



**STATE OF NEW HAMPSHIRE**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**Winnisquam Regional School District**

v.

**Winnisquam Regional Teachers Association, NEA-NH**

**Case No. E-0122-1**  
**Decision No. 2012-130**

**Appearances:**

James A. O'Shaughnessy, Esq. Upton and Hatfield, LLP  
Concord, New Hampshire for the Complainant

Steve Sacks, Esq., NEA-NH, Concord, New Hampshire  
for the Respondent

**Background:**

The District filed an unfair labor practice complaint on October 21, 2011 claiming that the Association violated RSA 273-A:5, II (f) when it filed a demand to arbitrate a grievance concerning a new professional staff evaluation plan (PSEP). The District argues that under the parties' collective bargaining agreement (CBA), the School Board's decision to approve and adopt a new PSEP qualifies as managerial prerogative or School Board policy that is expressly excluded from grievance arbitration.

The Association denies the charge and asserts that the PSEP was developed in accordance with the CBA, requires the approval of both the School Board and the Association, and is subject to the contractual grievance procedure. The Association requests that the PELRB find that the grievance is arbitrable and order the parties to proceed to arbitration.

An adjudicatory hearing was held on January 26, 2012 at the PELRB offices in Concord. Both parties had the opportunity to present evidence in the form of witness testimony and exhibits, and both parties submitted post-hearing briefs following the conclusion of the hearing. The decision is as follows.

### **Findings of Fact**

1. The Association is the exclusive representative of certain bargaining unit employees of the Winnisquam School District by virtue of the Association's certification by the Public Employee Labor Relations Board.

2. The District is a public employer as that term is defined by RSA 273-A:1, IX.

3. Joint Exhibit 1 is the parties' 2009-2012 collective bargaining agreement (CBA). Article VI is titled "Teacher Evaluation," and it includes the following provisions:

6.3 Each new teacher to the Winnisquam school system shall be made aware of the school district's evaluation plan, including criteria, goals and objectives of any such plan (including new plans) and the Association shall have the right to contribute input and to meet and confer; but in any event, the Board shall make the final determination of any matters under this Section 6.3.

.....

#### Joint Committee on Evaluation System

6.10 The District Evaluation Committee will review the teacher evaluation system upon request by either the Winnisquam Regional Teachers Association or the Winnisquam Regional School Board. The committee shall forward pertinent recommendations to the Winnisquam Regional School Board.

4. Article IX of the CBA is titled "Grievance Procedure," and includes the following provision:

#### 9.1 Definition

A "grievance" is a claim based upon an event or condition which affects the welfare and/or terms and conditions of employment of a teacher or group of teachers based upon the interpretation, application, or violation of any of the provisions of this Agreement. An "aggrieved teacher" is the person or persons making the claim. All time limits specified in this Article shall mean school days, except under Section 9.9 of this Article.

9.4 Formal Procedure

.....

Level D. If the grievance remains unsettled, then the matter may be referred by the Association to arbitration....

.....

9.13

The following matters are excluded from the arbitration provision, but not from the grievance procedure, of this Agreement:

- Management prerogative as set forth in this Agreement, and as provided and interpreted under RSA 273-A;
- School Board Policy, except with respect to the provisions specified in Section 7.12;
- Dismissal and non-renewal of a teacher which shall be accomplished solely under the appropriate RSAs.

5. During the 2009-2010 school year the Joint Committee on Evaluation System (JCES) developed an updated Professional Staff Evaluation Plan (2010 PSEP). See Joint Exhibit 7. The existing PSEP was approved in 2005. Joint Exhibit 5.

6. On June 2, 2010 Association representatives informed Director of Curriculum and Instruction Suzan Gannett that the Association intended to vote on the 2010 PSEP shortly. See Joint Exhibit 6. Mrs. Gannett served on the 2005, 2010 and 2011 JCES. As reflected in the minutes of the June 21, 2010 School Board meeting, Item 5.10, the Association voted against the 2010 PSEP. See Joint Exhibit 8. At this meeting Superintendent Davis described the plan generically as "an extension of the teacher's collective bargaining agreement." The School Board did not vote on the 2010 PSEP and the minutes of the School Board meeting do not state a reason for this inaction.

7. During the 2010-2011 school year the JCES continued to work on an updated Professional Staff Evaluation Plan (2011 PSEP), making changes which took into account Association concerns about the updated plan prepared in the prior year.

8. Mrs. Gannett again communicated with the Association about the conduct of a vote, which was eventually held, resulting in vote against the revised updated plan. See Joint Exhibits 9, 10, and 11; District Exhibit 17. According to Mrs. Gannett, her review of the 2011 PSEP with teachers, and the conduct of an Association vote, served as a means to provide awareness to teachers of changes, receive feedback from teachers, and to generally get input to provide to the School Board. She believes the “then current document” reference in the last sentence of the process review clause in Joint Exhibit 12 means the parties will default to the 2011 PSEP.

9. In a May 17, 2011 email Superintendent Davis cited language in Article VI, Section 6.10, noting that the “Board needs to determine whether or not they will approve it at this point” and that “the contract indicates that the committee shall forward the recommendations.” The president of the Association informed Superintendent Davis of the outcome of the Association vote opposing the new PSEP by letter dated June 14, 2011. See District Exhibit 17.

10. The School Board approved the updated plan (Joint Exhibit 12) at its June 20, 2011 meeting. See Joint Exhibit 13, Item 5.8. The minutes of the meeting include the following:

#### 5.8 Professional Evaluation Plan

Discussion: Mrs. Gannett summarized the committee’s work on the evaluation plan. She addressed the concerns of the WRTA (Association) and committee members. Mr. Crowley asked several questions regarding the process.

Motion: A motion was made by Mr. Goodwin and seconded by Mr. Lang to approve the Professional Evaluation Plan as presented.

Discussion: Mrs. Lawrence (Association president) explained the process of getting the teacher vote. 70% of the teachers in the union voted and the majority voted no to the plan. She noted that Article 6 is in regards to the teacher evaluation plan. Mrs. Lawrence said the teachers are hoping to come together to work on the areas of concern and that past practice was that the vote by both parties was binding. Dr. Davis said 6.3 states “...but in

any event, the Board shall make the final determination of any matters under this Section 6.3.”

Vote: Affirmative - Unanimous

11. The 2010 PSEP prepared and agreed to by the JCES contained the following provision titled “Process Review” (Joint Exhibit 7):

All evaluations and plans that occur during the pilot year will be considered valid. Any changes occurring to the pilot plan will not invalidate evaluations or plans during that period. Recommendations for change will be sent to the committee by March 1, 2011. All changes will be reviewed and presented to the WRTA and WRSD School Board for final approval by May 1, 2011. Subsequent review will be conducted on a yearly basis and follow the above procedure. Should a change not be agreed to by both parties, the then current document will be used.

12. The 2011 PSEP prepared and agreed to by the JCES contained the following provision titled “Process Review” (Joint Exhibit 12):

This evaluation plan will be voted on during the 2010-11 school year upon approval of the WRTA and WRSD School Board by June 30, 2011. Any recommendations for change to the documents or the process should be sent to the committee by March 1, 2012. All changes will be reviewed and presented to the WRTA and then the WRSD School Board for final approval by May 1, 2012. Subsequent review will be conducted on a yearly basis and follow the same procedure. Should a change not be agreed to by both parties, the then current document will be used.

13. Joseph Linko, a teacher who served on the 2005, 2010 and 2011 JCES, believed mutual approval by the Association and the School was necessary to adopt a new PSEP, and PSEP discussions were that the Association would vote first, followed by the School Board. He also believes that “the then current document” reference that appears in the final sentence of the process review language in the 2011 PSEP (Joint Exhibit 12) refers to the 2005 PSEP (Joint Exhibit 2).

14. The Association filed a grievance, stating that the School Board’s vote to approve the plan constitutes “a violation of past practice and a misinterpretation of the intent of Article 6.3 and 6.10 and any and all other pertinent Articles of the 2009-2012 Agreement...” The Association requested that the new plan be suspended until “a committee is formed and

continues to work to develop an effective and mutually beneficial plan.” See January 17, 2012 Statement of Stipulated Facts.

## **Decision and Order**

### **Decision Summary:**

The Association violated RSA 273-A:5, II (f) when it filed a demand to arbitrate a grievance concerning the School Board’s approval and adoption of a new professional staff evaluation plan (PSEP) because the School Board’s action is specifically excluded from grievance arbitration pursuant to Article IX of the CBA.

### **Jurisdiction:**

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

### **Discussion:**

Whether the Association is entitled to arbitrate the School Board’s June, 2011 approval of the 2011 PSEP depends upon whether I can find “with positive assurance that the CBA is not susceptible of an interpretation that covers this dispute.”

A presumption of arbitrability exists if the CBA contains an arbitration clause, but the court may conclude that the arbitration clause does not include a particular grievance if it determines with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute. Furthermore, the principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties.

*Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998). In the current case the PELRB has jurisdiction to interpret the collective bargaining agreement to the extent necessary in order to determine, as a threshold matter, whether the dispute at issue is arbitrable because the parties did not confer this power upon an arbitrator in their CBA. *Appeal of Police Comm’n of City of Rochester*, 149 N.H. 528, 533 (2003).

The Association argues, in effect, that that exclusion of the current dispute from grievance arbitration is not appropriate where a change to the existing PSEP is effectively a change to the CBA and therefore joint approval is required. The Association maintains that the "Process Review" language included in the 2010 and 2011 PSEP also requires approval by the Association as well as the School Board. The District's essential argument is that the School Board's approval of the 2011 PSEP is specifically excluded from grievance arbitration given the provisions of Sections 6.3, 6.10, and 9.14 of the CBA, and the process review language cited by the Association does not apply to the adoption of the 2011 PSEP.

For the reasons that follow, I find with "positive assurance" that the parties did not intend to subject the current dispute over the School Board's June, 2011 approval of the 2011 PSEP to grievance arbitration, and that the CBA "is not susceptible of an interpretation that covers this dispute." I reach this conclusion based on the exclusionary language contained in section 9.14 of Article IX of the CBA and the process and approval language applicable to new PSEPs set forth in sections 6.3 and 6.10 of Article VI of the CBA. These provisions reflect that the authority to adopt or reject the 2011 PSEP was within the managerial prerogative and policy making authority of the School Board, and on that basis this dispute is expressly excluded from grievance arbitration under Section 9.14.

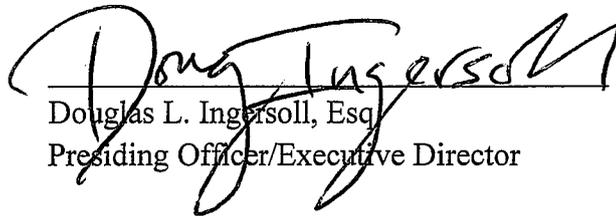
Sections 6.3 and 6.10 generally describes a committee process to be followed in the preparation of proposed new PSEPs, and that committee process did result in the proposed 2010 and the 2011 PSEPs. However, the power of the JCES is limited to preparation and submission of recommendations to the School Board. Once the School Board has the JCES' recommendation "the Board shall make the final determination of any matters under this Section 6.3." A proposed new PSEP prepared by the JCES is a matter within the purview of Section 6.3.

Nothing in the CBA gives to the JCES the power to modify or reduce the School Board's authority under Sections 6.3 and 6.10, and nothing in the CBA gives to the JCES the power to override such CBA provisions and mandate that any update to the 2005 PSEP must be jointly approved by the Association as well as by the School Board. Therefore, the JCES could not mandate in process review language contained in its recommendation (the 2011 PSEP) that approval of both the Association and the School Board was required, contrary to the provisions of Article VI of the CBA. There is insufficient evidence that such authority had ever been conferred upon the JCES. Consequently, when the School Board acted in June 2011 it utilized its existing authority to approve and adopt new PSEPs as set forth in Sections 6.3 and 6.10, and its exercise of that authority falls within the scope of managerial prerogative and policy and is therefore specifically excluded from grievance arbitration pursuant to Section 9.14.

Based upon the foregoing, the Association did commit an unfair labor practice on account of its wrongful demand for arbitration, all in violation of RSA 273-A:5, II (f). The Association is directed to cease and desist in its demand for arbitration.

So ordered.

June 7, 2012

  
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Douglas L. Ingersoll, Esq.  
Presiding Officer/Executive Director

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