



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

**Tamworth Educational Support Personnel Association, NEA-NH**

**v.**

**Tamworth School Board**

**Case No. E-0025-2**  
**Decision No. 2014-221**

**Appearances:**

Peter Miller, UniServ Director, NEA-NH for the Tamworth Educational Support Personnel Association, NEA-NH

Matthew H. Upton, Esq., Drummond Woodsum, Portsmouth, New Hampshire, for the Tamworth School Board

**Background:**

On March 11, 2014, the Tamworth Educational Support Personnel Association, NEA-NH (Association) filed an unfair labor practice complaint claiming that the Tamworth School Board (District) violated RSA 273-A:5, I (h) and (i) when it unlawfully outsourced bargaining unit position of Technology Service Technician to an outside contractor during the term of a collective bargaining agreement. The Association requests that the PELRB order the School Board to restore the Technology Service Technician position.

The School Board denies the charges and claims that, like in *Appeal of Matthew Kennedy*, 162 N.H. 109 (2011), the elimination of the position was part of a lawful reorganization.

The adjudicatory hearing was conducted on May 1, 2014 at the Public Employee Labor Relations Board (PELRB) offices in Concord. The parties had a full opportunity to be heard, to

offer documentary evidence, and to examine and cross-examine witnesses. The parties filed post-hearing briefs on June 14, 2014. The parties' factual stipulations are incorporated into the Findings of Facts below; and the decision is as follows.

### **Findings of Fact**

1. The District is the public employer within the meaning of RSA 273-A:1, X. It is part of the SAU 13 which also includes the School Districts of Madison and Freedom. In July of 2012, Louis Goscinski became the Superintendent of the SAU 13. See Stipulated Facts at 2, 7, & 9.

2. The Association is the certified representative for the District support personnel under certification issued by the PELRB. Stipulated Facts at 1. The position of the Technology Services Technician is within the bargaining unit represented by the Association.

3. The Association and the District are parties to a CBA that expires on June 30, 2016. The parties' agreement was approved in early March, of 2013. During 2013-16 CBA negotiations, wages for the Technology Services Technician were discussed, among other things. The parties agreed to increase the Technology Services Technician's rate of pay by \$4.75 per hour. No other employee's pay was increased by a similar amount. See Stipulated Facts at 3 & 18 and District Exhibit 2.

4. Article 2 of the parties' CBA provides as follows:

(A) The Board reserves to itself sole jurisdiction and authority over matters of policy and retains the right, in accordance with applicable laws and regulations (1) to direct employees of the School District, (2) to hire, promote, demote, assign, and retain employees in positions with the School District, and (3) to suspend, discharge, or take other disciplinary action against employees in accordance with this Agreement.

...

(E) No employee shall be disciplined except for just cause.

See District Exhibit 2.

5. The parties' CBA contains the following grievance procedure: Step 1 – Immediate Supervisor, Step 2 – Principal, Step 3 – Superintendent, Step 4 – School Board, and

Step 5 – Final and Binding Arbitration. The scope of the arbitrator's authority is limited to interpretation and application of the terms of the agreement. A grievance is defined as "an alleged violation, misinterpretation or misapplication of any provision of this Agreement." See School Board Exhibit 2.

6. CBA Article 18, Reduction in Force, provides as follows:

- (A) Notification of intended layoff shall be given as far in advance as possible.
- (B) A member shall have the right to an explanation for the reasons of the lay off by the Superintendent or his designee. The personnel file of the employee laid off for economic reasons (including decrease in enrollment) shall indicate that such was the reason for the layoff.
- (C) Seniority shall be used as the determining factor in layoff/recall...

See District Exhibit 2. Article 18 is not excluded from the CBA grievance procedure.

7. The 2013-2016 CBA wage schedules for bargaining unit employees contain a wage schedule for Technology Service Technician. Wage schedules are not excluded from the CBA grievance procedure. See District Exhibit 2.

8. Charles McNevech was employed as the Technology Services Technician at the District's Kenneth A. Brett School (Brett School). Mr. McNevech was the Association President. See Stipulated Facts at 8 and District Exhibit 2.

9. Mr. McNevech had been working for the District since 1994. At first a volunteer, he was offered a part time 4-hour-a-day library aid position at the school. Later his hours gradually increased.

10. As a library aid, Mr. McNevech was responsible for maintaining the library database, teaching students to use computers, stocking library shelves, and setting up computers. He was responsible for computer networking within the Brett School. One of the former Brett School principals wanted a computer in each room and hired an outside company to install wiring because when they tried to do it themselves, it did not work.

11. In early 2000s, per the principal's request, Mr. McNevich started to work less in the library and more on teachers' computers. He also started to instruct. Prior to 2003, the District eliminated and then reinstated the Technology Service Technician position. Mr. McNevich was rehired for this position.

12. The job description for the position of Technology Service Technician, approved by the School Board on June 10, 2003, provides that this position requires the following qualifications: knowledge of hardware/software and computer operating systems and an ability to work with other technologies. The job description includes the following responsibilities:

1. To see that all technologies are in working order and are upgraded as necessary.
2. Assist teachers in the use of these technologies.
3. Maintain accurate property and licensing records for equipment, operating systems and software.
4. Installs new computer systems throughout the school and determines correct configurations for the systems.
5. To assist administration in developing a technology budget.
6. To investigate and report to the administration regarding the proper items needed to continue the technology plan.
7. To serve on the Technology Committee and be an active member.
8. To attend school board meetings as necessary to report on the use of technologies in the school.

See District Exhibit 4. This job description has not changed since 2003.

13. Later, Mr. McNevich drafted a job description for the position of Network Administrator because, according to him, the 2003 job description did not cover his actual duties and responsibilities. According to Mr. McNevich the following description more accurately reflects his duties and responsibilities:

- Network administration (including backup, security management, user account management, e-mail systems including email web server, internet access, office systems and applications support).

- Supports server, network and desktop hardware, software and applications.
- Performs technology needs analysis
- Rolls out hardware and software to ensure optimal deployment of resources.
- Plans, implements, and supports the network and computing infrastructure plan.
- Manages small to medium sized projects according to agreed upon budgets and schedules.
- Assists with technology planning through ongoing research.

Mr. McNevich submitted this job description draft to the Principal and discussed it with the Superintendent. This job description has not been adopted by the District. See Association Exhibit 4.

14. After the 2012-13 school year, the District began participating in a SAU-wide tablet-based computing program known as the Digital Learning Initiative ("DLI"). The initiative was spearheaded by Superintendent Goscinski with the help of, among others, Brett School Principal Ken Hawkins. The DLI relies on products and services provided by CurriculumLoft - a privately-held internet company. CurriculumLoft provides its proprietary Kuno tablet computers and proprietary software for use with its Kuno tablets and maintains internet-based services necessary for the Kuno tablets to operate. CurriculumLoft software is designed specifically for school districts. It is safe and cost effective. The Kuno tablets' breakage rate is less than 2%. Under the DLI, teachers would use "cloud" computing "to store, organize, access, and present digital curriculum, lessons, and instructional material to their students." See Stipulated Facts at 10-14 and Association Exhibit 13.

15. Superintendent Goscinski first started to look into utilizing tablets and cloud-based technology at the District school in March of 2013. He had heard about this technology and contacted superintendents in Texas and North Carolina to find out more about it. He vetted the information about cloud-based technology and looked into technology availability and personnel issues, including what training was necessary and what changes must be made in the school structure. The Superintendent decided to move forward with the DLI.

16. In the Superintendent's opinion, the technology at the Brett school was inadequate; the network system, installed, in part, and maintained by Mr. McNeovich, was unreliable; and it was difficult to go online. The Superintendent was concerned that the existing network would not be able to accommodate cloud computing and Kuno tablets and believed that the school network needed to be upgraded to accommodate the DLI.

17. The Northledge Technologies Inc. (Northledge) is a private company that provides tech support services, consultation, equipment installation, and integration. In spring of 2013, the District asked Northledge to assess the data network infrastructure at the Brett School to determine whether "the current layout of cabling, routers, switches and WiFi access points can sustain steady growth and possibly a sharp increase in WiFi usage." Technical considerations for this assessment included "Internet source services, data system cabling, data routers, Ethernet switches, WiFi router/access point devices, and to the extent where they affect routing, the servers." The overall objectives of the assessment were "to review and if possible a) determine any major causes of occasional WiFi network dropouts, and b) make recommendations for remedial actions that will resolve those current issues and also allow for future growth." See Association Exhibit 12.

18. On April 10, 2013, Northledge issued its report containing the assessment of the existing school network and recommendations for the upgrade. See Association Exhibit 12.

19. According to Mr. McNeovich, he has been recommending the upgrade of the school network system for many years but it was not done because of the budget constraints. Mr. McNeovich's budget used to be \$25,000 but it was cut down first to \$15,000, then to \$10,000, and finally, to \$6,500.

20. Rastech is a Bedford, NH-based company that provides computing services to customers. See Stipulated Facts at 16. Rastech has been providing tech support services to the SAU 13 schools prior to the implementation of the DLI. See Association Exhibit 11. On June 18,

2013 Keith Jones of Rastech sent the following email to Superintendent Goscinski:

...it would take one to two weeks to repair, correct, update and configure the infrastructure at the Tamworth school, and bring Tamworth's infrastructure up to speed to accommodate 1:1 digital learning with C-Loft and Kunos.

The rate would be \$75 an hour, 40 hours a week equaling \$3,000 a week, not including IT equipment that may need to be purchased. ...

Once we are working on the infrastructure we would be able to give you suggestions of alternative ways to the BASCOM internet filtering.

We ... could come up with an alternative filtering solution which would entail no ongoing licensing fees or costs, unlike the BASCOM internet filtering, which would alleviate the need of a \$1500 router and eliminate the annual cost of \$1490.

We would strongly recommend a service contract which would keep your initial investment of repairing and upgrading the infrastructure continuously working and maintained.

Rastech offers a service contract of this size at about \$1295 a month, which would include:

- software updates
- repair and servicing of all types of equipment
- infrastructure maintenance and updates
- full IT support
- IT engineering design services
- custom software and hardware design
- computer builds
- off-site backup
- over 30 years of experience...

See Association Exhibit 14.

21. On June 19, 2013, Superintendent Goscinski sent the following email communication to Rastech:

... I am meeting with the Tamworth Board tomorrow evening. I am hoping it will approve funds and authorize me to select a vendor to do the project. Since you folks have been doing work in SAU 13 and Dan has been involved with the Curriculum Loft and KUNO vetting process since the beginning, you folks obviously have the inside track. It seems to me we have four major areas to address to improve the infrastructure to allow for our Digital 1-To-1 Learning Initiative to become a reality. I will provide them below for you. If you could give me some estimates, in terms of products and your labor, for each area by mid-afternoon tomorrow it would be appreciated. I would like to take your information to the board meeting with me....

1) Upgrade web filter. Current filter is too locked down, cumbersome, difficult for teacher to use, doesn't support iPads currently, is not integrated with the network (requires a separate login), and expensive. Install a proper firewall and a proper web filtering system.

...

2) Redo the wireless network. The current wireless network is disjointed, underpowered, very insecure, and will not support all the new devices. Install higher-grade access points, which will create a single, unified wireless network with adequate coverage. Estimate 8-12 APs [access points] needed.

...

3) Properly configure the server. The server is not functioning properly due to a O drive space issue which had reportedly been an issue for some months but just recently became critical. Backups were stopped as a part of the troubleshooting process, back in April, and had not resumed. In addition, student logins are not configured to be properly locked down, and some configuration items are contributing to slow network speeds.

...

4) Look at bandwidth needs. As part of the 1:1 tablet rollout, identify what bandwidth needs there will be. The school currently has a 15/3 Time Warner connection, which is fine for normal browsing but may be too slow to support significant file usage over the Internet. This should be part of the consultation/project design process with the company that is supplying the tablet architecture. Upgrading bandwidth would result in some increased ongoing cost from Time Warner.

...

Also, below I have provided what we believe to be low priority areas. Based on your email below, it appears you disagree. So, I am trying to figure out what is essential to improving the current system to implement the Digital 1-To-1 Learning Initiative and a bottom line cost figure to recommend to the board.

1) Switches: There are small switches in many of the different classrooms (because of just 1 network drop to each classroom) which created a potential for networking issues, failures, and slowdowns. Once the number of classroom computers (versus tablets) is identified, some classrooms may benefit from a wiring update, but this is not a top priority.

2) Network switches: The network switches are all old and running at 100 mbps, versus the newer gigabit standards. These will need to be replaced in the near future (ideally immediately, but no longer than 18 months). This should increase speed. However, to take advantage of new gigabit speeds properly, all network cabling to older classrooms would need to also be redone, as it's Cat5, which does not support gigabit.

3) Google Apps: Google apps are in place for email but is [sic] not being used for docs or other components. Consider ways to leverage this powerful tool and planning for further implementation/teacher training. ...

See Association Exhibit 14.

22. On June 20, 2013, Keith Jones of Rastech provided the following list of costs to Superintendent Goscinski:

Labor -	\$3000.00
48port gigabit Switches	\$1290.00
8port gigabit Switches	\$1188.00



Wireless Access Points	\$3300.00
Web Filter Server	\$2695.00
Server	\$2995.00
Total	\$14,468.00

See Association Exhibit 14.

23. At the June 20, 2013 School Board meeting Superintendent Goscinski addressed technology infrastructure improvement costs, informed the board that he “contacted two companies, Mainstay (which provides technology services to the SAU) and Rastech (which provides technology services to the Freedom and Madison school districts)”, and provided cost estimates for each company’s services. The Superintendent noted that the School Board has been discussing funding for technology infrastructure improvement since March. See Association Exhibit 7.

24. The School Board authorized the Superintendent “to use up to \$15,000 for a technology infrastructure upgrade from the fund balance of this fiscal year.” See Association Exhibit 7.

25. On June 21, 2014 Superintendent Goscinski sent the following communication to Rastech:

The board voted last night to do the work and authorize me to choose a contracted service provider. I would like you folks to do the work....

See Association Exhibit 14.

26. Ken Hawkins began working as the Brett School Principal on July 1, 2013. Prior to his employment with the District, he worked in a York, Maine middle school for 8-9 years as an Assistant Principal. During his employment with the Maine school system, he worked on a 1-to-1 technology initiative under which all students were given Apple laptops. At the time Mr. Hawkins left, the Maine school system was switching to tablet-based technology. While working for the York school system (600-700 students), Mr. Hawkins handled basic software issues, such

as uploading software, and worked with teachers on technology-related issues. Hardware issues were covered by the Apple warranty. Mr. Hawkins holds a Master's degree in Technology in Education.

27. Principal Hawkins chairs the District's Technology Committee, which consists of 5 or 6 volunteers who meet once a month to discuss technology needs and prepare the school technology plan. Principal Hawkins is McNevech's immediate supervisor.

28. The School Board approved the DLI in August of 2013.

29. On August 9, 2013, Rastech Sales and Service representative sent the following message to Principal Hawkins:

Here's a list of some of the services that you would receive in a full service contract.

Your Rastech Service Contract includes:

- 24x7 on-site & remote support
- computer system repair, configuration, refurbishment
- upkeep of technology
- full range support: Windows, Mac, Linux, iOS (iPad, etc.), Android
- custom software development & integration
- in-house backup
- off-site backup
- technology interpretation
- system admin services, including infrastructure & network design, configuration & repair (wired, wireless, Internet, etc.)
- over 30 years of experience
- software updates
- repair and services of all types of equipment
- infrastructure maintenance and updates
- full IT support
- IT engineering design services
- custom software and hardware design
- computer builds ...

We would strongly recommend a service contract which would keep your initial investment of repairing and upgrading the infrastructure continuously working and maintained. Rastech offers a service contract of this size at \$1295 a month.

See Association Exhibit 5. The Principal showed this document to Mr. McNevech. According to Mr. McNevech, from the services listed on the Rastech document, he performs all services except

for the following: software development, technology interpretation, engineering, custom software or hardware design, and building computers for the school.

30. In August, 2013, the District entered into a service agreement with Rastech. See Stipulated Facts at 16. Rastech upgraded the Brett School network.

31. The SAU received funds from the New Hampshire Department of Education for the purpose of staff training to help implement the DLI. The Superintendent also looked into Federal grants available. He could not find funds in Tamworth and decided to proceed with leasing, as opposed to buying, Kuno tablets. The lease agreement is for 4 years.

32. The District provided training on new technology to all teachers over the summer of 2013.

33. The District implemented a tablet based learning initiative during the 2013-14 school year. See Stipulated Facts at 6.

34. Dr. Virginia Barry, the New Hampshire Commissioner of Education, visited the SAU 13 with connection with the DLI "to encourage the teachers and administrators." See Association Exhibit 13.

35. All District teachers and students received Kuno tablets between July and November of 2013. See Stipulated Facts at 15. Students can take tablets with downloaded teachers' assignments home. They do not need to have an internet access at home to do the assignments.

36. In September, 2013, the SAU 13 issued a Media Alert stating in part as follows:

SAU 13 to use Kuno android tablets with all students (Kindergarten – 8<sup>th</sup> grade).  
First in Nation to launch a multi-district learning initiative with an SAU-wide integrated "education cloud" and "mobile devices."

In its Media Alert, the SAU provided the following reasons for the initiative:

Today's students are "Digital Natives" who have grown up with computers and smart phones. 21<sup>st</sup> century students think, process, and learn in digital world. Often when they get to school students are asked to "turn off" technology and adults wonder why students

become disinterested and bored. This initiative is to get students excited and engaged in their learning, become more interactive and collaborative, and prepare them for the 21<sup>st</sup> century workforce.

See Association Exhibit 13 (emphasis in original).

37. On September 5, 2013, Superintendent Goscinski sent a letter to students' parents/guardians informing them about the DLI and requesting their participation, including attendance of informational sessions. The District's goal was to "give every student a Kuno tablet to use on or about October 15th." See Association Exhibit 13.

38. The District also sent a Frequently Asked Questions (FAQ) sheet to students' parents/guardians. In this sheet, the District explained that the purpose of the initiative was "to provide all of our students and teachers with digital technology to be used in daily instruction." The goal was "to teach our students to use advanced 21<sup>st</sup> Century technology skills in order to be well prepared middle-high school students, college and career ready, and productive employees in a competitive global economy." See Association Exhibit 13.

39. According to the District, "[a]s textbook manufacturers make the transition to digital textbooks, the school will be in a position to use the new technology when it becomes available." See Association Exhibit 13.

40. All students are assigned a Kuno tablet to use "during various instructional times at school and when at home as determined by their teachers." The District explained in the FAQ that:

Students will access digital education information approved by the school administration. The information students receive will be "pushed-down" to them from the "CLOUD" by their teachers. For example, teachers will give students classroom materials, reading assignments, individualized work and homework to complete in class and at home. This allows students who do not have access to the Internet at home to use technology to learn. Students who do have access to the Internet at home or in community locations can only go to Internet sites available through the school to complete their educational research.

... The technology used complies with the federal law known as the Child Internet Protection Act (CIPA). The school's "CLOUD" and KUNO tablets have web filters built into their cores. This prevents students from going to inappropriate places on the Internet

when using the KUNO tablet whether at school or off school property ... Students must access the school's CIPA compliant technology regardless of where the KUNO tablet is used. Students cannot load games on the device...

See Association Exhibit 13. The District owns information that is in the "Cloud."

41. Under the DLI, the students will still be able to use printed library books, novels, textbooks; and the teachers "will continue to plan lessons and use the KUNO tablets to enhance the quality of instruction for all of their students." See Association Exhibit 13.

42. The primary purpose of the DLI and the accompanying technology upgrade was to provide a new digital learning environment to students.

43. In its FAQ sheet, the District indicated that the DLI is "funded by a variety of sources including private & public grants and the school budget. Over \$188,000 in grants has been committed to this initiative SAU-wide." See Association Exhibit 13.

44. At the September 19, 2013 School Board meeting, Business Administrator Michael O'Neill provided a tablets-lease update stating that "the lease agreement is ready to be signed ... The cost is \$28,971.56 in four yearly payments, totaling \$115,886.24." See Association Exhibit 8, page 3.

45. Kuno tablets allow teachers to send a request for a particular education-related application from the "Cloud." The process works as follows: a teacher finds an application he/she wants students to work with and puts it on his/her tablet. The teacher then sends a request to use the application to the Principal, and if approved, "pushes" the application to all students through the "Cloud." Sometimes an application does not work because it has not been "synced." The Principal then syncs the application.

46. The breakage rate of a Kuno tablet is approximately 2%. If damaged or lost, a tablet is treated in the same manner as a lost textbook, and if stolen, it is disabled by the school administration. See Association Exhibit 13. Kuno tablets are sealed and cannot be serviced at the school. The District purchased/leased extra tablets, in case of breakage.

47. Teachers currently use both classroom computers and tablets. The District continues to use large number of desktop and laptop computers (over a hundred) in addition to tablets. For detail, see Association Exhibit 6.

48. Karl Nordlund, a 3rd grade teacher at the Brett School, testified that he must access the tablet thorough his laptop and must use the desktop computer to be able to print. He had no problems with his tablet. When his students had problems with tablets, he most often sent them to Mr. McNevich.

49. After the upgrade, the District administration felt that the network was strong and the computer lab was no longer needed. The District is eliminating the computer lab for the 2014-15 school year. See Stipulated Facts at 5. The District plans to scrap some of the technology as 30% of the school computers are outdated. Library computers will be moved to classrooms. Computers will still be used in classrooms in addition to tablets.

50. On November 21, 2013, the Tamworth School Board voted to eliminate Mr. McNevich's position for the 2014-15 school year. See Stipulated Facts at 4. The Superintendent met with Mr. McNevich to inform him of the Board's decision. June 30, 2014 was Mr. McNevich's last day of employment with the District.

51. At the November 21, 2013 meeting, the School Board also approved the creation of a part time Education Technology Integrator position. See Association Exhibit 9, page 4. According to Superintendent Goscinski, the Technology Integrator's duties would include instructing teachers on the use of technology and getting them ready to use tablets.

52. The Technology Integrator position was not filled because of the lack of funding.

53. At the December 19, 2013 School Board meeting, the Superintendent related to the Board Principal Hawkins opinion that the technology integrator position was important and asked "if we could go back and forgo any other parts of the budget." Board Chair Charles Pugh

suggested to the Board that "if Ken can find \$27,000, Ken would like to get the tech integrator position back." See Association Exhibit 10, page 4.

54. During the February 6, 2014 District Public Meeting, School Board Chair Pugh, who presented the proposed fiscal year 2014-15 budget, said that "the board has agreed to include a tech integration specialist in the budget." The Superintendent noted that "we are reorganizing staff, not adding a position" and that "the position of tech service technician was \$39,233 last year, not including benefits, and we decided to eliminate that position and to create a half time position for a tech specialist, someone who works with the teachers and students on how to use the technology." See Association Exhibit 11, page 1.

55. Prior to the implementation of the DLI, Mr. McNevech's responsibilities included disconnecting computers to prepare them for custodial staff, who moved them out for the summer, and preparing for the school year by connecting the computers back up, updating them, backing up library database (done automatically), adding new students, and deleting old ones. Mr. McNevech also managed the school lunch-related computer system, except for the end-of-the year back up of the system that was done by the Food Manager. Food-related software came preinstalled. Mr. McNevech also rearranged computers and installed new computers. He connected teachers' computers to copiers and printers. All other copier/printer related problems were resolved by companies providing printers.

56. Internet filter has been in place since 2003 and used to be provided by the Bascom company. Internet filter is a program/computer that stops inappropriate content from getting to students. It must be adjusted to block or unblock something. The Bascom took care of the filter. "Running the filter" used to be Mr. McNevech's responsibility. Specifically, when a teacher wanted a site unblocked, he/she had to get permission from the Principal, then come to Mr. McNevech to get it unblocked. Mr. McNevech could do it remotely. After the upgrade, he no

longer performed this task and Bascom no longer provided the filter. Now, a teacher must contact a Rastech employee to have a site unblocked.

57. In the past, Mr. McNevich always talked to the Principal about technology needs, after which the Principal related the needs to the administration and to the School Board and then let Mr. McNevich know what was given a "go" and what was rejected. Mr. McNevich also used to be involved in upgrades. He obtained quotes, selected the best possible quote, and brought it to the administration for approval. According to Mr. McNevich, he was not included in discussions of the network upgrade related to the DLI.

58. Teachers used to take their computers to Mr. McNevich and to Principal Hawkins for repair and service. Currently, Rastech does some of the repair and service work. For example, in the past, Mr. McNevich used to put links on laptops and now this work is done by Rastech. Also, in the past, only Mr. McNevich used to do email administration. He used to set up accounts, change passwords if someone forgot it. After the upgrade, he was no longer able to do it as he no longer had access privileges. Principal Hawkins currently has administrator privileges and does email administration.

59. After the upgrade, the District sent an email to teachers indicating that they could continue to contact Mr. McNevich regarding technology-related problems. According to the Superintendent, Mr. McNevich has been asked to work with the administration on new technology.

60. Mr. McNevich's responsibilities included attending the monthly Technology Committee meetings and he was invited to attend them after the network upgrade. In 2014, he only attended two Technology Committee meetings. Most of these meeting occurred during the work day. According to Mr. McNevich, after receiving a notice of non-renewal, he stopped going to meetings although it was still his responsibility.



61. Outside companies, including Rastech, have always provided technology support services for the District. The computer filter used to be provided and serviced by Bascom, an outside company. The District had also utilized services of Northledge, another outside company. In the past, when technology-related problems were beyond Mr. McNevich's expertise, he contacted outside companies for help, which, according to Mr. McNevich, occurred rarely. Rastech performed computer repairs when Mr. McNevich was not able to do it. The Madison and Freedom School Districts used Rastech services before Mr. Goscinski was hired as the SAU Superintendent.

62. There have been very few complaints about the new system since the implementation of the DLI. Currently, non-working tablets are brought to Principal Hawkins, who attempts to make them work without disassembling them, as the tablets cannot be disassembled by the District staff. Each Kuno tablet comes encased in hard shell. A tablet's screen can be crushed, and if it is, it gets replaced under the warranty. Out of 285 Kuno tablets leased by the school, fewer than 10 have been damaged during the first year of use.

63. The "life expectancy" on each tablet is 4-5 years. The price of a tablet is \$300. The Superintendent is now working on a plan to replace the tablets when they get older. According to him, the important part of the DLI is the "cloud," not the tablets.

64. According to Principal Hawkins, who has daily experience with Kuno tablets, the only problems he encountered while working with tablets were broken screens, which cannot be repaired at the school but are instead replaced under warranty. A Kuno tablet has a case and a case flap is held on by a plastic ring. This ring sometimes snaps. Principal Hawkins fixes the rings back on. The school purchased 30-40 extra rings for replacement purposes. There was also one tablet that failed because it was not charged. If a student has a problem with the tablet, it usually takes 5-10 minutes to fix.

65. The District decided to eliminate the position of Technology Services Technician in part because the overhaul of the school computer network eliminated 20% of Mr. McNevitch's duties and, in part, to free up funds for the Technology Integrator position.

66. Another factor that influenced the District's decision was that the Brett school now had a Principal who had Masters' Degree in Technology and could perform troubleshooting and minor repairs, if necessary.

67. In the past, Mr. McNevich's duties included maintenance of licenses and warranties. Now, the SAU took over the responsibility of maintaining licenses and warranties. The SAU regular responsibilities include budgeting, negotiations, and general administration, including filing warranty claims.

68. Hiring a Technology Integrator will also take away some of the Mr. McNevich's former responsibilities as Mr. McNevich did work with teachers in the past. The Technology Integrator (not yet hired), will instruct teachers on technological matters, including on how to take state testing online and how to use new technology.

69. According to the Superintendent, over the next 4 or 5 years, all desktop and laptop computers will be phased out /eliminated. The District will train all employees to use the new technology. After the elimination of the computer lab, lab computers that are 2 years old or newer will go to teachers with older computers/laptops. Leftover computers, if any, will be given to a custodian and a guidance counselor. The Principal, and not Rastech, will decide where the lab computers will go. Rastech will be responsible for resolving large issues, such as problems with Internet content filters.

70. According to the Superintendent, Rastech's duties differ from those of the Technology Service Technician and there was no new special funding to hire Rastech as replacement for the Technician.

**Decision Summary:**

The District did not breach the parties' CBA, or adopt a rule that invalidated a portion of it, when it eliminated the Technology Services Technician position as part of the school technology system reorganization. Accordingly, the Association's claims are denied.

**Jurisdiction:**

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

**Discussion:**

The Association claims that the District violated RSA 273-A:5, I (h) and (i) when it unlawfully outsourced bargaining unit position of Technology Coordinator to an outside contractor during the term of a CBA. RSA 273-A:5, I provides in relevant part:

It shall be a prohibited practice for any public employer ... (h) To breach a collective bargaining agreement; (i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer ...

"A CBA is a contract between a public employer and a union over the terms and conditions of employment." *Appeal of Alton School Dist.*, 140 N.H. 303, 306, 666 A.2d 937, 940 (1995). "Once parties to a CBA have chosen to bargain over matters not otherwise prohibited from negotiation, the parties must abide by the agreement entered into during the term of the CBA. Language specifically negotiated and agreed upon by public employer and employee is binding upon both." *Appeal of Pittsfield Sch. Dist.*, 144 N.H. 536, 540 (2000). RSA 273-A:1, XI defines "terms and conditions of employment" as follows:

wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase 'managerial policy within the exclusive prerogative of the public employer' shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

Managerial policy within the exclusive prerogative of the public employer may include position creation and elimination. See *Appeal of Matthew Kennedy*, 162 N.H. 109, 112 (2011). See also *Appeal of City of Nashua Bd. Of Educ.*, 141 N.H. 768, 775 (1997) (“[A] public employer’s ‘greater’ power to create or eliminate a position or program does not necessarily include the ‘lesser’ power to unilaterally determine wages and hours for the position or program”). Managerial policy also includes decisions to add school programs. For example, in *Appeal of Berlin Educ. Ass’n*, 125 N.H. 779, 784 (1984), the Court held that the decision to offer extracurricular school programs and the number of such programs were matters of managerial policy while a salary scale for extracurricular duties of teachers was a mandatory subject of bargaining.

“The prerogatives afforded to management, however, do not include the right to substitute subcontracted work for bargaining unit work.” *Appeal of Matthew Kennedy*, supra, 162 N.H. at 113. In *Appeal of Hillsboro-Deering School District*, 144 N.H. 27, 33 (1999), the Supreme Court recognized that terminating members of the bargaining unit and subcontracting with private companies to perform the work involving the same duties during the term of a CBA may constitute an unfair labor practice. In that case, the Court applied an *Appeal of State of N.H.* three-part test,<sup>1</sup> see 138 N.H. 716, 720-22 (1994), which delineates “the parameters of the

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<sup>1</sup> The three-part test is as follows:

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... Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy... 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...

A proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.

managerial policy exception,” and found, among other things, that where an independent contractor’s employees merely replace the existing employees to do the same work under similar conditions of employment and where the decision to subcontract does not alter the school district’s basic operations, the district is required to bargain with the union over the subcontracting issue. See *Appeal of Hillsboro-Deering School District*, supra, 144 N.H. at 32-33. See also *Appeal of City of Nashua*, supra, 141 N.H. at 776 (“management rights” article of CBA provided no refuge for employer who laid off full-time union employees and then hired part-time employees to perform same duties at reduced wages and benefits). The Court also recognized that a true layoff or reorganization does not violate the CBA or constitute an unfair labor practice. See *Appeal of Hillsboro-Deering School District*, supra, 144 N.H. at 30.

In *Appeal of Matthew Kennedy*, the Hinsdale school district eliminated the school band program and notified the band teacher that “he was not being renewed due to declining enrollment.” Supra, 162 N.H. at 111. After eliminating the band program, the Hinsdale district entered into an agreement with Brattleboro, Vermont high school whereby Hinsdale students could receive credit for participation in Brattleboro school’s music offerings, including band program; allowed Hinsdale students to participate in Winchester community band program, though not for credit; and started to offer online music classes through the virtual high school program. *Id.* The Court agreed with the PELRB’s conclusion that the elimination of the school band program and the resulting non-renewal of the band teacher “was part of a reorganization within the district’s managerial prerogative” because “the primary effect of the elimination of the band program was to alter the district’s curricular offerings,” not to transfer the band teacher’s duties to another provider. See *id.* at 114.

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*Appeal of City of Nashua Bd. Of Educ.*, supra, 141 N.H. at 773-74 (citations omitted). “Public employers must bargain mandatory subjects, may bargain permissive subjects, and may not bargain prohibited subjects.” See *New England Police Benevolent Association, Auburn Police Union v. Town of Auburn*, PELRB Decision No. 2014-011.

Similarly, in *AFSCME Council 93, Local 1444 v. Berlin School District*, PELRB Decision No. 2011-282, the hearing officer found that the elimination of the bargaining unit position of custodial foreman and creation of a non-bargaining unit position of building and grounds director were part of the larger department-wide reorganization and that the District was not obligated to bargain its reorganization decision because, under the circumstances of that case, the reorganization constituted a permissive and not mandatory subject of bargaining:

the reorganization of the custodial department, including elimination of the Foreman's position and hiring of, and assignment of duties to, a Building and Grounds Director, is akin to the school reorganization in *Hinsdale* case and entails changes to the District's organizational structure as well as the selection, direction and number of its personnel. In addition, unlike independent contractors in *Hillsborough-Deering* case, a new Building and Grounds Director has not merely replaced a Custodial Foreman, a bargaining unit employee, to do the same work under similar conditions of employment but has been assigned managerial responsibilities that were not part of a Custodial Foreman's job description.

*Id.*

In the present case, the Association does not argue that the District violated its obligation to negotiate in good faith when it decided to proceed with the DLI and related network upgrade. The Association, instead, argues that the District "violated the collective bargaining agreement by allowing bargaining unit work to be performed by non-bargaining unit employees of the employer, and by third parties" and that the "employer invalidated portions of the agreement by nullifying all sections of the agreement dealing with the technology services coordinator, including the wage schedule." The Association's arguments are unpersuasive.

The intent of a collective bargaining agreement is "determined from the agreement taken as a whole, and by construing its terms according to the common meaning of their words and phrases." See *Appeal of New Hampshire Dept. of Safety*, 155 N.H. 201, 203 (2007). Nothing in the parties' CBA appears to prohibit the District from eliminating a position or from modernizing its technology. On the contrary, Article 2 of the parties' CBA reserves to the School Board sole jurisdiction and authority "over matters of policy and retains the right, in accordance with

applicable laws and regulations (1) to direct employees of the School District, (2) to hire, promote, demote, assign, and retain employees in positions with the School District, and (3) to suspend, discharge, or take other disciplinary action against employees in accordance with this Agreement.” The mere fact that a position is referenced in a CBA and wage schedule does not by itself deprive a public employer of a right to eliminate that position, as claimed by the Association. Such an interpretation of a CBA would interfere with a public employer’s governmental function.

Furthermore, the District’s actions complained of in this case concern “matters of policy.” The circumstances here are more akin the circumstances in *Appeal of Matthew Kennedy* and *Berlin School District* than to the circumstances in *Appeal of Hillsboro-Deering School District*. The record shows that the District decided to embark on major reorganization of its technology system. The District conducted an extensive research of digital learning programs offered by software developers and used by other schools in different states prior to initiating the change at the Brett school. After deciding to initiate the change, the Districts trained the teachers, parents and students. The DLI also necessitated technology upgrade at the Brett school, which in turn lead to the elimination of Technology Services Technician. The record shows that the purpose of the DLI was to provide “students and teachers with digital technology to be used in daily instruction” and to teach the students to use the advanced technology skills to better prepare them for college and career. The primary effect of the DLI and associated technology upgrade is on students, including those students who prior to the DLI did not have access to the internet at home, and on the school curriculum and method of its delivery.

The elimination of the Technology Services Technician position in this case is similar to the elimination of the school band teacher position in *Appeal of Matthew Kennedy*. Like in *Kennedy*, the elimination of position resulted from the District’s reorganization, here the change in the school curriculum delivery method and associated technology upgrade. The technology

upgrade itself is within the District's exclusive managerial prerogative under RSA 273-A:1, XI ("“managerial policy within the exclusive prerogative of the public employer’ shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology ...”). The upgrade in the school hardware and software, including the switch to tablets and “Cloud”-computing and planned elimination of the computer lab, led to the elimination of some of the Technician's duties and responsibilities, in part because new hardware (tablets) does not require extensive maintenance, and ultimately led the District to the decision to eliminate the position and lay off the employee. The reduction in the Technician's duties here is similar to the reduction in school band enrollment, which led to the elimination of the band teacher position in *Kennedy*. Like in *Kennedy*, the District's actions here involved managerial policy within the District's exclusive prerogative because they were part of a true reorganization and primarily affected the school's policy on the use of technology.

The Association's claim that the Technician's duties have been outsourced to a private contractor is equally unpersuasive. The evidence shows that the District had utilized outside tech support companies prior to its decision to proceed with the DLI. The Technician himself used to contact outside contractors when he was unable to resolve technology-related problems. It appears from evidence that Rastech will continue to provide the same services they have been providing to the District in the past in addition to the new services related to the DLI technology upgrade. Mr. McNevich testified that he does not provide software development, technology interpretation, engineering design or custom software and hardware design services, nor does he build computers for the school, all of which are among the services provided by Rastech.<sup>2</sup> The duties performed by Rastech and CurroculumLoft (company providing tablets and software for DLI) are significantly

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<sup>2</sup> The Association's emphasis on the words “outsourcing a technician,” used by Alan Labrie during one of the School Board meetings, is misplaced as it appears from the evidence that Mr. Labrie was a member of the public and not a member of the School Board or District administration and had no authority to act or speak on behalf of the District.



different from the duties that had been performed by the Technician. The fact that some of the Technician's duties will remain after reorganization is completed and will be performed, as necessary, in part by the Principal (minor issues with tablets), in part by the SAU office (maintenance of licensing and warranties), and in part by the outside contractors does not mean that the District cannot eliminate the Technician's position when, as here, the elimination of a position is part of true reorganization.

Further, the parties' CBA does contain a Reduction in Force provision which provides that a notification of "intended layoff shall be given as far in advance as possible"; that a bargaining unit member shall have a right to an explanation for the reason of the layoff; that the "personnel file of the employee laid off for economic reasons (including decrease in enrollment) shall indicate that such was the reason for the layoff"; and that seniority "shall be used as the determining factor in layoff/recall..." The Association does not appear to claim that the District breached the Reduction in Force Article of the CBA. To the extent the Association claims violation of the Reduction in Force Article, or any other specific article of the CBA, the Association must utilize the contractual grievance procedure as this procedure provides for final and binding arbitration and there is no positive assurance in this case that the Association's claim Article has been excluded from the grievance procedure.<sup>3</sup>

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<sup>3</sup> "While the PELRB has primary jurisdiction of all ULP claims alleging violations of RSA 273-A:5, see RSA 273-A:6, I, it does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration... [A]s a threshold matter, the PELRB is empowered to interpret the CBA to the extent necessary to determine whether a dispute is arbitrable." *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006) (citations omitted). The determination of whether the parties' dispute is arbitrable is guided by the following four principles:

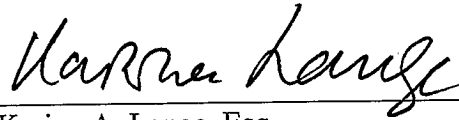
- (1) arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit ...;
- (2) unless the parties clearly state otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator;
- (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 City of Manchester*, 144 N.H. 386, 388 (1999).

Accordingly, the District did not commit an unfair labor practice in violation of RSA 273-A:5, I (h) and (i); and the Association's claims and requests for relief are denied.

So ordered.

September 23, 2014

A handwritten signature in cursive script, reading "Karina A. Lange", written over a horizontal line.

Karina A. Lange, Esq.  
Staff Counsel/Hearing Officer

Distribution: Peter Miller, UniServ Director  
Matthew H. Upton, Esq.