



State of New Hampshire
Public Employee Labor Relations Board

**Concord Education Association,
Affiliated with NEA/NH**

v.

Concord School District

**Case No. E-0206-2
Decision No. 2019-073**

Pre-Hearing Memorandum and Order

Date of Conference: April 2, 2019

Appearances: Jason Faria, UniServ Director, for the Complainant
Edward M. Kaplan, Esq., for the Respondent

Background:

On February 27, 2019, the Concord Education Association, affiliated with NEA-NH (Association) filed an unfair labor practice complaint under the Public Employee Labor Relations Act claiming that the Concord School District (District) had committed an unfair labor practice when it assigned bargaining unit work (classroom instruction) to non-certified, non-bargaining unit employees. The Association alleges, among other things, (1) that the District created a full time kindergarten program titled Kindergarten Enrichment Year (KEY) for school year 2018-2019; (2) that the District hired one certified teacher and several Program Assistants, who are non-certified, non-bargaining unit employees,¹ for the KEY program; (3) that the

¹At the pre-hearing conference, the parties explained that Program Assistants are paraprofessional employees who are currently within the "educational assistants" bargaining unit represented by the Concord Educational Assistants Association.

District represented to the Association that the non-bargaining unit employees will not perform bargaining unit work; (4) that on August 31, 2018 the Association learned that the non-bargaining unit employees were performing bargaining unit work and filed a grievance against the District; (5) and that the District's actions constitute an inappropriate "subcontracting" of bargaining unit work and violate RSA 273-A:5, I (a), (b), (e), (g), and (h). The Association requests, among other things, that the PELRB order the District to assign classroom instruction elements of the KEY program to existing certified staff and/or hire sufficient additional certified staff to provide classroom instruction and order the District limit the KEY program activities assigned to Program Assistants to activities appropriate for non-certified staff.

The District denies the charge and asserts, among other things, (1) that the KEY Program Assistants do not perform bargaining unit work; (2) that the District acted within its managerial prerogative when it created the KEY program and hired staff for the program; (3) and that nothing in the collective bargaining agreement (CBA) prevents the District from assigning the KEY program-related work to Program Assistants. The District also argues (1) that the Association's complaint is untimely under RSA 273-A:6, VII because the KEY program was adopted in March of 2018 and the Association knew about it in June of 2018 at the latest, i.e., more than six month prior to filing of the complaint; and (2) that the matter should be "deferred to arbitration" because the parties' CBA provides for final and binding arbitration and the issue in this case is identical to the issue in the Association's grievance that is currently pending arbitration. The District requests that the PELRB dismiss the complaint and defer the matter to arbitration.

Issues for Determination by the Board

1. Whether the complaint was timely under RSA 273-A:6, VII and Admin. R. Pub 201.02 (a).

2. Whether the PELRB has jurisdiction over the Association's claims.
3. Whether the District violated RSA 273-A:5, I (a), (b), (e), (g), and/or (h) as charged by the Association.

Witnesses and Exhibits

As outlined in the Joint Pre-Hearing Worksheet. Both parties reserve the right to amend their lists of witnesses and exhibits in conformity with Pub 203.01.

Decision

1. "Parties" means the Association, the District or their counsel/representative appearing in the case. The parties shall simultaneously copy each other electronically on all filings submitted in these proceedings.
2. On March 21, 2019, the District filed a motion to amend its answer by adding the following affirmative defense: "The Unfair Labor Practice Charge in this matter is untimely as if [sic] exceeds the statute of limitations set out in RSA 273-A:6, VII." The District's motion to amend is granted and the answer is amended accordingly.
3. On March 14, 2019, the District filed an assented to motion to continue the hearing scheduled for April 25, 2019. The District's motion is granted. Accordingly, the hearing scheduled for April 25, 2019 is cancelled. A new hearing date will be established in a subsequent Notice of Hearing. On or before **April 9, 2019**, the parties shall file with the PELRB a list of all dates within the two-week period commencing May 13, 2019 on which both parties are available for a hearing.
4. As discussed at the pre-hearing conference, any request for relief which seeks action or decision in advance of a final hearing on the merits, such as a request to dismiss the complaint, "shall be presented in a separately filed motion specifically stating the relief

requested and the factual and legal basis for the requested relief.” See Admin. R. Pub 201.01 (j). See also Admin. R. Pub 203.04 (a).

5. At the pre-hearing conference, the parties indicated that the Association has submitted the KEY program-related grievance for arbitration and that the arbitration hearing is scheduled for July 17, 2019. If parties wish to continue proceedings in this case pending resolution of the grievance in arbitration, they shall file a motion to continue proceedings no later than **April 16, 2019**.
6. The parties shall exchange final lists of witnesses and exhibits no later than 15 days prior to the date of hearing.
7. The parties shall file with the PELRB final lists of witnesses and exhibits and a statement of stipulated facts no later 10 days prior to the date of hearing. All non-joint exhibits on the lists shall be pre-marked as either “ID” (if objected to) or “Full by Agreement.” It is understood that each party may rely on the representations of the other party that witnesses and exhibits appearing on their respective lists will be available at the hearing.
8. The requirement that the parties file copies of proposed exhibits prior to the date of hearing is suspended. The parties shall not file, either electronically or via mail, proposed exhibits prior to the day of hearing. The parties shall pre-mark each exhibit by placing identifying markers in the upper right corner of each exhibit, if possible, and bring an original and five copies of each exhibit to the hearing. To facilitate access to a particular exhibit, the parties shall use tabs to separate exhibits.
9. The time set aside for this hearing is 5 hours. If either party believes that additional time is required, a written notice of the need for additional time shall be filed with the PELRB at least 10 days prior to the date of hearing.

So ordered.

Date: 4/2/2019

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

Distribution: Jason Faria, UniServ Director
Edward M. Kaplan, Esq.