



**State of New Hampshire**  
Public Employee Labor Relations Board

**Inter-Lakes Education Association, NEA-NH**

v.

**Inter-Lakes School Board**

**Case No. E-0248-1**

**Decision No. 2020-187**

Order re Motion to Dismiss

Background:

On December 11, 2019, the Inter-Lakes Education Association, NEA-NH (Association or ILEA) filed an unfair labor practice complaint claiming that the Inter-Lakes School Board (District or ILSD) violated RSA 273-A:5, I (a), (b), (c), (e), (g), (h), and (i) when it placed teachers "on a Direct Assistance Plan, using a form that was unilaterally created and implemented" by the District. Specifically, the Association alleges as follows:

Pursuant to CBA Article 23.1 through Article 23.12, the CBA set forth the evaluation process and procedures to be used by the ILSD in evaluating the ILEA teachers. The evaluation rubric (PEER), evaluations levels (PEEL) evaluation handbook (PEEH), evaluation glossary (PEEG) were all negotiated between the ILEA and the ILSD and incorporated by reference in the CBA in Article 23.2.

On June 14, 2019, the ILSD placed a teacher on a Direct Assistance Plan, using a form that was unilaterally created and implemented by the ILSD. On or about August 16, 2019, the ILSD placed a second teacher on a Direct Assistance Plan, using a form that was unilaterally created and implemented by the ILSD.

The ILSD asserts that pursuant to CBA Articles 23.5 and 23.11, the ILSD is authorized to create and implement a Direct Assistance Plan through the Direct Assistance Plan form that the ILSD unilaterally created and implemented.

All aspects of the evaluation process and procedures have been negotiated between the ILEA and the ILSD for many years as set forth in multiple successive

CBA's. The ILEA asserts that the ILSD is required to negotiate the process and procedures to be employed by the ILSD in creating and implementing a Direct Assistance Plan as well as the form, if any, that is to be used as a part of the Direct Assistance Plan.

See Association's Unfair Labor Practice Complaint at 1-4. The Association asserts that the District's actions (1) interfere "with its employees in the exercise of the rights conferred by RSA 273-A, in violation of RSA 273-A:5, I (a)"; (2) dominate and interfere "with the administration of the ILEA, in violation of RSA 273-A:5, I (b)"; (3) discriminate "in the hiring, tenure or the terms and conditions of employment of its employees for the purpose of discouraging membership in the ILEA, in violation of RSA 273-A:5, I (c)"; (4) constitute a "refusal to negotiate in good faith with the exclusive representative of the bargaining unit, the ILEA, in violation of RSA 273-A:5, I (e)"; (5) "fail to comply with this chapter, or any rule adopted under this chapter, in violation of RSA 273-A:5, I (g)"; (6) constitute a breach of the terms and conditions of the CBA, in violation of RSA 273-A:5, I (h); and (7) constitute a "rule or regulation that violates the terms and conditions of the CBA, in violation of RSA 273-A:5, I (i)." The Association requests, among other things, that the PELRB find that the District committed an unfair labor practice and order the District to cease and desist from using the Direct Assistance Plan (Plan) and the Plan form.

The District denies the charges and asserts that the CBA did not prohibit the District from placing teachers on Direct Assistance Plans or from creating a form to do so; and that CBA Articles 23.5 and 23.11 require the administration to assist an employee whenever a professional employee's performance is unsatisfactory. The District also argues that under *Appeal of City of Manchester*, 153 N.H. 289 (2006) and *Appeal of State of NH*, 147 N.H. 106 (2001), the PELRB lacks jurisdiction over the complaint because the parties' CBA provides for binding arbitration. The District moved to dismiss the complaint for lack of jurisdiction and the Association objected.

Thereafter, on January 3, 2020, the Association filed a Motion for Deferral requesting that the PELRB order this matter to be "deferred to arbitration over the contract interpretation question and any other relevant contractual violations" and "hold the current ULP in abeyance until after the arbitrator issues an award." The District assented to the Motion for Deferral. The PELRB granted the Association's motion, cancelled the pre-hearing conference and the hearing and directed the parties to submit a Status Report on or before March 27, 2020. See PELRB Decision No. 2020-007. On April 15, 2020, the PELRB granted the Association's assented to motion to extend deferral and directed the parties to submit a further Status Report on June 15, 2020. See PELRB Decision No. 2020-084.

On June 5, 2020, the District filed a second Motion to Dismiss. The District asserts in relevant part as follows:

On May 18, 2020, the arbitrator issued an award finding that the school district did not violate the collective bargaining agreement when creating and implementing the direct assistance plan and that placing the employee on a direct assistance plan was consistent with the collective bargaining agreement's obligation to provide assistance before giving a teacher an unsatisfactory rating. CBA Section 23.5.

The arbitrator also found that Section 23 of the collective bargaining agreement requires the administration to "offer direct assistance including specific recommendations to help the professional employee improve if performance has shown need for improvement" and that in creating a direct assistance plan and placing the employee on a direct assistance plan, the district complied with paragraph 23.11 of the CBA.

By the terms of the collective bargaining agreement, the arbitrator's award is binding on the district, the grievant and the association.

See District's Motion to Dismiss, at 8-10.

The Association objected to the motion to dismiss. The Association argues, among other things, that "even if the PELRB determines it does not have jurisdiction to interpret the [CBA], it still maintain primary jurisdiction over all other violations of RSA 273-A:5 and dismissal of the

entire ULP would be inappropriate." See Association's Objection to the District's Motion to Dismiss, at 3. The Association also asserts the following:

The parties utilized the grievance and proceeded to arbitration on the question of whether the District violated the [CBA] by unilaterally creating a document entitled "Direct Assistance Plan" rather than negotiating the same with the Association. *The arbitrator found that the District did not violate the CBA by unilaterally creating the Direct Assistance Plan and was not obligated to negotiate the form used to implement the Plan. Arguably, the decision of the arbitrator addressed the alleged violations of RSA 273-A:5, I (e), (g), (h) and (i).* It should also be noted that had the arbitrator found that the District violated the CBA, then such decision would have resolved this proceeding, thereby supporting the decision to defer proceeding on the ULP complaint currently pending before the PELRB. It should also be noted that the decision of the arbitrator has narrowed the issues to be heard by the PELRB.

However, the arbitrator did not have jurisdiction to determine the other violations of RSA 273-A, such as the alleged violations of RSA 273-A, I (a), (b), and (c) as alleged by the Association in the ULP Complaint. That jurisdiction rests solely with the PELRB. If the remaining allegations of the Complaint were dismissed on jurisdictional or res judicata grounds, that would leave the Association without a forum for adjudication of the remaining allegations, thereby frustrating the purpose of RSA 273-A which encompasses the public employee/employer labor management dispute system.

Here, beyond the violations that the Association alleged to have arisen directly from the plain language of the CBA, violations of RSA 273-A:5, I (e), (g), (h), and (i), the Association has charged that the District purposefully violated the provisions of RSA 273-A:5, I (a), (b), and (c). The arbitrator did not address these issues as the jurisdiction to address these issues rests with the PELRB. Significantly, the parties, especially the District, did not request that the arbitrator decide these issues. These alleged violations must be addressed on the merits by the PELRB.

See Association's Objection to the District's Motion to Dismiss, at 4-6 (emphasis added).

At the August 19, 2020 pre-hearing conference, the District argued that the complaint should be dismissed because the arbitrator's award resolved all claims in this case as all the claims arose from the same allegations that the District breached the CBA and unilaterally changed terms of employment when it implemented the Plan. The Association countered that the PELRB retained jurisdiction over the remaining RSA 273-A:5, I (a), (b), and (c) claims.

## Decision and Order

### Jurisdiction

Under RSA 273-A:6, I, the PELRB has primary jurisdiction of all unfair labor practice claims alleging violations of RSA 273-A:5. However, it does not have jurisdiction to interpret a CBA or review the merits of a grievance when the CBA to which the parties are subject provides for binding arbitration or other binding resolution. See *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006). See also *Appeal of the State of New Hampshire*, 147 N.H. 106, 108-109 (2001); *Appeal of Silverstein*, 163 N.H. 192, 199 (2012). Likewise, the PELRB lacks jurisdiction to review the arbitrator's decision absent the filing of a subsequent unfair labor practice complaint alleging the failure to implement the arbitrator's award. See *Appeal of Laconia School District*, 150 N.H. 495, 497 (2004).

### Discussion

In this case, it is undisputed that (1) the parties' CBA provides for binding arbitration; (2) the Association's claims that the District breached the CBA and unilaterally changed terms or conditions of employment when it placed teachers on a Plan using a unilaterally created form was presented to the arbitrator; (3) the arbitrator found that the District did not violate the CBA by creating and implementing the Plan/form and that placing an employee on the Plan was consistent with the terms of the CBA; (4) the Association does not dispute the arbitrator's decision or argue that it is against public policy; and (5) the arbitrator's award resolves the Association's claims of violation of RSA 273-A:5, I (e), (g), (h), and (i).

In its motion to dismiss, the District argues that the arbitrator's award resolved the claims in this case and is binding on the parties. The Association continues to assert that the District's actions also violate RSA 273-A:5, I (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter); (b)(to dominate or to interfere

in the formation or administration of any employee organization); and (c)(to discriminate in the hiring or tenure, or the terms and conditions of employment if its employees for the purpose of encouraging or discouraging membership in any employee organization).

I agree with the District. The Association's complaint contains no factual allegations to support any claim of interference, coercion or discrimination or any other violation of subsections (a), (b), or (c). The complaint focuses on the alleged breach of contract and unilateral change in terms or conditions of employment when the Plan and form were created and implemented. This was the basis of the arbitration case and the PELRB lacks jurisdiction to decide such matters. Citing subsections (a), (b), and (c) does not change the jurisdictional analysis.

Moreover, by the Association's own admission, the arbitrator's award resolved the breach of contract and unilateral change in terms of employment claims (subsections (e), (g), (h), and (i)). Therefore, if the arbitrator's decision were incorporated into the complaint, the allegations might read as follows: The District appropriately, and in compliance with the CBA, created and implemented a Plan/Plan form and appropriately placed teachers on the Plan, therefore, by its actions, the District interfered with employees' and Association's statutory rights and discriminated against the employees in hiring, tenure and terms and conditions of employment. Such allegations would be absurd because, if the District acted appropriately under the CBA, it could not have possibly by the same actions have interfered with the employees' or the Association's rights or coerced or discriminated against employees or otherwise violated statutory subsections (a), (b), and (c).

The Association's reliance on *United Steelworkers of America, AFL-CIO, CLC, Manchester Water Works Local 8938 v. City of Manchester* case, PELRB Decision No. 2014-183, is misplaced. In *Manchester Water Works*, after dismissing a breach of contract claim for


lack of jurisdiction, the PELRB retained jurisdiction over the union's RSA 273-A:5, I (a) claim because the union's complaint contained allegations of improper direct dealing, which could arguably be interpreted as an attempt to interfere with employees' right to be represented by an employee organization/union.<sup>1</sup> There are no such allegations in this case.

The District and the Association are parties to a CBA. "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. at 293 (citations omitted). The CBA here requires that the arbitrator's award be binding on both parties. The arbitrator found that there was no violation, and in this case, the arbitrator's award resolved all the claims set forth in the complaint. Therefore, there are no genuine disputes of relevant and material fact, and the hearing is unnecessary. See Admin. Rule Pub 203.05 (b).

Based on the foregoing, this case is dismissed.

So ordered.

Date: 8/27/2020

  
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<sup>1</sup>The PELRB did note that "direct dealing" claims fall within subsection (e)(failure to negotiate in good faith) rather than subsection (a)(to restrain, coerce or interfere with its employees in the exercise of their statutory rights). Whether the alleged "direct dealing" was a violation of (a) or (e), the PELRB found that the evidence was insufficient to find that the City of Manchester committed an unfair labor practice. See PELRB Decision No. 2014-183, page 10.

