



State of New Hampshire
Public Employee Labor Relations Board

Keene School District

v.

Association of Keene Tutors, NEA-New Hampshire

Case No. E-0222-1
Decision No. 2018-170

Appearances: Brooke Lovett Shilo, Esq. and Lauren S. Irwin, Esq., Upton & Hatfield, Concord, New Hampshire for the Keene School District

Lauren Snow Chadwick, Esq., NEA-NH, Concord, New Hampshire, for the Association of Keene Tutors, NEA-New Hampshire

Background:

On April 13, 2018 the District filed an unfair labor practice complaint against the Association, alleging that the Association has violated RSA 273-A:5, II (d) (to refuse to negotiate in good faith with the public employer). The charge relates to the District's refusal to provide District tutors with funds they could use to purchase to own a paraprofessional workshop instruction book.¹ This led to an Association grievance, and also an NEA-NH UniServ Director's efforts to obtain funds from an alternative source via a "Go-Fund Me" post titled "Books for Keene Tutors." The District complains that the post contains inaccuracies and is misleading to a degree that created unjustified negative public perceptions about the District's relationships with its employees and the Association. The District also claims that the post: 1)

¹ "Paraprofessionals & Teachers Working Together"

was retaliation for the school board's refusal to approve a proposal which would have provided tutors with the funds needed to buy and own the books; 2) represents the improper exertion of pressure on the school board to gain an unfair advantage in fall 2019 bargaining; and 3) is defamatory. The District claims that the Association's post constitutes a refusal to negotiate the Association grievance in good faith.

The District requests that the PELRB: 1) find that the Association refused to negotiate in good faith with the District in violation of RSA 273-A:5, II (d); 2) order the Association to post a correction that accurately sets forth the facts; 3) order the Association to apologize to the District and the public for the misleading information; 4) order the Association to remove any other reference to the "Go Fund Me" post in any social media or other Association's publication; and 5) award the District all costs and fees associated with the administration of this dispute, including administrative fees paid to the PELRB, as well as attorneys' fees and costs incurred by the necessity of filing this ULP charge.

The Association denies the charge and requests that the PELRB dismiss the complaint. The Association argues that the duty to negotiate in good faith does not apply to grievances, and in any event the subject grievance had not been advanced and was abandoned at the time of the Go Fund Me post. The Association also generally disputes many of the District characterizations of the Go Fund Me post.

The Association also filed a motion to dismiss, reiterating, in substance, the defenses stated in its answer to the complaint. The District duly filed an objection to the motion to dismiss, countering the dismissal request with the argument, among other things, that the RSA 273-A:3, I good faith bargaining obligation is not limited to contract negotiations, and citing

School District #42 of the City of Nashua v. Murray, 128 N.H. 417 (1986) for the proposition that a failure to negotiate a pending grievance in good faith is a violation of RSA 273-A:5, II (d).

The board held a hearing on June 19, 2018, and both parties filed post hearing briefs² by July 10, 2012, and the board's decision in this case is as follows.

Findings of Fact

1. The Keene School District is a public employer within the meaning of RSA 273-A:1, X.

2. The Association is the certified exclusive bargaining representative for certain Keene School District employees, including tutors. See PELRB Decision No. 2001-121 (November 28, 2001).

3. The parties' current collective bargaining agreement was executed on April 1, 2015 and covers the period from July 1, 2015 to June 30, 2019 (2015-19 CBA). Negotiations on a successor contract will take place in the fall of 2019.

4. Article 11 of the 2015-19 CBA is titled "Grievance Procedure." There is a four step grievance process under Article 11.3, consisting of Level A (building principal or designee), Level B (Assistant Superintendent), Level C (school board), and Level D (arbitration). The grievance procedure provides that if a grievance is not settled at Level B, "then within 10 (ten) days from receipt of the answer rendered at this level, the grievance shall be referred to Level C."

² The District was informed prior to the start of hearing that board rules and the provisions of RSA 273-A do not provide for the filing of Requests for Findings of Fact and Rulings of Law, and that the District's Requests would not be acted upon. This decision sets forth the board's findings of fact as well as the legal basis for the board's ruling.

5. Rachel Hawkinson is the NEA-NH Uniserv Director who represents the Keene School District tutors; Nancy Deutsch is the District Director of Human Resources; and both are involved in the administration of the 2015-19 CBA.

6. Beginning at the end of January, 2018 Hawkinson had a series of email communications with Deutsch about using 2015-19 CBA Article 13.2 (a) course reimbursement funds to allow tutors to purchase and keep an instruction book related to a March 23, 2018 paraprofessional workshop (workshop) some tutors were going to attend. The total expense is less than \$300. See Association Ex. 2.

7. Deutsch took the position that Article 13.2 (a) funds could not be used to purchase the books. Instead, she proposed purchasing the books using the library account, but the books would be owned by the district and kept in the library when not being used by a tutor. See Association Exhibit 2.

8. Hawkinson then contacted school board chair George Downing, hoping he would intervene with Human Resources to make the requested funding available. He declined, stating that "I can see support there (the 2015-19 CBA) for either interpretation" and that it would be inappropriate for him to intervene. He suggested that the Association should use the grievance procedure to resolve the issue.

9. On February 26, 2018 the Association filed a Level B grievance with Assistant Superintendent Dorothy Frazier over the District's failure to allow tutors to use Article 13.2 (a) funds to purchase to own the book. See District Ex. 4.

10. At some point before March 27, 2018 Hawkinson, Frazier and Deutsch held a grievance meeting. They agreed to resolve the grievance, subject to school board approval, by

making a “one time agreement” pursuant to which the District would purchase, for tutors to own, up to 20 copies of the book.

11. Deutsch drafted a Memorandum of Understanding (MOU) outlining the agreement reached at the grievance meeting which Hawkinson signed on March 27, 2018. Paragraph 5 of the MOU states “[t]his Agreement will fully and finally resolve Grievance filed by the Union on this issue on February 26, 2018 (Grievance 022618).” Hawkinson handwrote an additional sentence at the end of paragraph 5 stating “Grievance is withdrawn without prejudice or precedent.”

12. On March 28, 2018 Deutsch informed Hawkinson that the school board had not approved the MOU. Deutsch also advised that the (tutor) group’s consideration of fundraising as a means to purchase the books was fine. See District Ex. 14.

13. Although the school board had not approved the MOU, Assistant Superintendent Frazier did not take any further action on the grievance. Additionally, Hawkinson never asked Assistant Superintendent Frazier to act on the grievance, and Hawkinson never took any steps to have the school board decide the grievance beyond the school board action on the MOU. At hearing Hawkinson testified that she considered the grievance withdrawn as of March 27, 2018, the date on which she notated and signed the MOU.

14. According to Deutsch at hearing, after the school board failed to approve the MOU, Hawkinson could have either refiled the grievance with the Assistant Superintendent (Level B) or advanced the grievance to the school board (Level C). At hearing Deutsch also maintained there was an April 11, 2018 deadline, based on the 10 day period specified in the grievance procedure, for the Association to file the grievance with the school board based upon her March 28, 2018 notice to Hawkinson that the school board had not approved the MOU.

15. By the end of March, the District had purchased the books using library funds and the books were available to the tutors through the library. On April 1, 2018 Hawkinson posted a Go Fund Me Campaign on the NEA-NH Monadnock Region Facebook page. She may have also posted it on her personal Facebook page. The funding goal was \$300 to purchase 20 of the books from the District for tutors to keep at a cost of \$15 per book. See District Exhibits 1 and 2.

16. On April 5, 2018 the District's attorney sent a letter to Hawkinson stating "there are three materially false or misleading statements in the post." The letter goes on to identify, in substance, the following District issues with the post: 1) the post suggests that tutors should have been paid for attending the workshop and it overstates the number of tutors who attended the workshop; 2) the post inaccurately describes the reasons why the Association asked the school board to approve the MOU; and 3) the post fails to state that tutors could access the books through the library. See District Ex. 10.

17. It does not appear that Deutsch, the Assistant Superintendent, or the school board had any communications with Hawkinson about the Go Fund Me campaign content before the District authorized the April 5, 2018 attorney's letter demanding changes to the content and threatening the filing of an unfair labor practice.

18. The Go Fund Me campaign post included background information about the reason for the fundraising. In general, it is an accurate account of the history leading up to the Go Fund Me Campaign. Content in the post included the following, and the accuracy or inaccuracy of certain content is as indicated:

- a) The book is identified as "500+ Teaching Strategies for Differentiating Instruction." However, the correct name of the book is "Paraprofessionals & Teachers Working Together." Hawkinson relied on information provided by the Association President (a tutor). The author's name was correct, but the wrong book was identified.

b) It states that 20 tutors attended the workshop, but only 14 tutors attended. However, the 20 tutor reference was also included in the MOU prepared by Deutsch, signed by Hawkinson on March 27, 2018, and presented to the school board. It is also a figure the parties sometimes used in other earlier communications. Hawkinson corrected this error after receiving the District's April 5, 2018 letter.

c) It states tutors were not paid for their time because the district did not budget to pay the tutor wages for time spent attending the workshop. This is an accurate statement, and is consistent with language used in a February 1, 2018 Deutsch email to Hawkinson. See Association Ex. 2.

d) It correctly states that the Article 13.2 (a) fund the tutors tried to access holds over \$13,000. The amount of \$13,050 is recited in the MOU.

e) It accurately summarizes the grievance and the District's response.

f) It accurately states that the school board refused to approve funds which tutors could use to purchase and keep the books.

g) It accurately states that tutors will either have to pay for the books "out of their own pockets" or return the books to the district. It omits the fact that even if tutors don't purchase the books to own, the books will be available to them at the library to use and check out as necessary.

h) It accurately states that the cost of a book exceeds the hourly wage for tutors.

i) It accurately states that tutors are the lowest paid employees in the district based on information reviewed by Hawkinson when preparing the content (collective bargaining agreement information available through the District and Public Employee Labor Relations Board websites). However, as recounted by Deutsch at hearing, there are non-represented District employees (food services workers) who are paid even less than tutors. However, food service worker wage information is not published on the District or Public Employee Labor Relations board websites.

19. The Go Fund Me Campaign post was shared approximately 35 times and reached 35 people. The only detailed comment provides as follows:

This is an outrageous story. INVEST in the people who invest in our children! \$300 from an already allocate \$13,000 is a drop in the bucket. Every single person who works on getting our kids to school, keeping them safe, feeding them, cleaning up after them, teaching them, and assisting those teaching them are valuable – every employee of the schools is important and without even one, the system would falter. Not paying for these workshop books seems to suggest that the tutors are not as important as other staff. GIVE THE DISTRICT THE FUNDS IN NICKELS AND DIMES.

See District Ex. 1 (emphasis in original).

20. According to school board chair George Downing, he heard from one parent who asked why the school board was not paying for the books. Otherwise, apart from general conclusory statements and concerns expressed by District management at hearing, there was no evidence adduced at hearing tending to establish either that the general public in the areas covered by the Keene School District noticed the post or formed any negative opinion about District labor relations because of the post.

21. As noted, Hawkinson corrected the employee number reference within a few days, but declined to make most of the changes demanded by the District because in her judgment no corrections were necessary.

22. The District filed this complaint on April 13, 2018.

23. The Go Fund Me campaign successfully raised the \$210 necessary to allow the 14 tutors to purchase the book from the District. See Association Ex. 3.

24. There was a lack of evidence at hearing showing that the Go Fund Me campaign negatively impacted public perception of the District or the school board as charged, that the Go Fund Me campaign has somehow provided the Association with an unfair or unlawful advantage in the fall of 2019 negotiations on a successor contract, or that the purpose of the Go Fund Me campaign was anything other than a reasonable and lawful effort to raise the money necessary for tutors to purchase and keep the books.

Decision and Order

Decision Summary

There is insufficient evidence to find that the Association has violated RSA 273-A:5, II (d) as the District has charged. The complaint is dismissed.

Jurisdiction

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

Discussion

Under the Public Employee Labor Relations Act (Act), it is a prohibited practice for the exclusive representative of any public employee:

- (a) To restrain, coerce or otherwise interfere with public employees in the exercise of their rights under this chapter;
- (b) To restrain, coerce or otherwise interfere with public employers in their selection of agents to represent them in collective bargaining negotiations or the settlement of grievances;
- (c) To cause or attempt to cause a public employer to discriminate against an employee in violation of RSA 273-A:5, I(c), or to discriminate against any public employee whose membership in an employee organization has been denied or terminated for reasons other than failure to pay membership dues;
- (d) To refuse to negotiate in good faith with the public employer;
- (e) To engage in a strike or other form of job action;
- (f) To breach a collective bargaining agreement.
- (g) To fail to comply with this chapter or any rule adopted hereunder.

See RSA 273-A:5, II.

The District charges that the Association violated sub-section (d)(to refuse to negotiate in good faith with the public employer). The obligation of public employers to bargain in good faith is detailed in RSA 273-A:3, I (Obligation to Bargain):

It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. *"Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession. (Emphasis added)*

The District's claim that this statutory good faith bargaining obligation applies to the prosecution of grievances under a completed contract is not supported by this statutory language, which is not ambiguous or difficult to understand. It very directly states that "[g]ood faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment..." This is a clear reference to the collective bargaining negotiation process, and this statutory provision establishes that the duty to bargain in good faith applies to the negotiation of collective bargaining agreements.

The District's reliance on *School District #42 of the City of Nashua v. Murray*, 128 N.H. 417 (1986) for the proposition that RSA 273-A:5, II (d) applies to the claim it makes in this case is not persuasive. The holding in *Murray* is straightforward, and provides that this board's jurisdiction over breach of collective bargaining claims under RSA 273-A:5, I (e) and A:5, II (f) extends to wrongful demand to arbitrate³ unfair labor practice charges filed by a public employer as well as wrongful refusal to arbitrate unfair labor practice charges filed by a union. The court considered, but rejected, using failure to negotiate in good faith claims filed under sub-sections A:5, I (e) and II (d) to litigate these grievance procedure disputes:

Although section 5 does not deal with arbitration in explicit terms, two general categories of unfair practices are arguably broad enough to cover demands and refusals to arbitrate. RSA 273-A:5, I(e) and II(d) make it an unfair labor practice to refuse to negotiate in good faith. A refusal to arbitrate might be treated as a refusal to negotiate in good faith, on the reasoning of *United Steelworkers of American v. Warrior & Gulf Navigation Co.*, 363 U.S. at 581, 80 S.Ct. at 1352, that a grievance procedure is an element of a continuous process of collective bargaining.

We rely, however, on the somewhat narrower category of unfair labor practice, breach of a collective bargaining agreement. RSA 273-A:5, I(h) and II(f). Because it is undisputed that a wrongful refusal to arbitrate may be litigated as a breach of a CBA, we cannot justify treating a wrongful demand to arbitrate any differently.

Murray at 422 (emphasis added).

³ The final step of many grievance procedures, including the grievance procedure set forth in Article 11 of the 2015-19 CBA, is some form of arbitration.

The prosecution of a grievance is not a negotiation within the meaning of RSA 273-A:3, I and A:5, II (d). We reject the District's argument that RSA 273-A:5, II (d) applies to the Association grievance and the Go Fund Me campaign post. The District's claim that the association has refused to negotiate in good faith must be supported, at the very least, by evidence that the parties were engaged in collective bargaining agreement negotiations. However, negotiations on the parties' 2015-19 CBA concluded three years before the Go Fund Me campaign. Furthermore, bargaining on a successor contract will not begin until late summer or early fall of 2019. The link between the Go Fund Me campaign post and 2019 negotiations is extremely tenuous, to say the least, and the evidence adduced at hearing is insufficient to prove that the Association has violated its good faith bargaining obligations as to these future negotiations.

In conclusion, there is insufficient evidence to prove that the Association has committed an unfair labor practice in violation of RSA 273-A:5, II (d)(to refuse to negotiate in good faith with the public employer) as charged by the District. The complaint is dismissed.

So ordered.

Date: September 14, 2018


Andrew Eills, Esq., Chair

By unanimous vote of Chair Andrew Eills, Esq., Board Member James M. O'Mara, Jr., and Board Member Richard J. Laughton, Jr.

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