



**State of New Hampshire**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Berlin Education Association,  
NEA-New Hampshire  
Complainant

v.

Berlin School District  
Respondent

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Case No. T-0201-14

Decision No. 2005-155

APPEARANCES

For the Berlin Education Association, NEA-NH: Jay Tolman, Uniserv Director

For the Berlin School District: John Moulis, Superintendent.

BACKGROUND

The Berlin Education Support Association, NEA-NH (hereinafter the "Association") filed an improper practice charge on August 1, 2005 alleging that the Berlin School District (hereinafter the "District") violated RSA 273-A:5, I (a), (e) and (h) by denying three employees access to a voluntary sick leave bank established under the parties' contract. According to the Association, each of the employees referenced in the complaint satisfied all conditions under the contract in order to draw time from the sick bank and yet were denied. The Association alleges that the District's actions in this regard, by and through its superintendent, constitute an unlawful restraint from use of the sick leave bank that was obtained through good faith bargaining [RSA 273-A:5 I (a)], a lack of good faith bargaining [RSA 273-A:5 I (e)], and a violation of the Collective Bargaining Agreement (hereinafter "CBA") [RSA 273-A:5 I (h)]. As remedies, the Association requests that the PELRB make the three (3) effected employees whole for the days that were wrongfully denied from them based upon the superintendent's abuse of discretion and failure to act in good faith.

The District filed a response to the Association's charge on August 12, 2005, wherein it stated that requests for the use of the Catastrophic Sick Leave Bank have been approved or denied by superintendents of the Berlin Public Schools based upon language contained in the current CBA and in former agreements.

A pre-hearing conference was conducted at PELRB offices on November 2, 2005. Following discussion with the parties, it was ordered by the hearing officer that the District would supplement its answer to bring it into conformance with the requirements of Admin. R. Pub 201.03, that the parties would redact identifying medical information from any exhibits to be offered at the evidentiary hearing, and that the parties would identify and refer to the individual employees at issue in these proceedings as, for example, "Teacher A", "Teacher B", etc.

An evidentiary hearing was conducted on November 16, 2005 at which both parties were present. Each party was provided the opportunity to present witnesses and exhibits and had the opportunity to cross-examine witnesses. The parties submitted an agreed "Statement of Facts" which was accepted into evidence and appear as Findings of Fact #1-#16, below. Additional findings were made by the Board following the conduct of the hearing and also appear below. Each party made a brief closing statement in lieu of the submission of a post-hearing legal memorandum. At the conclusion of the hearing the members of the board considered all evidence admitted, assigned appropriate weight to each, weighed the credibility of all witnesses and made the following determinations of fact:

#### FINDINGS OF FACT

1. The Berlin School District ("School District") is a public employer as defined by RSA 273-A:1,X.
2. The Berlin Education Association/NEA-NH ("Association") is the duly elected exclusive representative of the bargaining unit which consists of all permanent full-time teachers employed by the Berlin Public Schools.
3. The language found in Article 10-4 of the current Collective Bargaining Agreement has been in place with exactly the same wording since the 1986-1989 agreement. See Jt. Ex. 1 & 10.
4. On or about March 21<sup>st</sup> of 2005 the Berlin Education Association through its member, [Teacher A] requested the use of the Catastrophic Sick Bank as it appears in Article 10-4 of the CBA. See Jt. Ex. 6.
5. [Teacher A] was denied by the Superintendent. See Jt. Ex. 5.

6. When asked for a reason as to why, the Superintendent stated that the faxed doctor's statement was not legible.
7. A second statement was sent by the doctor. See Assoc. Ex. 1.
8. A second denial was issued by the Superintendent. See Jt. Ex. 4.
9. In a conversation with the Superintendent, he stated that he needed a medical term for [Teacher A's] condition.
10. The Superintendent called the doctor's office to find out what her condition was. The staff told him that they could not release that information without the patient's consent.
11. [Teacher A] gave her doctor permission to disclose her condition to the Superintendent.
12. The Superintendent denied the use of the Sick Bank again, stating that this was a "pre-existing condition."
13. [Teacher C] had an operation during the 2004-05 school year. Prior to the operation, she expected to return to teach before her sick leave was used up. Because of complications, she could not return on that date. She applied for five days from the Catastrophic Sick Bank and was denied by the Superintendent.
14. During the School year 1990-91 seven days were drawn from the bank. During the School year 1991-92 three days were drawn from the bank. During the school year 1999-00 forty-two and a half days were drawn from the Catastrophic Sick Leave Bank. See Jt. Ex. 8.
15. On or about July 29, 2005, the Association filed an improper practice charge alleging that the Superintendent did not exercise good faith by refusing to grant the use of the Sick Bank to members even though all the terms and conditions to utilize the bank had been met.
16. The Association also alleged a breach of the CBA since members are being denied access to a benefit they have earned under the contract.
17. The provisions relating to the employees' sick leave bank are found in §10-4 of the parties' CBA (Exhibit #1), the title of which is "Catastrophic Sick Leave Bank", and provides as follows:

10-4.1 A voluntary sick leave bank will be established for the benefit of those professional employees whose accumulated sick leave for illness becomes exhausted. Each participating employee will contribute two sick leave days

upon their initial enrollment. The number of days in the bank will be maintained at a minimum of not less than fifty days. When the bank falls one day below this minimum, enrolled employees shall donate one additional day.

10-4.2 The employee may be eligible to receive up to fifty days from the bank. Utilization of these days will provide salary and Board provided insurance benefits not to exceed 1/185<sup>th</sup> of the professional's annual contracted salary.

10-4.3 Any professional needing to utilize the bank must submit the following to the Superintendent of Schools:

10-4.3a A written statement requesting authorization to draw from the sick leave bank including the date this action would commence.

10-4.3b A doctor's statement indicating the nature of the illness.

10-4.3c A doctor's statement indicating the current status of the illness must be provided at each twenty-five day interval.

10-4.4 They must have fulfilled the following:

10-4.4a Exhausted available sick leave

10-4.4b Have been ill for five consecutive days.

10-4.5 The superintendent will approve or disapprove the request within five working days. His decision is final and not subject to the grievance procedure."

18. Although the numeric reference to these provisions in several CBA's has varied, the same language has appeared in the parties' agreements through nine separate CBA's covering approximately nineteen years and existing under the administrations of three different Superintendent

19. The voluntary sick leave bank was created under the terms of the parties' 1986-1989 CBA (Joint Exhibit #9) and initially funded and later supported and maintained by the contribution of unit members from some of their own allotted sick leave.

20. Over the period of ten years extending from 1990 to 2000, a total of 52 ½ days had been used from the employees' sick leave bank. (Joint Exhibit #7). The bank must be maintained at a minimum level of 50 days and after the initial contribution of each teacher of two days each and the same contribution from all new hires over the approximately 19 years of its

existence, a positive balance has been maintained with one early instance of a negative balance that was immediately remedied by teachers making an additional contribution. The use of 52 ½ days over that period of time is not unreasonable or abusive.

21. Credible testimony reveals that in the nineteen years of existence, only three employees have been denied the right to borrow from this sick leave bank.
22. The present Superintendent, John Moulis, assumed his position with the District in 2003.
23. During the school year 2004-05 Teacher A properly met the required conditions appearing in § 10-4.3 and §10-4.4 to request use of leave from the sick leave bank.
24. Prior to this occasion Teacher A had used a limited amount of sick leave.
25. Teacher A's medical condition was diagnosed as severe depression that prevented her from performing her teaching duties in the spring of 2005 and the Superintendent was so informed by her physician.
26. The Superintendent refused her request because she was being treated on an "out patient" basis and because it was what he referred to as a "pre-existing condition".
27. Teacher A's request had been for use of fifty days from the sick leave bank.
28. Teacher B had taught within the system for eighteen years with no evidence of excessive sick leave use or abuse. She became ill while out of state on her Christmas 2004 vacation and sought care at an emergency room for what she, then, believed was a heart attack. An EKG test reported a negative indication at that time. Her course of treatment continued with diagnoses varying from several medical doctors and included pulmonary embolisms, pneumonia, and myasthenia gravis, an auto-immune disease that destroys muscles. Her symptoms were eventually diagnosed in May of 2005 by specialists in two medical facilities as suffering the effects of pulmonary infarctions and minor strokes within her brain.
29. Throughout the initial period of her illness, Teacher B attempted to return to work, arranging with the administration to lessen her workweek and work hours eventually exhausting her accumulated sick leave.

30. The Superintendent's reason for denying Teacher B's request was that her diagnosis was inconclusive, varied, and the final diagnosis was not made until May 2005 while she had exhausted her own sick days in April.
31. Teacher B properly met the required conditions appearing in § 10-4.3 and §10-4.4 to request use of leave from the sick leave bank.
32. Teacher B's request had been for use of fifty days from the sick leave bank.
33. As a direct result of having been denied paid sick leave days from the sick leave bank, Teacher B was caused to withdraw funds from an IRA account to meet living expenses, including her mortgage payment. This withdrawal was subject to the standard tax and penalty for early withdrawal.
34. Teacher C's condition arose from her plans to have surgery performed on her knee to relieve pain and improve functioning. The also required a post operative recovery regimen that would cause her to extend her time away from the classroom and she properly requested to utilize the voluntary sick leave bank.
35. The Superintendent received these three requests for use of the sick leave bank during the school year 2004-2005, from Teachers A, B and C. He denied each request despite having received supportive medical information regarding each from their respective treating physicians.
36. Teacher C, following the Superintendent's denial of her request, met with him without notice of that meeting to the Association and signed a document effectively converting her request for use of the sick leave bank to a request for an unpaid leave of absence to undergo the course of treatment she pursued for her knee that involved surgery.
37. Teacher C's request had been for use of five days from the sick leave bank.
38. The Superintendent granted the request for a limited leave of absence.
39. Teacher B testified that her physical and emotional condition and lack of additional paid sick leave resulted in a catastrophic situation where she was lacking money for groceries and her mortgage.
40. Superintendent Moulis testified that he made his decisions, for approval based upon the individual's application and his own review of the medical doctor's diagnosis.

41. He further testified that "some catastrophic categories would be cancer, heart conditions, heart attack, but not limited to just that.....maybe not the flu, but avian flu [might qualify]". He did not distinguish among cancers, for example, basal cell carcinoma (skin cancer) from malignant melanoma nor among heart conditions, for example, angina from myocardial infarctions.
42. None of the witnesses testified as to specific standards of medical, financial or impact criteria to qualify a condition or circumstance as "catastrophic." Witnesses for both parties agreed that a cold or regular type of flu would not qualify.
43. Roland Simard has taught in the District for twenty-three years and is presently the president of the Association. He is also the chief negotiator for the most recent round of negotiations and through earlier rounds leading to the execution of CBA's between the parties.
44. Mr. Simard credibly testified that he had sought out information from the membership (See Exhibit #7) to determine whether there was knowledge of previous denials of requests to use the sick leave bank and also sought information from the District's administrative office. From these efforts he concludes that there have been no denials except for the instant three teachers since the bank was established in 1986. This testimony is uncontraverted.
45. Mr. Simard's belief over the years of his involvement was that the sick leave bank could be used if you had exhausted your own sick leave and still needed to be out, "not for a cold or the flu, but something you might have a note for."

## DECISION AND ORDER

### JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate claims between the duly elected "exclusive representative" of a certified bargaining unit comprised of public employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I).

In this case, the Association has complained that actions of the District constitute violations of RSA 273-A:5, I (a) constraint, coercion or interference with employees exercising their rights, (e) refusal to negotiate in good faith with the exclusive representative; and (h) breach of a collective bargaining agreement. By reason of these alleged violations of the statute, we accept jurisdiction of the Association's complaint.

## DISCUSSION

The parties appearing before the PELRB have negotiated a series of CBA's that have contained a provision that created a pool of sick leave from which an employee could request usage pursuant to certain conditions if their own sick leave had been exhausted. The language of the provision has remained the same since the 1986-1989 CBA describing how the bank would be initially funded with contributed days from the unit members and otherwise maintained and utilized. (Joint Exhibit #9). The language then was as it appears in the parties current CBA and appearing above in Finding of Fact # 17.

The CBA article under consideration is Article 10-4, entitled "Catastrophic Sick Leave Bank". The terms "catastrophic" or "catastrophic sick leave" or "catastrophic illness or injury" do not appear within the text of the article containing the parties' agreed terms and procedural steps required to request usage of this bank. These terms are not defined anywhere in the parties' agreement. This provision had been applied without conflict between the parties for a period of approximately seventeen years under the tenure of two preceding District superintendents and eight collective bargaining agreements. Prior to the instant matter involving three teachers, whom we have referred to as "Teacher A", "Teacher B" and "Teacher C", we find the weight of the evidence to indicate that there had been no previous denials of requests to use this bank. While there was little evidence offered regarding incidents of usage, that offered leads us to find that there had been only three requests to do so prior to those instances presently at issue. All three of those requests made since the parties established the bank were granted.

In 2003, John Moulis became Superintendent of the District. In the following school year, 2004-2005, Teacher A, Teacher B and Teacher C all made procedurally proper requests to utilize the bank as called for by the terms of the parties' agreement. All three teachers provided medical support for their requests. Teacher A's request was for fifty days based upon a medical condition diagnosed as severe depression for which she was under active care, albeit at the time of her request she was being treated on an out patient basis. Teacher B's request was for fifty days based upon an inability to perform normal functions over a protracted period of testing and diagnosis that varied from the possibility of pulmonary embolisms to pneumonia to myasthenia gravis, a neuromuscular disorder caused by an abnormal immune response to minor strokes in her brain. Teacher C's request was for five days based upon a decision to undergo surgery and subsequent therapy to a knee to relieve pain and improve function.

The Superintendent's reason for denying Teacher A's request was that despite a diagnosis of severe depression, she was being treated on an out patient basis. His reason for denying Teacher B's request was that her diagnosis was inconclusive, varied, and the final diagnosis was not made until May 2005, while she had exhausted her own sick days in April. His reason for denying Teacher C's request was that he characterized the surgery as "elective" and that after a discussion with Teacher C, without notice to or representation by the Association, Teacher C signed a document characterized by him as a "waiver" and Teacher C was then granted an unpaid leave of absence, to address her need for leave instead of being able to use the bank.

A collective bargaining agreement is a contract between an employer and its employees that governs the wages, benefits, terms and conditions of work. It is a document that represents the result of a process of negotiations between the parties, a "give to get" exchange. These parties negotiated the provisions of a voluntary sick leave bank nearly two decades ago that is expressed by the language of Article 10-4 consisting of five subsections relating to the procedural operation of the bank. For facility of reference, headings or titles are assigned to some thirty-six articles in the current CBA. The title used by the parties for Article 10-4 is "Catastrophic Sick Leave Bank". "Catastrophic" is not defined in the text of the document and does not appear elsewhere in the provisions of Article 10-4.

In the area of labor relations, sick leave banks are proposed by employees and negotiated into CBA's to fulfill a purpose based upon insurance principals. From the perspective of the contributing employees it provides an insurance pool to protect them from certain income loss against the day when a medical condition may require their absence from work after they have exhausted their own sick leave. In the instant matter, the Association and its members assign little weight to the title of the contract provision, but agree that, to qualify, the medical condition must have a degree of severity beyond the common cold and flu. On the other hand, the District, acting through the Superintendent, puts a controlling weight on the title and, in particular, the use of the word "catastrophic".

Having reviewed the evidence, including the testimony of persons representing both parties' interests who have been employed and involved in negotiations since the initial insertion of this article into the parties' CBA, we find that ambiguity is caused by the isolated appearance of "Catastrophic" in the title. We further find that the manner in which the sick bank requests have been addressed, *i.e.* all approved prior to the instant three denied by a new Superintendent, also contributes to a consideration of whether or not these teachers' requests should have been approved.

Meaning is inevitably dependent on context. (See *Restatement 2<sup>nd</sup> of Contracts* §202). Here, the parties do not use the word in any sentence form and fail to clarify its application by referencing it in the content of the Article or a common "definitions" provision. Management would have us assign a meaning to the word as an adjective referring to a degree of severity in the nature of the illness or injury. The Association would have us also focus on the severity of the employee's physical or mental condition,

but arguably believe a less severe medical condition or impact was contemplated by the parties when the benefit was bargained. According to *Webster's Third New International Dictionary*, 351, 1993, the characteristic that makes an illness catastrophic is that it is "financially ruinous". Since the District offered no evidence indicating that the financial condition of the teachers was part of the criteria used in denying their requests, it does not appear to us that it intended the common dictionary meaning of the adjective at the time it bargained this issue. Likewise, most of the evidence offered by the Association, with some exception relating to Teacher B, also was directed to the nature of the teachers' condition and not directed at the financial impact. Therefore, it would also appear that the Association did not intend to apply the common dictionary meaning of that adjective either.

We conclude that a reasonable person, reading the parties' contract language and taking into account the evidence presented would find that "a cold or [regular] flu" would not qualify. We find that each of the teachers who requested to use the sick bank presented conditions of sufficient severity to warrant approval of their use. We believe the nature of these three teachers' conditions were of the type that moved the employees to initially bargain for the benefit of having a sick leave bank and contributing their own sick leave, also a bargained for benefit, to fund and maintain it. Without further definition of what constitutes a catastrophic condition, illness or injury being expressed in the agreement, all of the teachers' circumstances in this case substantially exceed the only standard upon which the parties could agree, namely "a cold or [regular] flu."

Parties are entitled to the benefit of their bargain. In this instance, the Association had, for years, bargained in good faith to establish and then to continuously maintain the sick leave bank and utilize it fairly and without abuse. That benefit was rendered void when the Superintendent denied each of these three teachers' request to use the bank for the reasons he provided that are discussed above. We find that his action constituted a statutory violation of the good faith requirement of collective bargaining and a breach of the parties' CBA. We further find that his denials, again on the rationale provided by him at hearing, were arbitrary and represented a violation of the element of good faith embodied in every CBA and in the exercise of the authority bargained for by the parties granting him final authority pursuant to § 10-4.5. So while his actions may not have been subject to a grievance, the District remains subject to the statutory requirements of RSA 273-A. In the instance of actions relating to Teacher C, the benefits bargained for in the CBA by the Association as the exclusive bargaining representative are not individual benefits, without express provisions indicating otherwise. Therefore, the individual discussions with Teacher C that resulted in some type of "waiver" and an agreement that Teacher C would use an unpaid leave of absence also constitute a violation of the statutory obligation of a public employer to bargain in good faith with the exclusive representative.

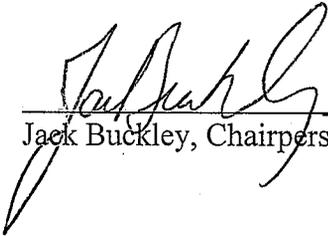
The District is hereby ordered to cease and desist from utilizing arbitrary criteria in denying procedurally proper and medically supported requests to use the sick leave bank. The District shall forthwith make full payment of all wages and benefits to Teacher A and Teacher B equivalent to fifty days of paid leave and to Teacher C equivalent to

five days and to otherwise make such necessary calculations and corrections to accounting and personnel records as though the requests of each of these teachers had been originally granted.

From these proceedings and this decision, it should be obvious that the present language of their CBA is ambiguous and that additional contractual language is necessary to lessen or eliminate the probabilities of future incidents causing conflict and costs to the parties. A review of labor relations practices and other collective bargaining agreements may prove helpful in more specifically describing this benefit, promoting harmonious relations between the employer and its employees and the uninterrupted operation of public services.

So ordered.

Signed this 22<sup>nd</sup> day of December , 2005.



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Jack Buckley, Chairperson

By unanimous vote. Chairman Jack Buckley presiding with Board Members E. Vincent Hall and James M. O' Mara also voting.

Distribution:

Jay Tolman, UniServ Director  
John Moulis, Superintendent