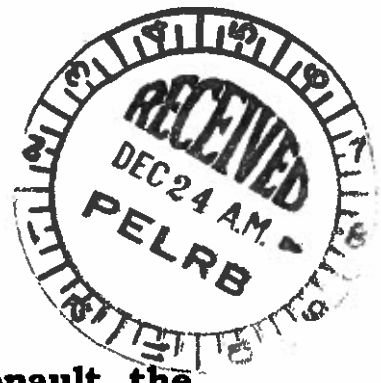
Appeal of PELRB Decision
No. 2019-028 dismissed



THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2019-0218, Appeal of Elizabeth Arsenault, the court on December 23, 2019, issued the following order:

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). Because we conclude that the appeal is procedurally barred pursuant to RSA 541:4 (2007), we dismiss it.

The plaintiff, Elizabeth Arsenault, appeals a decision of the Public Employee Labor Relations Board (PELRB) affirming a hearing officer's decision denying her unfair labor practice complaint against the defendant, Chester School District, SAU #82, in which she alleged that the defendant denied her the right to grieve the termination of her employment. On February 6, 2019, following a hearing during which the plaintiff, the school principal, and the superintendent testified, the hearing officer concluded that the defendant did not prevent the plaintiff from grieving her termination and that, in fact, the plaintiff never properly initiated a grievance. On March 6, 2019, in a pleading captioned "Motion for Rehearing Pursuant to RSA 561:3 [sic] and RSA 273-A:14," the plaintiff requested the PELRB to reconsider its decision and grant a rehearing.

On March 22, 2019, the PELRB issued a two-page decision, explaining that it would evaluate the plaintiff's "motion for rehearing" as a motion for review of the hearing officer's decision. New Hampshire Administrative Rule, Pub 205.01 provides that "[a]ny party to a hearing . . . may file with the board a request for review of the decision of the hearing officer." See also RSA 273-A:6, VIII (2010) (allowing for PELRB review of hearing officer decision). The PELRB further noted that all findings of fact contained in the hearing officer's decision are presumed to be reasonable and lawful, see Pub 205.01(b), and that, because the plaintiff did not file a transcript of the hearing, the board would not consider requests for review based upon objections to the hearing officer's findings of fact, see id. (noting that "the board shall not consider requests for review based upon objections to hearing officer findings of fact unless such requests for review are supported by a complete transcript of the proceedings conducted by the hearing officer"). After review, the PELRB approved the hearing officer's decision and denied the plaintiff's motion.

On April 17, 2019, without filing a motion for rehearing of the PELRB's March 22 decision, the plaintiff filed a Rule 10 appeal in this court. The defendant moved to dismiss the appeal based upon the plaintiff's failure to

move for a rehearing before the PELRB. See Sup. Ct. R. 10(1) ("To appeal to the supreme court from an administrative agency under RSA 541, the appealing party must have timely filed for a rehearing with the administrative agency."). We denied the defendant's motion without prejudice to raising the issue in its brief. In its brief, the defendant again argues that the plaintiff's appeal must be dismissed pursuant to Rule 10 and RSA 541:4. The plaintiff responds that she should not be required to file "an additional motion for rehearing" simply because the board "chose to treat the motion as a request for review" of the hearing officer's decision.

RSA 273-A:14 (2010) provides that a person aggrieved by a final order of the PELRB "may obtain review of such order in the manner prescribed in RSA [chapter] 541." RSA 541:4 precludes an appeal from an administrative agency decision to this court by a party who has not applied for a rehearing before the agency. Appeal of SAU #16 Coop. Sch. Bd., 143 N.H. 97, 100 (1998). "This requirement is grounded in the sound policy that administrative agencies have a chance to correct their own alleged mistakes before time is spent appealing from them." Id. (quotation, brackets, and ellipsis omitted). "[W]hen a party's motion for reconsideration of a hearing officer's decision is denied by the PELRB, the moving party must still apply for rehearing to satisfy the requirements of RSA 541:4 because a reconsideration motion relates to errors of the hearing officer while a rehearing motion relates to errors by the PELRB." Id. at 101 (discussing former version of Pub. 205.01(a), which identified a "motion for review" as a "motion for reconsideration"); see also Pub 205.01(d) ("The request for review of the hearing officer's decision shall precede, but shall not replace, a motion for rehearing of the board's decision.").

Although in Appeal of SAU #16 Cooperative School Board we declined to dismiss the appeal under the circumstances of that case, we advised future parties that "when a record does not demonstrate that the appealing party has met the requirements of RSA 541:4 we will refuse the appeal or dismiss it on our own motion." Id. at 101-02 (quotations and brackets omitted). Because the record in this case does not demonstrate that the plaintiff met the requirements of RSA 541:4, we dismiss the appeal. See id. at 101-02.

Dismissed.

Hicks, Bassett, Hantz Marconi, and Donovan, JJ., concurred.

Eileen Fox,
Clerk

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NH Supreme Court dismissed appeal of this decision on 12-23-19.
(NH Supreme Court Case No. 2019-0218)

State of New Hampshire
Public Employee Labor Relations Board

Elizabeth Arsenault

v.

Chester School District, SAU #82

Case No. E-0226-1
Decision No. 2019-028

Appearances:

Leslie C. Nixon, Esq., Nixon, Vogelman, Slawsky & Simoneau, Manchester, NH for Elizabeth Arsenault

Peter C. Phillips, Esq., Soule, Leslie, Kidder, Sayward & Loughman, Salem, NH for the Chester School District, SAU #82

Background:

On July 30, 2018, Elizabeth Arsenault filed an unfair labor practice complaint under the Public Employee Labor Relations Act alleging that the Chester School District (District) violated RSA 273-A:5, I (h) when it breached a collective bargaining agreement (CBA) between the District and the Chester Educational Support Personnel Association, NEA-NH (Association or CESPA). Ms. Arsenault originally claimed, among other things, that she was terminated in violation of the "just cause" provision in the CBA; that her termination was not in writing despite the CBA requirement that all discharges "be in writing with the reasons stated"; and that when she attempted to file a grievance concerning her termination, the District Principal responded that there was no justification for her request to file a grievance. Ms. Arsenault also claimed that her request for a review of her termination by the school board was denied by the Superintendent. Ms. Arsenault asserted that these actions constitute a breach of the CBA and requested that the

PELRB order that the District reinstate her and pay her lost wages, attorney's fees, and compensation for emotional distress.

The District denies the charges and asserts, among other things, that the PELRB lacks jurisdiction over Ms. Arsenault's claim because the CBA provides for binding arbitration and Ms. Arsenault failed to follow the contractual grievance procedure. The District also argues that the complaint fails to state a claim upon which relief may be granted. The District filed a motion to dismiss on the ground that the PELRB lacks jurisdiction and is requesting that the PELRB dismiss the complaint and deny all requests for relief. Ms. Arsenault objected to this motion.

The hearing was conducted on December 6, 2018 at the Public Employee Labor Relations Board (PELRB) offices in Concord. At the commencement of the hearing, Ms. Arsenault, through her counsel, agreed with the District that the PELRB does not have jurisdiction to decide Ms. Arsenault's underlying claims (i.e. termination). Ms. Arsenault agreed to limit the issues to whether she properly initiated the grievance procedure, whether the District prevented her from utilizing the grievance procedure, and whether she should be allowed to re-initiate and/or proceed with the grievance. As a remedy, Ms. Arsenault now requests an order directing the District to allow her to continue with the grievance process. At the hearing, 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 January 7, 2019; and the decision is as follows.

Findings of Fact

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

2. The CESPA is an employee organization certified as the exclusive representative of the District's Instructional Assistants. See PELRB Certification of Representative and Order to Negotiate, Decision No. 2001-046 (June 11, 2001)("[i]t is hereby certified that Chester

Educational Support Personnel Association, NEA-New Hampshire has been designated and selected by a majority of the employees ... as their representative for the purposes of collective negotiations and the *settlement of grievances*")(emphasis added).

3. The District and the CESPA are parties to a CBA effective from July 1, 2017 to June 30, 2020. See Joint Exhibit 1.

4. Article 4 of the 2017-20 CBA sets forth a four-step grievance procedure culminating in binding arbitration. Article 4.1 defines a grievance as "a claim of an alleged violation of a specific provision of this agreement." This Article also provides that a "grievance, to be considered under this procedure, must be initiated, in writing, by the employee or the Association within 15 school days if its occurrence." See Joint Exhibit 1.

5. Subsection 4 of Article 4.1, Definitions, provides that "[a]t all stages of the grievance procedure, the employee or the Association shall be entitled to a representative of her/his choice."

6. CBA Article 4.3, titled Structure, designates the Principal as the administrative representative for Level One (step one) and the Superintendent as the administrative representative for Level Two (step two) of the grievance procedure.

7. Article 4.4, titled Initiations and Processing, provides as follows:

> Failure at any step of this procedure to communicate the decision on a grievance within the specified time limits shall permit the aggrieved person to proceed to the next step. Failure by the grievant to process a grievance within the prescribed time limits shall constitute a waiver of further appeal and acceptance of the administrative decision made at the last level. A decision or appeal on a grievance shall be in writing and shall be rendered within the time limit set forth.
>
> 4.4.1 Level One – Principal
>
> Any employee who has a grievance shall first meet with the principal in an attempt to resolve the matter. If the situation is not resolved, the employee may within five (5) school days, set forth his/her grievance in writing, to the principal specifying:
>
> a) The nature of the grievance and the date occurred;

b) The specific provision of the agreement alleged to have been violated;
c) The nature and extent of the injury, loss or inconvenience;
d) The result of previous discussions;
e) Her/his dissatisfaction with decisions previously rendered; and
f) The remedy sought

The principal shall communicate her/his decision to the employee, in writing, within five (5) school days of receipt of the written grievance.

4.4.2 Level Two – Superintendent

The employee, no later than five (5) school days after receipt of the principal's decision, may appeal the principal's decision to the Superintendent of Schools. The appeal must be made, in writing, reciting the matter submitted to the Principal, as specified in (a) through (f) above. The Superintendent shall meet with the employee to attempt to resolve the matter, as quickly as possible, but within a period not to exceed ten (10) school days. The Superintendent shall communicate his/her decision, in writing, to the employee and the principal within five (5) school days of his meeting with the employee.

4.4.3 Level Three – School Board

If the grievance is not resolved to the grievant's satisfaction, she/he, no later than ten (10) school days after receipt of the Superintendent's decision, may request a review by the Board. The request shall be submitted, in writing, through the Superintendent of Schools who shall attach all related papers and forward the request to the Board. The Board shall hold a hearing with the grievant within thirty (30) calendar days of the request and render a decision, in writing, within fifteen (15) school days of the hearing.

4.4.4 Level Four – Arbitration

If the decision of the school board does not resolve the grievance to the satisfaction of the employee grievant, and s/he wishes review by a third party, she/he shall so notify the Association within five (5) school days of receipt of the School Board's decision. If the Association determines that the matter should be arbitrated further, it shall, in writing, so advise the Superintendent within ten (10) school days of receipt of the School Board's decision.

See Joint Exhibit 1.

8. Article 4.5 provides in part that the "decision of the arbitrator shall be binding upon both parties subject to the provisions of RSA: 542 [sic]..."

9. The CBA does not require that the District or its agents explain the grievance procedure to the bargaining unit employees or assist them in the filing or prosecution of grievances.

10. Employee discipline and terminations are governed by Article 5 of the CBA, titled Disciplinary Procedure, which provides in part as follows:

...

5.2 All suspensions and discharges shall be in writing, with the reason stated, and a copy given to the employee at the time of suspension or discharge.

5.3 Disciplinary action shall normally follow this order:

a) An oral warning
b) A written warning
c) Suspension without pay
d) Discharge

5.4 An employee may be suspended or discharged for the following reasons:

a) Misconduct during employment
b) Incompetence or inefficiency
c) Failure to perform assigned duties
d) Disobedience to his/her superior
e) Intoxication while on duty
f) Conviction of felony
g) Failure to observe rules and regulations
h) Incompatibility with other employees
i) Unauthorized absence from duty

5.5. Subject to the language of this AGREEMENT, a suspension or *discharge of an employee shall rest with the Superintendent of Schools.*

5.6 No employee shall be penalized, disciplined, suspended, reprimanded, adversely evaluated, reduced in rank or compensation, or deprived of any advancement without just cause...

See Joint Exhibit 1 (emphasis added).

11. Darrell Lockwood has been the District's Superintendent for 5 years.

12. Karen Lacroix has been employed by the District as a Principal for approximately 2 years.

13. Elizabeth Arsenault was employed by the District from October 7, 2004 to March 28, 2018. Ms. Arsenault was an instructional assistant/paraprofessional and a member of the bargaining unit represented by the CESPA. See Findings of Fact at 2.

14. The terms and conditions of Ms. Arsenault's employment at the time of her termination were governed by the provisions of the 2017-20 CBA.

15. On March 27, 2018, Ms. Arsenault had a meeting concerning a disciplinary matter with Superintendent Lockwood, Director of Special Services Jana Ruiz, and CESPA President Cindy McLaughlin. No decision regarding discipline was made at that meeting.

16. After the meeting, Ms. Arsenault sent the following email to Superintendent Lockwood, Ms. Ruiz, and CESPA President McLaughlin:

> I have been thinking about the meeting today, and also of the meeting around the 20th or 21st with Jana. It is difficult, at best, to say things in a meeting that you would like to be known. Even though I made some points that I wanted to make clearer, there were some other important facts I failed to mention. At this point I would like to add a few statements, in my defense. I admittedly did something that was not correct. However, as far as my para duties are [sic]: I enjoy my job working with the students that are assigned to me. I do whatever I can to help them understand the lessons, and be successful and proud of their accomplishments. There are many different types of students and learning levels and I gladly accept the challenge to help them move forward.
>
> I invite your, especially you, Dr. Lockwood, to join any and all of the classes I work in to show you my dedication to these students. I would gladly welcome you, to see me in the workday environment, and although I have made mistakes, perhaps this would show you the other side.
>
> In closing, I am truly very sorry for what I did, and to tell you that it will not happen again, is, [sic] I am sure hard for you to accept, but it will not occur again. Please consider what I have said, and know that my focus will be strictly for the students I am assigned to, and my energy will be in a positive manner. I look forward to talk again.

See Joint Exhibit 7.

17. On March 28, 2018, Ms. Arsenault met again with Superintendent Lockwood. At that meeting, the Superintendent informed Ms. Arsenault that her employment was terminated and explained why. The CESPA President and Director Ruiz were also present at that meeting.

18. The District never provided a written notice/letter of discharge to Ms. Arsenault.

19. March 28, 2018 was the last day of Ms. Arsenault's employment.

20. Ms. Arsenault did not seek advice or guidance from the CESPA President or any other member of the CESPA regarding her termination, the possibility of filing a grievance, or any other issue. The CESPA President did not give Ms. Arsenault any advice regarding her situation or the filing of a grievance.

21. Ms. Arsenault believed that she was not allowed on the school premises following her termination. However, the District has not informed Ms. Arsenault either verbally or in writing that she was not allowed on the school premises.

22. On April 13, 2018, Principal LaCroix received the following letter from Ms. Arsenault, dated April 7, 2018:

> Please refer to the pamphlet titled: Contractual Agreement between the Chester School District and the Chester Educational Support Personnel Association, dated July 1, 2017 to June 30, 2020. Specifically Page 3, Article Four, Grievance Procedure. According to 4.3. Structure, number 2, the principal is designated as the administrative representative for Level One procedure. This step was overlooked and went directly to the administrative representative for Level Two, which is the Superintendent.
>
> As respect for your position, and as stated in 4.3 number 1, administrative representative for Level One procedure, and referring again to Article Four, 4.1 number 1, I am submitting, in writing my intent to file a grievance. Also, in accordance to this article, I am within the 15 days of the occurrence.

See Joint Exhibit 3. At the time she sent this letter, Ms. Arsenault did not have any grievances filed or pending.

23. On April 17, 2018, Principal LaCroix responded as follows:

> I read over your letter that outlined your concerns regarding a violation of the Chester Educational Support Personnel Association contract agreement. The articles you reference involve specific language regarding grievance protocol. Your termination had nothing to do with this section of the contract. Therefore, there is no justification for your request. A grievance can only be filed based on a violation of the contract.

See Joint Exhibit 4. The Superintendent reviewed and approved this letter prior to its issuance.

24. In her complaint and objection to the motion to dismiss, Ms. Arsenault claims that her April 7, 2018 letter was not a step one grievance but a notice of her intent to file a grievance.

25. Principal LaCroix understood Ms. Arsenault's April 7 letter to be a letter of intent to file a grievance and not a step one grievance. After receiving this letter, Principal LaCroix expected Ms. Arsenault to file a grievance at step one. She did not understand this letter to be a request for a step-one grievance meeting.

26. After receiving Principal LaCroix's response, Ms. Arsenault did nothing. She did not file a grievance, request a grievance meeting, or have any grievance-related contact with either Principal LaCroix or Superintendent Lockwood. She also did not seek any guidance from any CESPA representative.

27. On May 25, 2018, Ms. Arsenault's legal counsel, Attorney Leslie Nixon, sent the following letter to Superintendent Lockwood:

> I represent Elizabeth Arsenault, paraprofessional, whose employment was terminated on March 28, 2018. I have reviewed the circumstances of her termination, and believe it was unlawful for several reasons.
>
> Among other reasons it appears to be in violation of Article 5 of the contractual agreement between the Chester School District and the Chester Educational Support Personnel Association, which requires that "all suspensions and discharges shall be in writing, with the reason stated, and a copy given to the employee at the time of suspension or discharge." If there is such a document, this is to request a copy of it pursuant to the enclosed authorization. This is also to request a copy of her personnel file. I am not clear if the District believes that the grievance procedure set forth in the contractual agreement applies to this situation, as it provides for a first level appeal to the principal, and a second level appeal to the superintendent, although it is my understanding that it was your decision to terminate Elizabeth's employment, so it is not clear what, if any, procedures she should have followed.
>
> If it is the position of the District that she should pursue the grievance procedure, please allow this to serve as our *intent* to pursue that process, and we hereby request a review by the school board.
>
> In any event, whether or not it is the District's position that the grievance procedure applies, this is to request re-evaluation of the decision to terminate Elizabeth's employment and that she be reinstated to her position.

See Joint Exhibit 5 (emphasis added). The counsel copied members of the School Board and Principal LaCroix.

28. Superintended Lockwood responded to the May 25, 2018 letter as follows:

> As I informed Ms. Arsenault during meetings I held with her and her Association's President on March 27 and 28, 2018, she was terminated because she violated student confidentiality. She was previously suspended without pay in 2014 for this same offense, and was advised at that time that another such infraction may result in her termination.
>
> The terms and conditions of employment of Ms. Arsenault's position as a paraeducator are governed by the provisions of the 2017-2020 collective bargaining agreement ("CBA") between the Chester School District and the Chester Educational Support Personnel Association ("Association"), including Article Five, Disciplinary Procedures. Any claim of an alleged violation of Article Five, or any other specific provision of the CBA, is governed by the terms of Article Four, Grievance Procedure, and "must be initiated, in writing, by the employee of the Association within 15 school days of its occurrence." Article Four further reads, in relevant part, that "[f]ailure by the grievant to process a grievance within the prescribed time limits shall constitute a waiver of further appeal and acceptance of the administrative decision…"
>
> Based upon Ms. Arsenault's failure to file a grievance contesting the manner of (or reasoning for) her termination within 15 school days of its occurrence constitutes a waiver of further appeal under the CBA. Know that the District is bound to apply all terms and conditions set forth in the CBA in an equal and consistent manner amongst all members of the bargaining unit represented by the Association. If the District permitted Ms. Arsenault to pursue a grievance under a different timetable, it would likely constitute not only a breach of the CBA, but also an unfair labor practice under RSA 273-A. While it is clear that Ms. Arsenault should have followed the process outlined in Article Four, it is equally clear that the District is neither permitted nor required to now allow her to commence a grievance at Level Three – School Board, as you request.
>
> Based on the foregoing, I respectfully decline to reevaluate my decision to terminate Ms. Arsenault's employment.
>
> In accordance with District policy and practice, I will provide you with a copy of Ms. Arsenault's personnel file upon receipt of a signed authorization to do so from Ms. Arsenault…

See Joint Exhibit 6.

29. According to the Superintendent, he did not discuss with the School Board the May 25, 2018 letter, including the request for a review by the School Board.

30. Neither the Association nor Ms. Arsenault requested an arbitration of any issue related to Ms. Arsenault's termination.

31. Ms. Arsenault used the contractual grievance procedure at least once in the past. At that time, she did not seek advice or assistance of an Association representative.

Decision and Order

Decision Summary

The District's motion to dismiss is denied. However, the District did not prevent Ms. Arsenault from grieving her termination and, therefore, did not violate RSA 273-A:5, I (h). Ms. Arsenault's unfair labor practice complaint and her request for relief are denied.

Jurisdiction

In general, the PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, see RSA 273-A:6. In this case, the District filed a motion to dismiss the complaint for lack of jurisdiction and this motion is addressed below.

Discussion

I. Motion to Dismiss

The District moved to dismiss Ms. Arsenault's complaint on the ground that the PELRB lacks jurisdiction because the CBA in this case provides for binding arbitration. While, under RSA 273-A:6, I, the PELRB has primary jurisdiction of all unfair labor practice claims alleging violations of RSA 273-A:5, including breach of contract claims, "it does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration." See *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006).[1] However, "[a]bsent specific language to the contrary in the CBA ... the PELRB is empowered to determine as a threshold matter whether a specific dispute falls within the scope of the CBA." *Id.* (citations omitted).

[1] The primary purpose of the arbitration process is "expeditious and economical dispute resolution." See *Appeal of the City of Manchester*, supra, 153 N.H. at 295-96. The Supreme Court explained that "[a]llowing an employee to contravene the underlying purpose of arbitration, by raising a substantive issue before the PELRB after agreeing to submit it to final and binding arbitration under the CBA, would not be in accord with the legislative purpose of RSA chapter 273-A." *Id.* (Citation omitted). Furthermore, "employees must exhaust grievance procedures provided in the CBA before they can bring an action against an employer for breach of the CBA." See *Vaca v. Sipes*, 386 U.S. 171, 184-85 (1967). See also *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965).

In its motion to dismiss, the District relies on *Appeal of Michael Silverstein*, 163 N.H. 192, 199 (2012). In *Silverstein*, the Supreme Court affirmed the PELRB's dismissal of Silverstein's complaint for lack of jurisdiction. However, the issue in this case is markedly different from those raised in *Silverstein*. Specifically, in *Silverstein*, the complainant raised the following issues: (1) whether "the PELRB has the power to review the merits of his unfair labor practice dispute, as a matter of law, absent final and binding arbitration with a neutral third-party..."; see *id.* at 197; (2) whether the PELRB's interpretation of the CBA, i.e. refusal to exercise jurisdiction, violated the complainant's due process and equal protection rights under the State and Federal Constitutions; see *id.* at 199; and (3) whether the CBA's grievance procedure culminating in final and binding review by the School Board is not "workable" and/or contrary to public policy. See *id.* at 201. Conversely, in this case, the main issue is whether the District wrongfully refused to allow Ms. Arsenault to file/prosecute a grievance concerning her termination.[2] Ms. Arsenault's claim here is independent of, for example, a wrongful refusal to arbitrate claim. In wrongful refusal to arbitrate cases, the PELRB's jurisdiction is limited to an assessment of whether a specific dispute is arbitrable, i.e. falls within the scope of the CBA, when a CBA provides for a final and binding arbitration. See *Appeal of the City of Manchester*, supra, 153 N.H. at 293. The Court's rulings on the limits of PELRB jurisdiction in such cases do not deprive the PELRB of jurisdiction over a claim that the District has interfered with an employee's use of the grievance procedure in an earlier stage of the process. Furthermore, if the crux of a claim is that the District is preventing an employee from accessing the grievance procedure, it would be nonsensical to insist that the employee's remedy is to file a second grievance over the District's actions which are allegedly preventing the employee from even filing a grievance.

[2]The District here concedes that Ms. Arsenault's termination grievance, if filed, would have been within the scope of the CBA, but maintains that she never did file it.

I find that the PELRB has jurisdiction in this case, at least to determine whether the District has effectively blocked an employee from using the grievance procedure, which is the path the employee must follow to access step-four binding arbitration. Like a wrongful refusal to arbitrate, a wrongful refusal to allow an employee to use a grievance procedure would constitute a breach of the CBA. See *School District #42 of the City of Nashua v. Murray*, 128 N.H. 417, 422-23 (1986). For the foregoing reasons, the District's motion to dismiss is denied.[3]

II. RSA 273-A:5, I (h) Claim

The remaining issue is whether the District violated RSA 273-A:5, I (h) by wrongfully preventing Ms. Arsenault from grieving her termination. The complainant asserts that she appropriately and timely "initiated" a grievance procedure by submitting a letter notifying the District of her intent to file a grievance but the District prevented her from filing and pursuing the grievance.

"A CBA is a contract between a public employer and a union over the terms and conditions of employment. When parties enter into a CBA, they are obligated to adhere to its terms, which are the product of their collective bargaining." *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006) (citations omitted). Under RSA 273-A:5, I (h) a breach of a CBA by a public employer constitutes a prohibited practice. In addition, RSA 273-A:4 mandates that "[e]very agreement negotiated under the terms if this chapter shall be reduced to writing and shall contain workable grievance procedures." In determining whether a CBA has been breached, it is necessary to "first examine the relevant language of the CBA as that language reflects the parties' intent." *Appeal of City of Concord*, 168 N.H. 533, 536 (2016). "This intent is determined from the agreement taken as a whole, and by construing its terms according to the common meaning of their words and phrases." *Appeal of Silverstein,* supra, 163 N.H. at 196.

[3] The District does not dispute, and this decision does not address, the standing of an individual employee to maintain a breach of CBA (RSA 273-A:5, I (h)) claim at the PELRB.

Here, on March 28, 2018, the Superintendent informed Ms. Arsenault that her employment was terminated as of that date. Although Ms. Arsenault was never provided with a written termination notice stating the reasons for termination, she was informed of the reasons for her termination and attended at least two meetings concerning the issue that led to her termination. See also Finding of Facts at Fact at 16.[4] The Association representative also attended these meetings. On April 7, 2018, i.e. 10 calendar days after being informed of her termination, Ms. Arsenault, without consulting with or requesting help from the Association, sent the following letter to the Principal:

> Please refer to the pamphlet titled: Contractual Agreement between the Chester School District and the Chester Educational Support Personnel Association, dated July 1, 2017 to June 30, 2020. Specifically Page 3, Article Four, Grievance Procedure. According to 4.3. Structure, number 2, the principal is designated as the administrative representative for Level One procedure. This step was overlooked and went directly to the administrative representative for Level Two, which is the Superintendent.
>
> As respect for your position, and as stated in 4.3 number 1, administrative representative for Level One procedure, and referring again to Article Four, 4.1 number 1, *I am submitting, in writing my intent to file a grievance*. Also, in accordance to this article, I am within the 15 days of the occurrence.

See Joint Exhibit 3 (emphasis added). The Principal responded on April 17, 2018 as follows:

> The articles you reference involve specific language regarding grievance protocol. Your termination had nothing to do with this section of the contract. Therefore, there is no justification for your request. A grievance can only be filed based on a violation of the contract.

See Joint Exhibit 4.

Ms. Arsenault's claim that the District, through the Principal's April 17, 2018 letter, prevented her from actually filing a grievance is without merit. Nothing in the Principal's letter prohibited Ms. Arsenault from filing a grievance. The letter simply correctly pointed out that the

[4]After the conclusion of the March 27, 2018 meeting with the Superintendent, among others, and prior to being informed of her termination, Ms. Arsenault sent the letter to the Superintendent that contained the following admission: "I admittedly did something that was not correct... I am truly very sorry for what I did, and to tell you that it will not happen again, is, I am sure hard for you to accept, but it will not occur again..." See Joint Exhibit 7.

CBA Articles referred to in Ms. Arsenault's "letter of intent" had nothing to do with her termination. The record here is devoid of evidence demonstrating that the Principal, the Superintendent, or any other District representative did anything to prevent Ms. Arsenault from filing a grievance over her termination. Likewise, there is no evidence, apart from Ms. Arsenault's unsubstantiated belief, that the Superintendent, the Principal, or any other District representative did anything to prevent her from coming onto the school premises for any reason, including, e.g., a step-one meeting with a Principal, following her termination.

Further, the record shows that Ms. Arsenault never did initiate a grievance. The plain language of the CBA requires that the grievance be initiated by an aggrieved employee or the Association at step one which has two parts: first - the meeting with the Principal to attempt to resolve the issue and, second - if the matter remains unresolved, the filing of a written grievance with the Principal, in accordance with Article 4.4.1, no later than 5 days from the meeting with the Principal and 15 days from the date of occurrence that gave rise to the grievance. Both parties agree that Ms. Arsenault's April 7 letter was not a step-one grievance, a conclusion supported by the record in this case. The record also shows that the April 7 letter was not a request for a required step-one meeting with the Principal.

Moreover, although Attorney Nixon's May 25, 2018 letter (filed nearly 60 days after the termination) does request reinstatement, this letter also cannot be fairly or reasonably interpreted as the initiation of a grievance within the meaning of the CBA grievance procedure. To find otherwise would render the plain requirements of step one obsolete and meaningless. In addition, even if May 25 letter were treated as a grievance, after the Superintendent responded, neither Ms. Arsenault nor Attorney Nixon attempted to advance it to the next step.

Also, any argument that the District improperly failed to help Ms. Arsenault file a grievance is equally without merit. Nothing in RSA 273-A or the CBA requires the District to

assist, advise, or otherwise help bargaining unit employees with the filing of grievances. In fact, such an "assistance" might arguably constitute an interference with the administration of the union, which is prohibited under RSA 273-A:5, I (b).[5]

Finally, Ms. Arsenault's reliance on "equitable estoppel" doctrine is misplaced. "Unlike, for example, the superior court, the PELRB does not have general 'equitable' powers." *Professional Firefighters of Newington, IAFF Local 4104 and Town of Newington, Fire Department*, PELRB Decision No. 2014-069 (March 21, 2014). See *Hollis School Board v. Hollis Education Association/NEA-NH*, PELRB Decision No. 2011-045, affirmed, *Appeal of Hollis Educ. Assoc.*, 163 N.H. 337 (2012)("the PELRB lacks jurisdiction to fashion an appropriate equitable remedy under equitable estoppel or some other potentially applicable equitable doctrine"). See also *Appeal of Somersworth*, 142 N.H. 837, 841 (1998). In *Appeal of Somersworth*, the Supreme Court reversed the PELRB decision finding that "it was error for the PELRB to use an equitable remedy" to bring a claim within its jurisdiction. *Id.* The Court stated in part:

> The PELRB's broad jurisdiction, however, applies only to those matters specifically encompassed within the statute... Although the PELRB may issue cease and desist orders, see RSA 273-A:6, III, VI (1987 & Supp. 1997); *State Empl. Ass'n v. Board of Trustees*, 118 N.H. 466, 468-69, 388 A.2d 203, 204-05 (1978), the statute does not give it the ability to grant all equitable remedies... The legislature, however, simply did not give the PELRB the ability to utilize an equitable remedy to bring ... [a] claim within its jurisdiction, and we will not create such authority.

Id. (citations omitted). Therefore, the doctrine of "equitable estoppel" does not apply in this case.

Based on the foregoing, I find that Ms. Arsenault, and no one else, is responsible for her failure to file and pursue a termination grievance. Her attempts to shift the blame to the District

[5]Ms. Arsenault was a member of a bargaining unit represented by a certified exclusive representative, the Association. Although the Association's representative was present at the meetings that culminated in her termination, Ms. Arsenault did not seek advice or help with filing or processing of a grievance at any point during the meetings or following her termination.

are without merit. She never filed a step one grievance, and therefore, further analysis of any complaints about steps two and three are unnecessary.[6]

Accordingly, the District did not violate RSA 273-A:5, I (h). Ms. Arsenault's complaint is dismissed and her request for relief is denied.

So ordered.

Date: 2/6/2019

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

Distribution: Leslie C. Nixon, Esq.
Peter C. Phillips, Esq.

[6]The potential arbitrability of a termination grievance is academic given Ms. Arsenault's failure to file a grievance which would trigger possible arbitration. It should be noted, however, that only the Association (and not Ms. Arsenault) had the right to bring the termination claim to arbitration. There is no evidence here that the Association had any interest in doing so or that it had ever made a demand for arbitration of Ms. Arsenault's termination.