STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Berlin Education Association, NHEA/NEA

v.

Berlin Board of Education

Case No. E-0154-1
Decision No. 2014-083

Order

I. Background:

By way of background, the Berlin Education Association, NHEA/NEA (Association) filed an unfair labor practice complaint against the Berlin Board of Education (District), charging that the District breached Article 10-6.2 of the parties' collective bargaining agreement (CBA)(Association Exhibit 6) in violation of RSA 273-A:5, I (h). Article 10-6.2 provides that:

> Teachers shall not be asked the reason for emergency leave except during the first or last week of any semester and the last work day preceding or the first following any holiday period, but must adhere to stated guidelines.

According to the Association the District required a teacher to give a reason for October 31, 2013 emergency leave that was not taken during the time periods referenced in Article 10-6.2. The record reflects that while the teacher was allowed to take emergency leave the District subsequently required that he provide a reason.

The District asserts it applied Article 10-6.2 consistent with the parties established understanding and usage of the term "semester," which the District says means a "marking period or quarter, not the dictionary definition of one half of the school year." The District has also moved to dismiss on the grounds that: 1) the PELRB lacks jurisdiction because the

Association's claim is subject to final and binding arbitration; and 2) the complaint is barred by the six month statute of limitations set forth in RSA 273-A:6, VII.

Article 17-1 of the CBA contains the following grievance definition:

> A "grievance" shall mean a complaint by a teacher that there has been to him/her a personal loss or injury as a result of a violation or misapplication of any of the provisions of this agreement. A grievance may also be initiated by the Berlin Education Association concerning alleged violations or misapplications of the provisions of this agreement only when the matter cannot be grieved by the individual employee and does not affect a teacher's right or benefit under the contract. Such grievances may not be initiated by the BEA whenever it involves a personal loss or injury to an employee. Any grievance initiated by the BEA shall be subject to the restrictions and procedures listed in Article 17.

The last step of the Article 17 grievance procedure is arbitration, and Article 17-5.4 states that "[a]fter notification of the arbitrator's decision for settlement of a grievance, the Board of Education and the Berlin Education Association will agree to the arbitrator's decision, considering it final and binding."

II. Discussion:

The PELRB does not have jurisdiction to interpret collective bargaining agreements and adjudicate alleged contract violations under RSA 273-A:5, I (h) when the parties have agreed to submit the dispute to a grievance procedure that concludes in final and binding arbitration. "The extent of the parties' agreement to arbitrate determines the arbitrator's jurisdiction, and the overriding concern is whether the contracting parties have agreed to arbitrate a particular dispute." *Appeal of City of Manchester,* 153 N.H. 289, 293 (2006) (quotations and citations omitted). The PELRB "does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration. Absent specific language to the contrary in the CBA, however, the PELRB is empowered to determine as a threshold matter whether a specific dispute falls within the scope of the CBA." *Id.* (citations omitted). *See also In re Silverstein*, 163 N.H. 192 (2012).

Our analysis of the arbitrability of the current dispute is governed by four general principles:

> (1) arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit ...; (2) unless the parties clearly state otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator; (3) a court should not rule on the merits of the parties['] underlying claims when deciding whether they agreed to arbitrate; and (4) 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 ...

Appeal of the City of Manchester, 144 N.H. 386, 388 (1999) (citations omitted). The "positive assurance" standard means "that the arbitration clause does not include a particular grievance if [we] determine(s) with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute." *Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998).

Given the basis for this unfair labor practice charge and Articles 10-6.2, 17.1, and 17.5 of the CBA, we cannot say "with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute." Resolution of the District's claim would require that we interpret Article 10-6.2 in general and the meaning of the term "semester" in particular, and there is a lack of any "forceful evidence of a purpose to exclude [this] claim from arbitration." Accordingly, as stated at the April 1, 2014 hearing, the District's motion to dismiss for lack of jurisdiction is granted. Given this determination and ruling it is not necessary to address the District's statute of limitations argument.

So ordered.

April 4, 2014.

Michele E. Kenney

Michele E. Kenney, Esq., Chair

By unanimous vote of Board Members Michele E. Kenney, Esq. and Senator Mark M. Hounsell, and James M. O'Mara, Jr.

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