District has previously and unsuccessfully argued that it has the exclusive power to establish teacher evaluation procedures by operation of this state's education regulations. (*Appeal of Pittsfield, Ibid.*,citing N.H. ADMIN RULES, Ed 303.01(a). In the instant matter, we do not find that the State education regulation now relied upon by the District grants it the exclusive power to do so through implementation of a master plan. In fact, Ed 512.02 (e) provides that the professional development master plan shall be consistent with state laws and regulations that would include provisions of RSA 273-A as applied in labor relations and as interpreted in the previous District appeal.

Our consideration of the second step in the prescribed analysis leads us to the determination that the District's proposed changes primarily affect the terms and conditions of employment rather than broad management policies. We make this determination because we find that the proposed teacher evaluation system embodied in District Exhibit #2 is not similar to the terms and conditions of employment that these two parties have already negotiated and incorporated into their collective bargaining agreement nor are they similar to the so-called "1981 Handbook" which was determined by the court to be the operative evaluation handbook and left unchanged by the previous litigation between these parties. While the District may voluntarily develop broad education management policy to address what is essentially employee performance evaluation, or may do so at the request or mandate of other governmental bodies, it cannot implement such policy initiatives or changes that impact the terms and conditions of employment set forth in a previously negotiated collective bargaining agreement.

Despite testimony that some teachers were involved in the formulation of this new system, the law directs that the authority to negotiate changes to the terms and conditions of a collective bargaining agreement are reserved to the exclusive representative of the bargaining unit and the public employer, not to some members of the bargaining unit and the public employer. Therefore, the fact relied upon, in part, by the District that teachers were involved in the formulation of the proposed plan does not obviate that, if implemented, it would constitute a unilateral action violative of RSA 273-A. Likewise, to interpret regulatory actions requiring the adoption of a "master plan" to modify the terms and conditions of employment negotiated by parties would make all collective bargaining meaningless. Such a broad empowerment would allow the public employer to later disavow the responsibilities and obligations that arise through the collective bargaining process and contractual agreement and deprive public employees of the benefit of what had been bargained for by the parties. The board does not find any fact from the evidence presented that would cause it to conclude that the District cannot address contemporary issues confronting educational systems, and that relate to employee performance evaluations, through negotiations as it has done previously.

The board therefore finds that the proposed plan contains employee evaluation procedures that are not prohibited topics for negotiation by the parties. In so concluding, it declares that the evaluation plan adopted by the School Board on Thursday, October 2, 2003, is not within the "exclusive prerogative" of the District and is inconsistent with the provisions of the operative 1981 handbook evaluation procedures and the collective bargaining agreement between the parties. In this instance, changes in evaluation procedures that do not provide the same terms and conditions of employment for the bargaining unit members are to be negotiated and not unilaterally imposed. Therefore, until such time as negotiations shall result in such agreed

upon changes, the *status quo* evaluation provisions of the parties' collective bargaining agreement and the 1981 handbook shall continue in effect..

So Ordered.
Signed this 23rd day of June, 2004

Doris Desautel, Alternate Chairperson

By unanimous vote. Alternate Chairperson Doris Desautel presiding with Board Members Carol Granfield and E. Vincent Hall also voting.

Distribution:

Jay C. Boynton, Esquire
James F. Allmendinger, Esquire, Staff Attorney, NEA-NH