



State of New Hampshire  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Contoocook Valley Regional School District

Complainant

v.

Contoocook Valley Education Association/  
NEA-New Hampshire

Respondent

\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*  
\*

Case No. T-0275-20

Decision No. 2004-112

APPEARANCES

Representing the Contoocook Valley Regional School District:

David S. Forrest, Esquire

Representing Contoocook Valley Education Association/NEA-NH:

James F. Allmendinger, Esquire

BACKGROUND

The Contoocook Valley Regional School District (hereinafter "the District") filed an unfair labor practice complaint on January 20, 2004 alleging that the Contoocook Valley Education Association/NEA-New Hampshire (hereinafter "the Association") committed an unfair labor practice by filing two (2) grievances on behalf of its member, David A. Dodge, challenging the actions of the superintendent in suspending him with pay and then recommending his dismissal. The District claims that said grievances are neither grievable nor arbitrable under the parties' collective bargaining agreement ("CBA") and applicable state law. More specifically, the District states that in suspending Mr. Dodge with pay, the superintendent acted in accordance with and as authorized by RSA 189:31. Pursuant to said statute, as referenced by the District, the superintendent may remove teachers from the classroom "for cause." The District states that Article 3-1.1 of the parties' CBA specifically excludes from the grievance procedure such matters that, by statute, are beyond the scope of [school] board authority or limited to unilateral action by the [school] board. Moreover, Article 3-1.2 provides

that "the board does not agree to binding arbitration...[for those matters]...which a specific method of review is prescribed and expressly set forth by law or any rule or regulation of the state Commissioner of Education." The District avers that since Mr. Dodge may seek review of his suspension before the State Board of Education, the matter is therefore excluded from the parties' grievance procedure. The District also asserts that pursuant to RSA 189:13, Mr. Dodge's recommended dismissal by the superintendent is an action that is likewise excluded from review under the parties' grievance procedure.

The Association filed its answer to the District's unfair labor practice complaint on February 2, 2004. At the outset, the Association states that the instant charge should be dismissed for failure to allege any specific section of RSA 273-A as being violated. Secondly, it argues that the grievances are in fact covered by the CBA, given that they concern the "discipline" section of the contract, which references, *inter alia*, "suspensions....and dismissals." In applying the analysis set forth in *Appeal of Westmoreland School Board*, 132 N.H. 103 (1989), the Union asserts that it cannot be stated, with positive assurance, that the actions of the superintendent are not subject to challenge under the CBA's grievance procedure. The Association requests that the PELRB dismiss the District's unfair labor practice charge and grant such other relief as it deems just and proper under the circumstances.

A pre-hearing conference was convened at PELRB offices on February 18, 2004. Pursuant to the Pre-hearing Memorandum and Order dated February 26, 2004, counsel for the District was granted leave to amend the District's complaint in order to include appropriate statutory references of any and all provisions within RSA 273-A:5 that it alleges the Association has violated. On March 1, 2004, the District filed said document, specifying therein that it was alleging the Association's violation of RSA 273-A:5 II (f) based upon its of filing grievances on matters which are specifically excluded from the grievance process under the parties' CBA. The District filed its "Employer's Motion for Summary Judgment" on March 22, 2004, and, in response thereto, the Association filed its "Objection and Memorandum in Opposition to the School District's Motion for Summary Judgment" on March 31, 2004.

A hearing was held before the Public Employee Labor Relations Board (PELRB) at its offices in Concord, New Hampshire on April 6, 2004, at which both parties were represented and presented exhibits and argument. The PELRB accepted the parties' joint stipulation of facts and heard argument on the District's motion. It heard testimony offered by the Association and the District was afforded the opportunity to cross-examine. At the conclusion of testimony, the record was closed. Upon review of all filings submitted by the parties and consideration of all relevant evidence, the PELRB determines the following:

#### FINDINGS OF FACT

1. The Contoocook Valley Regional School District ("the District") is a public employer within the meaning of RSA 273-A:1 X.
2. The Contoocook Valley Education Association/NEA-New Hampshire ("the Association") is the duly certified exclusive bargaining representative for certain

employees, employed by the District, including full-time, professionally licensed teachers.

3. Representatives for the District and the Association executed the following agreed statement of facts and submitted same to the PELRB for consideration in the instant case:

1. The parties entered into a Collective Bargaining Agreement on January 29, 2002, with effective dates of July 1, 2001 through June 30, 2004.
2. Pursuant to the agreement, the Contoocook Valley School Board Administrative Unit #1, hereinafter, the "School Board", recognized the Contoocook Valley Education Association, hereinafter, the "Association", as the exclusive representative for full and part time professional employees of the Contoocook Valley School District School Administrative Unit #1, hereinafter, the "District".
3. At all relevant times herein, David Dodge is and has been a member of the Association.
4. ~~David H. Dodge entered into a Continuing Teacher Contract with the District on May 6, 2003 for the period July 1, 2003 to June 30, 2004.~~
5. By letter dated October 31, 2003, School Superintendent Keith R. Burke notified Mr. Dodge that pursuant to RSA 189:31, he was being suspended with pay on the grounds of insubordination.
6. By letter dated November 3, 2003, Mary Gaul, UniServ Director of NEA-NH notified Superintendent Burke that Mr. Dodge was filing a grievance of his suspension on the grounds that the action by the Superintendent violated the Collective Bargaining Agreement.
7. By letter dated November 6, 2003, counsel for the District notified counsel for NEA-NH that it was the District's position that the action of the superintendent was not grievable under the CBA, however, the parties agreed to suspend further proceedings in this regard and further agreed to waive any applicable time limits in this regard for the purpose of attempting to negotiate a possible resolution of the matter.
8. By letter dated December 16, 2003, Superintendent Burke sent a letter to Mr. Joseph McGregor, Chairman of the Contoocook Valley School board (the School Board) recommending that Mr. Dodge be dismissed as a teacher in the Contoocook Valley School District (the District) on the grounds of insubordination, and pursuant to RSA 189:13.

9. By letter dated December 19, 2003, counsel for the Association notified counsel for the District that Mr. Dodge was filing a grievance challenging the recommended dismissal by the superintendent on the grounds that the action by the superintendent violated the terms of the CBA. Counsel for the Association noted that this grievance incorporated the earlier suspension grievance.
10. By letter dated December 24, 2003, counsel for the District notified counsel for the Association that it was the District's position that the action of the superintendent in recommending dismissal of Mr. Dodge to the School Board was not grievable under the CBA. Counsel for the District agreed, however, to reserve the resolution of any disputes regarding the arbitrability of these matters until after the School Board's decision on the recommended dismissal.
11. The School Board, pursuant to its authority under RSA 189:13, conducted a public hearing on the recommended dismissal of Mr. Dodge on January 21, January 22, January 26, and January 27, 2004. The hearing was held in public session at the request of Mr. Dodge.
12. The School Board issued a written decision on March 2, 2004 sustaining the recommendation of the superintendent and terminating Mr. Dodge's employment with the District under RSA 189:13.
13. In the meantime, the District had filed a complaint with the PELRB on January 16, 2004. The complaint, as amended, alleges an unfair labor practice under RSA 273-A:5 II (f) in that the Association's actions in filing grievances with respect to the suspension and recommended dismissal of Mr. Dodge constitute an unfair labor practice because said actions are not grievable.
14. The Association has since amended its pending grievances to allege that the School Board's dismissal of Mr. Dodge is also a violation of the CBA. Counsel for the Association and the District agreed that this grievance should be considered along with the earlier grievances with regard to whether they are arbitrable under the terms of the CBA. The Association has withdrawn its grievance relating to the Superintendent's recommendation that Mr. Dodge be dismissed as moot at this point.
15. The section of the CBA relied upon by the District states as follows:

Article 3 Grievance Procedure:

Article 3-1.1:

A "Grievance" shall mean a claim by the member of the

bargaining unit that there has been to him/her a personal loss, injury or inconvenience because of a violation, misinterpretation or inequitable application of any of the provisions of this Agreement governing said employees, ...

b. Any matter which according to law is either beyond the scope of Board authority or limited to unilateral action by the Board alone as defined by State Statute or by the Power and Duties of School Boards as defined by the State Board of Education.

3-1.2 The Board agrees to allow grievances to be filed under the following provisions through the Board level. The Board does not agree to binding arbitration on the following provision:

Any matter for which a specific method of review is prescribed and expressly set forth by law or any rule or regulation of the State Commissioner of Education, or

16. The sections of the CBA relied upon by the Association states as follows:

Article 3-1.1:

A "Grievance" shall mean a claim by the member of the bargaining unit that there has been to him/her a personal loss, injury or inconvenience because of a violation, misinterpretation or inequitable application of any of the provisions of this Agreement governing said employees, ...

Article 3-8:

If the decision of the Board does not resolve the grievance to the satisfaction of the grievant and she/he wishes a review by a third party, and if the Association determines that the matter should be reviewed further, it shall so advise in writing the Board through the Superintendent within twenty (20) school days of receipt of the Board's decision.

....

Article 3-9:

The arbitrator shall limit himself/herself to the issues submitted to him/her and shall consider nothing else. She/he can add nothing to nor subtract anything from the

Agreement between the parties, or any policy of the Board.  
The recommendations of the arbitrator shall be binding.

....

#### Article 11-1

In the event that an employee is formally disciplined, said employee shall be provided with written notice specifying the reasons for the disciplinary action. Formal disciplinary actions shall be defined as written warnings or reprimands, suspensions, reduction in rank, probation, and dismissal. Dismissal does not include non-renewal. All teachers shall have the right to be represented by the Association at formal disciplinary conferences.

No written records of informal disciplinary action shall be filed in teachers' personnel files. Teachers shall have the right to attain written responses to the formal disciplinary report.

Normally, discipline shall be progressive and related to the nature of the offense.

17. The grievance article for the 1973-76 CBA stated as follows:

#### Article 3-1.1

A "Grievance" shall mean a claim by the member of the bargaining unit of the public school system that there has been to him a personal loss, injury or inconvenience because of a violation, misinterpretation or inequitable application of any of the provisions of this Agreement governing said employees, except a grievance shall not be:

- a. Any matter for which a specific method of review is prescribed and expressly set forth by law or any rule or regulation of the State Commissioner of Education;  
or
- b. A complaint of a probationary teacher which arises by reason of his not being re-employed; or
- c. A complaint by any certificated personnel occasioned by appointment to or lack of appointment to, retention in or lack of retention in,

any position for which a continuing contract either is not possible or is not required.

d. Any matter which according to law is either beyond the scope of Board authority or limited to unilateral action by the Board alone.

18. The grievance article, Article 3, was changed for the 1984-87 CBA, to include the language change set forth in Paragraph 15, supra.
19. The discipline article was first included in the 1984-87 CBA and stated as follows:

In the event that an employee is formally disciplined, said employee shall be provided with written notice specifying the reasons for the disciplinary action. Formal disciplinary actions shall be defined as written warnings or reprimands, suspensions, reduction in rank, probation and dismissal. Dismissal does not include non-renewal. All teachers shall have the right to be represented by the Association at formal disciplinary conferences.

No written records of informal disciplinary action shall be filed in teachers' personnel files. Teachers shall have the right to attach written responses to the formal disciplinary report.

20. The discipline article was changed for the 1990-93 CBA adding the following:

In the event that an employee is formally disciplined, said employee shall be provided with written notice specifying the reasons for the disciplinary action. Formal disciplinary actions shall be defined as written warnings or reprimands, suspensions, reduction in rank, probation, and dismissal. Dismissal does not include non-renewal. All teachers shall have the right to be represented by the Association at formal disciplinary conferences.

No written records of informal disciplinary action shall be filed in teachers' personnel files. Teachers shall have the right to attach written responses to the formal disciplinary report.

Normally, discipline shall be progressive and related to the nature of the offense.

4. To the best of the parties' knowledge, there have been no prior grievances filed relative to the suspension with pay or dismissal of an employee.

### ORDER

#### JURISDICTION

Pursuant to RSA 273-A:6 I, the PELRB has primary jurisdiction of all violations of RSA 273-A:5. As the District's complaint alleges that the Association has violated RSA 273-A:5 II (f), PELRB jurisdiction is appropriate under the circumstances.

#### DECISION

The District's motion is denied and the unfair labor practice dismissed. In applying the analysis set forth in *Appeal of Westmoreland School Board*, 132 N.H. 103 (1989) to the instant case, we find that it cannot be said, with positive assurance, that the grievances filed by the Association are excluded from coverage under the arbitration provisions of the parties' contractual grievance procedure. In other words, the grievances at hand may proceed to arbitration.

#### DISCUSSION

The instant case presents a rather straightforward but difficult question of arbitrability. The Association, on behalf of its member, Mr. Dodge, seeks to arbitrate the matters of his suspension with pay and subsequent dismissal from employment with the District. The District, in filing the improper practice charge presently before us, claims that the grievances are excluded from the arbitration provisions contained in the parties' CBA and that the Association's pursuit of said grievances to arbitration thus constitutes a breach of the CBA. As RSA 273-A:5 II (f) specifically provides that "it shall be a prohibited practice for the exclusive representative of any public employee...[t]o breach a collective bargaining agreement;..." the District claims that the Association is committing an unfair labor practice by seeking such arbitration.

We first look to the definition of a grievance under the terms of the parties' contractual grievance procedure in order to determine if the Association has satisfied its obligations in this regard. Article 3-1.1 of the parties' CBA specifically defines a grievance as "...a claim by the member of the bargaining unit that there has been to him/her a personal loss, injury or inconvenience because of a violation, misinterpretation or inequitable application of any of the provisions of this Agreement governing said employees..." (Finding of Fact No. 3, ¶15, above; see also Association Exhibit No. 1, p. 3). It should be noted that Article 3-1.1 also states that "a grievance shall not be...any matter which according to law is either beyond the scope of Board authority or limited to unilateral action by the Board alone as defined by State Statute or by the Powers and Duties of School Board as defined by the State Board of Education." (Finding of Fact No. 3, ¶15, above; see also Association Exhibit No. 1, p. 3).



Here, the Association's grievances allege that Mr. Dodge's suspension with pay and subsequent dismissal violate the disciplinary provisions of the CBA, specifically Article 11-1. Article 11-1, entitled "Discipline," defines various actions as being disciplinary, including suspensions and dismissals. (Finding of Fact No. 3, ¶ 16, above; see also Association Exhibit No. 1, p. 5). It also establishes that "employee[s]...be provided with written notice specifying the reasons for [a] disciplinary action," that "teachers shall have the right to be represented by the Association at formal disciplinary conferences," and that "[n]ormally, discipline shall be progressive and related to the nature of the offense." (Finding of Fact No. 3, ¶ 16, above; Association Exhibit No. 1, p. 5). The Association's grievances claim, among other things, that Mr. Dodge's suspension and dismissal are "neither progressive nor corrective in nature," and that Mr. Dodge "is being treated in a manner different from that of his colleagues, many of whom have acted similarly but who have not been punished." (See Association Exhibit No. 2, p. 6).

Based upon the foregoing, we find these grievances to satisfy the technical definition set forth in Article 3-1.1, since the Association does allege specific violations of the CBA for which Mr. Dodge has, at least arguably, suffered "a personal loss, injury or inconvenience." Moreover, we find no statutory reference that otherwise excludes the specific matters raised by the Association from the definition of a grievance under Article 3-1.1. Accordingly, we now address the question of whether they are appropriate matters for arbitration.

As cited by both parties, it is well settled "that arbitration should be ordered 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *Appeal of Westmoreland School Board*, 132 N.H. 103, 105 (1989)(quoting *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582-583 (1960)). "Under the 'positive assurance' standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists, and 'in the absence of any express provision excluding a particular grievance from arbitration,...only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'" *Id.* at 105, 106 (citations omitted).

Here, the parties' grievance procedure does contain an arbitration clause. In accordance with Article 3-8, if a grievance remains unresolved following review by the school board, it may be referred to a third party. (Finding of Fact No. 3, ¶ 16, above). Thereafter, pursuant to Article 3-9, "[t]he arbitrator shall limit himself/herself to the issues submitted to him/her and shall consider nothing else. She/he can add nothing to nor subtract anything from the Agreement between the parties, or any policy of the Board. The recommendations of the arbitrator shall be binding." (Finding of Fact No. 3, ¶ 16, above). In accordance with *Westmoreland*, we must therefore presume that the Association's grievances are arbitrable, unless there is an express provision excluding them from arbitration. If there is no express provision, only strong evidence establishing a purpose to exclude the grievances from arbitration can otherwise prevent them from proceeding in such manner.

In this regard, the District points to the following language, contained in Article 3-1.2, as constituting an express provision excluding the Association's grievances from arbitration:

The Board does not agree to binding arbitration on the following provision:

Any matter for which a specific method of review is prescribed and expressly set forth by law or any rule or regulation of the State Commissioner of Education, or

(Finding of Fact No. 3, ¶15, above). The District contends that since RSA 189 establishes methods for reviewing claims of unjust terminations and suspensions, the Association's grievances are excluded from arbitration. More specifically, as to the suspension grievance, the District cites RSA 189:31 and RSA 189:32, that provide, in pertinent part, that school superintendents "for cause may remove a teacher..." and "[a]ny person so removed,...may appeal to the state board..." respectively. As to the dismissal, the District cites RSA 189:13 and RSA 189:14. RSA 189:13, entitled "Dismissal of Teacher," establishes the right of a school board to dismiss a teacher, as well as required procedures for doing so. RSA 189:14, entitled "Liability of District," expressly states that "[t]he district shall be liable in the action of assumption to any teacher dismissed in violation of the provisions of RSA 189:13 to the extent of the full salary for the period for which such teacher is engaged."

For the following reasons, we conclude that the contractual and statutory language cited by the District does not exclude the Association's grievances from arbitration. First of all, we do not believe that the contract language itself is sufficiently clear to prohibit arbitration in this instance or, at the very least, constitutes "positive assurance" that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. The language "any matter for which a specific method of review is prescribed and expressly set forth by law..." is rather general, broad, and even reasonably characterized as vague.

We agree that the case of *Londonderry School District v. Londonderry Education Association*, PELRB Decision No. 2000-046 (July 19, 2000) is analogous to the case at hand. Although the disciplinary language is different, with the contract in *Londonderry* specifically establishing that "no teacher shall be disciplined for just cause," the exclusionary language is virtually identical. In *Londonderry*, the exclusionary language is contained in the definition of "grievance," wherein it states that the term grievance shall not apply to "any matter for which a specific method of review is prescribed by law." *Londonderry School District v. Londonderry Education Association*, PELRB Decision No. 2000-046, p. 3 (July 19, 2000). In *Londonderry*, we held that the phrase "specific methods of review prescribed by law" is not of a certainty or specificity sufficient to show an intent to limit or eradicate [the disciplinary language contained in the parties' CBA]." *Id.* at 9. We reach the same conclusion here.

As we also noted in *Londonderry*, "[u]nless a contrary intention appears from the contract construed as a whole, the meaning of a general provision of the contract should be restricted by the more specific provisions of the contract. *Id.* at 9 (quoting LABOR AND EMPLOYMENT ARBITRATION, §9.02 [3][d] (T. Bornstein, A. Gosline, and M. Greenbaum, 2d ed. 2001)). Thus, the specific language referenced in Article 11-1 must control over the general language contained in Article 3-1.2. In this regard, we find it significant that a portion of Article 11-1, specifically the language "[n]ormally, discipline shall be progressive and related to

the nature of the offense," was negotiated and added to the CBA by the parties well after the exclusionary language relied upon by the District was already in the CBA. (Finding of Fact, No. 3, ¶¶ 15, 18, 19, 20). It is well-settled that through the mechanism of collective bargaining, public employees have the opportunity to expand upon or otherwise make binding agreements concerning rights which they feel may be granted to them by other provisions of law." *Brown v. Bedford School Board*, 122 N.H. 627 (1982).

Moreover, in further analyzing the language contained in Article 3-1.2, we find that the phrase "[a]ny matter for which a specific method of review is prescribed and expressly set forth by law" may be construed as referencing mandated or required recourses under law. In this context, we particularly look to the parties' use of the word "prescribed" in Article 3-1.2. The word "prescribe" is defined as "to set down as a rule or direction; order; ordain; direct." WEBSTER'S NEW WORLD DICTIONARY 1124 (2d ed. 1980). We find that none of the statutory citations made by the District, as constituting prescribed methods of review, adequately fit this reference. In reviewing RSA 189:31 and RSA 189:32, it is readily apparent that a teacher *may* appeal such a suspension by a superintendent to the state board of education, but the language therein does not expressly provide that such recourse is mandatory or exclusive. Moreover, the RSA 189:32 specifically provides that "[a]ny person so removed, *unless dismissed by the school board*, may appeal to the state board...." (emphasis added). Since, in this case, the school board has dismissed Mr. Dodge, it would appear that an appeal to the state board would now not be appropriate. Thus, we dispute the characterization of RSA 189:31 and RSA 189:32 as presenting a prescribed method of review.

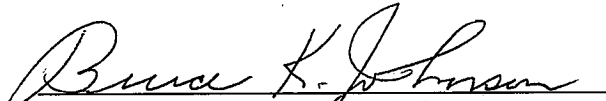
As to the dismissal issue itself, we are also not convinced that RSA 189:14 constitutes a specific method of review, prescribed and expressly set forth by law, to cover the instant dispute. On its face, RSA 189:14 establishes liability for a school district if it dismisses a teacher in violation of the provisions of RSA 189:13. While RSA 189:14 provides that such liability may be determined in an action of assumpsit, we see no requirement that the issues raised in the instant contract claim must be pursued in such forum, particularly to the extent that the grievance raises issues beyond those that would arise out of a violation of RSA 189:13. It is appropriate at this juncture to note the distinction between "dismissal" and "non-renewal." A non-renewal, by the plain language of Article 11-1, does not constitute discipline (Finding of Fact No. 3, ¶ 16) and therefore would not be grievable under such provision. As the case of *Thomas v. Contoocook Valley School District*, 150 F.3<sup>rd</sup> 31 (1<sup>st</sup> Circuit 1998) relied upon by the District involved the *non-renewal* of a teacher, as well as a discrimination claim under RSA 354 (as distinguished from a grievance filed under a CBA), we do not find it applicable to the facts at hand.

Based upon the foregoing, we find that it cannot be said, with "positive assurance," that the arbitration clause here is not susceptible of an interpretation that covers the instant dispute. It follows that we find no compelling evidence, otherwise, of a purpose to exclude the Association's grievances from arbitration. On the contrary, we conclude that the parties have agreed to the language of Article 11-1, and that alleged violations of their CBA, including Article 11-1, may be submitted to an arbitrator. The Association, on behalf of Mr. Dodge, is entitled to seek such recourse, but here we need not and do not, examine the merits of such grievances.

The District's improper labor practice is DISMISSED; the parties are directed to proceed forthwith with the grievance arbitration process as set forth in their CBA.

So ordered.

Signed this 29~~th~~ day of July, 2004.

  
Bruce Johnson, Alternate Chairman

By unanimous vote. Alternate Chairman Bruce Johnson presiding with Board Members Seymour Osman and E. Vincent Hall also voting.

Distribution:

David S. Forrest, Esq.

James F. Allmendinger, Esq.