State of New Hampshire
Public Employee Labor Relations Board

Newmarket Support Staff/NH-NEA
v.
Newmarket School District
Case No. E-0231-2

and

Newmarket School District
v.
Newmarket Support Staff/NH-NEA
Case No. E-0231-3
(Consolidated Cases)

Decision No. 2022-021

Appearances: Sean List, Esq., NEA Special Counsel, Concord, New Hampshire for the Newmarket Support Staff/NH-NEA

Peter C. Phillips, Esq., for the Newmarket School District

Background:

On August 3, 2021, the Newmarket Support Staff/NH-NEA (Association) filed an unfair labor practice complaint under the Public Employee Labor Relations Act in Case No. E-0231-2. The Association claims that the Newmarket School District (District) violated RSA 273-A:5, I (a), (b), (c), (d), (e), (g), (h), and (i), the parties' collective bargaining agreement (CBA), and a Memorandum of Agreement (MOA) when, in early spring of 2021, it unilaterally directed bargaining unit employees to work for the Town Recreation Center (Rec. Center). The Association claims that the District was obligated to, but did not, bargain this change in terms and conditions of employment. The Association charges that the District then retaliated against bargaining unit

employees who refused to work at the Rec. Center by auditing their timecards. The Association also claims that the District violated RSA 273-A:5, I (a), (b), (c), (d), and (g) when it retaliated against the Association leaders for their union activity by including comments about their performance as union representatives in their work performance evaluations. The Association requests, among other things, that the PELRB (1) find that the District committed an unfair labor practice; (2) order the District to cease and desist from further violations and to remove all references to the union activity and/or employees' Association roles from all employee evaluations; and (3) encourage the District to "foster harmonious labor relations with the Association rather than seeking to undermine and intimidate its leaders and membership."

The District denies the charges and asserts as follows: (1) the Association's complaint violates the six-month statute of limitations set forth in RSA 273-A:6, VII; (2) the PELRB lacks jurisdiction to hear the complaint because the Association failed to follow the contractual grievance procedure which includes binding arbitration; and (3) the complaint fails to state a claim upon which relief may be granted. The District states that the employees were not ordered to work at the Rec. Center but instead were asked to volunteer; that no employee suffered loss of pay as a result of a timecard "audit"; and that the District acted within it managerial rights. The District requests that the PELRB dismiss the complaint and deny all requests for relief.

The District filed a motion to dismiss on the following grounds: (1) certain portions of the Association's complaint are barred by the six month statute of limitations contained in RSA 273-A:6, VII, and (2) the PELRB lacks jurisdiction to consider the RSA 273-A:5, I (h) portion of the complaint because the parties' CBA grievance procedure provides for final and binding arbitration. The Association objected to the motion to dismiss.

On September 24, 2021, the District filed its unfair labor practice complaint against the Association in Case No. E-0231-3. The District claims that the Association violated RSA 273-A:5,

II (b), (d), (f), and (g) when it filed an unfair labor practice charge two days before the August 5, 2021 School Board meeting concerning the District Superintendent's employment contract renewal and when the Association's co-presidents appeared "without warning or notice" and criticized the Superintendent during the "public comment" portion of the August 5, 2021 School Board meeting. The District claims that, by expressing their concerns directly to the School Board at the August 5, 2021 meeting, the Association circumvented the contractual grievance process and that the Association's actions constitute a breach of the CBA, an interference with the District's selection of its agent to represent it in labor negotiations and settlement of grievances, and a refusal to negotiate in good faith. The District requests that the PELRB find that the Association committed an unfair labor practice and order the Association to cease and desist and to pay the costs incurred by the District in pursuing this complaint as well as responding to the Association's complaint, including all legal fees.

The Association denies the charges. The Association asserts that the appearance of employees at the School Board public meeting was outside their work hours and the employees were entitled to communicate their concerns regarding District administration to the School Board, "just as any other member of the public is entitled" to do. The Association argues that the employees' conduct is protected under RSA 273-A, RSA 98-E, RSA 91-A, and provisions of the State and Federal Constitutions. The Association also claims that: (1) the District filed its complaint in retaliation for protected union activity, including the Association's filing of its complaint; (2) the District's complaint fails to state a claim upon which relief may be granted; and (3) the Association representatives' actions did not interfere with the District's selection of a collective bargaining agent because the meeting concerned an employment contract and not a selection of a bargaining agent, and because the School Board maintained and utilized its exclusive

discretion regarding the Superintendent's employment contract at all relevant times. The Association requests that the PELRB dismiss the District's complaint.

The Association filed a motion to dismiss the District's complaint on the following grounds: (1) the Association's unfair labor practice complaint against the District cannot be construed as a violation of RSA 273-A; and (2) the Association representatives' comments were constitutionally protected speech and cannot serve as the basis of a violation of RSA 273-A or the CBA. The District objected to this motion.

On October 5, 2021, the parties' joint motion to consolidate was granted and these cases were consolidated for purposes of hearing and decision. See PELRB Decision No. 2021-172.

A hearing was held on November 8, 2021. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. Both parties filed post-hearing briefs[1] on December 21, 2021. The parties' Agreed Statement of Uncontested Facts is incorporated into the Findings of Fact below 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 Association is the certified exclusive representative for the bargaining unit of District paraprofessionals and tutors as reflected in PELRB Decision No. 2019-042 (February 21, 2019).

[1] On December 30, 2021, the Association filed a reply brief. The District moved to strike the reply brief on the ground that, at the hearing, the hearing officer denied the parties' request to submit reply briefs. The PELRB Rules, Admin. R. Pub 101 et sec., do not allow for reply briefs, and any post-hearing brief must be filed "no later than 14 days following the last day of hearing unless the presiding officer establishes a different date." See Admin. R. Pub 203.05 (d). Here, the hearing officer established December 21, 2021 as a deadline for post-hearing briefs. No deadline was established for reply briefs. Furthermore, Admin. R. Pub 203.05 (e) mandates that, "[e]xcept by prior leave of the presiding officer, no brief or memorandum shall exceed 15 pages." Filing additional briefs circumvents this rule and no leave to exceed 15-page limit has been granted in this case. Accordingly, the District's motion to strike the reply brief is granted and the reply brief is stricken from the record.

3. Pam Young, Holly Geekie, and Valerie Mitchell are District paraprofessionals and members of the bargaining unit. The elementary school has approximately 24 paraprofessionals.

4. The Job Description for paraprofessional provides in relevant part:

Qualifications:

1. Two years of college or an Associate's degree, or a high school diploma and demonstrated proficiency on an assessment of knowledge and ability to instruct in reading, writing and mathematics.
2. Ability to develop positive relationships with young people and to work well with school staff members.
3. General understanding of how children learn and the social and emotional needs of children.
4. Such alternatives to the above as the administration may deem appropriate and acceptable.

Reports To: Assigned teacher(s), Case Manager, Special Education Building Coordinator, and Building Principal.

Job goals:

1. To contribute to a well-organized, smooth functioning class environment in which students can take full advantage of the instructional program and available resources.
2. To help the professional staff meet their instructional objectives by assisting individual students and small groups under the specific direction of teachers.

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Performance Responsibilities:

1. Under supervision of a certified teacher, prepare for classroom instruction events and other educational or non-educational activities.
   a. Assists the teacher in implementing special strategies and interventions developed by the teacher for reinforcing material or skills based on an understanding of individual students, their needs, interests, and abilities;
   b. Serves as a resource person about the student(s) in communication with the teachers regarding specific instruction with students relative to specific goal attainment.

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2. Work with individuals and small groups of students to:
   a. Reinforce material initially introduced by the teacher;
   b. Assist with self-help and independence skills, which may include toileting/diapering, lifting/transfers, feeding and seizure procedures;
   c. Implement remedial and review exercises, practice and drill work as outlined by the teacher;

d. Aid independent study, enrichment or remedial work as provided by the teacher;
e. Help students master instructional tasks assigned by teachers;
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3. Assist teachers with non-instructional duties, such as:
   a. Attendance checking
   b. Classroom supervision of student in preparation for lunch, bus loading and unloading, cleanup, and play periods;
   c. Escorting and supervising movement of students throughout the school;
   ***
4. ***
5. Assist in the administrative duties of the school during normal school hours ...
6. Set up and operate instructional and /or assistive technology equipment under the direction of the teacher.
7. Participate in available professional development activities appropriate to district expectations
8. Perform other duties consistent with the position assigned as may be requested by the Principal or director of Student Services.
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See Joint Exhibit 8. In an in-person learning setting, the majority of paraprofessionals' workday duties involves working directly with students.

5. At all relevant times prior to July 30, 2021, Pam Young served as President of the Association and Holly Geekie served as Vice President. From July 30, 2021 to the present, Holly Geekie and Valerie Mitchell have served as Co-Presidents of the Association and Pam Young has served as Vice President. Stipulated Facts at 2. Pam Young, Holly Geekie, and Valerie Mitchell are active members of the Association, and Pam Young was one of the Association leaders who questioned the Rec. Center work assignment and timecards audit and who was involved in conducting a "culture and climate" survey among the paraprofessionals.

6. Dr. Susan Givens is in her third year as Superintendent of Schools for the Newmarket School District. Dr. Givens has over 30 years of experience in education. She has held her position with the District since July 16, 2019. Stipulated Facts at 8 & 17.

7. Attorney Michael Elwell served as the District's chief spokesperson in 2019-2020

for the negotiation of the first collective bargaining agreement between the District and the Association. Stipulated Facts at 13.

8. The District and the Association are parties to a Collective Bargaining Agreement (CBA) effective from July 1, 2020 through June 30, 2023.

9. CBA Article 4, titled Management Rights, provides in part as follows:

> 4.1 The School Board, subject only to the express language of this Agreement reserves to itself full jurisdiction and authority over matters of policy and retains the unrestricted right (a) to direct and manage all activities of the school District; (b) to direct the work of employees; (c) to hire, promote, transfer, assign, non-renew and retain employees in positions within the School District; (d) to maintain the efficiency of government operations; (e) to relieve employees from duties because of lack of work or for other reasons; (f) to determine the methods, means, personnel and number of personnel by which operations are to be conducted; and (g) to take actions as may be necessary to carry out the mission of the District in emergencies.
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> 4.4 The parties understand that the School Board may not lawfully delegate the power or authority which, by law, is vested in it, nor may the Superintendent lawfully delegate the power or authority which, by law, is vested in him/her; and this Agreement shall not be construed so as to constitute a delegation of the power or authority of either. The term "law" as used above shall include, but not be limited to, regulations lawfully adopted by the New Hampshire State Board of Education.
>
> 4.5 As to every matter not covered by this Agreement, and except as expressly or directly modified by clear language of a specific provision in this Agreement, the School Board and the Superintendent retain exclusively to themselves all rights and powers that now or may thereafter be granted by law.

See Joint Exhibit 1.

10. CBA Article 8, titled Letter of Agreement, provides in part as follows:

> 8.1 The District shall provide by June 1 of each year, for continuing employees only, a letter of agreement to reemploy the employee, including the expected position, expected rate of pay, expected hours per day, expected days per year, and expected certification, licensing, degree, and other qualification required for the positions...
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> ***
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> 8.3 Once an employee receives a letter of agreement, should a transfer to another school, a reassignment, or some other change in the expected terms of employment be made by the School District, the employee shall be notified of the change before it is made.

See Joint Exhibit 1.

11. CBA Article 13, titled Reduction in Force, provides in part as follows:

> 13.1 The School Board and administration shall have the authority to determine the number and qualifications of employees in each job classification. The job classification in this bargaining unit are paraprofessionals and tutors.
>
> 13.1.1 If a reduction in force in this bargaining unit is being considered by the School Board, the Association president will be notified.

See Joint Exhibit 1.

12. CBA Article 6, titled Grievance Procedure, provides in relevant part:

> 6.1 A grievance is defined as a claim by a member of the bargaining unit or by the Association that there has been a violation of a specific provision of this agreement, except that the following matters shall be excluded from the grievance procedure: (1) any matter for which a specific method of review is prescribed by law; (2) any statute, law or regulation by the State or Federal Government; (3) any bylaw of the School Board pertaining to its internal organization; (4) any matter which, according to law, is either beyond the scope of School Board authority or is limited to unilateral action by the School Board alone; (5) a complaint concerning evaluation of an employee's performance; (6) any matter listed in Article 4 [Management Rights]; (7) expiration of a letter of agreement, termination of employment during the probationary period, and expiration of an assignment; and (8) any matter which this agreement states shall not be subject to the grievance process.

The last step of the four-step grievance procedure is final and binding arbitration. See Joint Exhibit 1.

13. After the March, 2020 voter ratification of the current CBA, the parties negotiated three Memoranda of Agreement ("MOAs"). Stipulated Facts at 16.

14. Superintendent Givens served as one of the representatives of the District in the negotiations concerning the CBA and MOAs. NEA-NH UniServ Director Nicole Argraves represented the Association in negotiations regarding the CBA and in one negotiation session regarding the first MOA. The Association leadership engaged in all further negotiations regarding the MOAs directly with the District. Stipulated Facts at 18 & 19.

15. The September 16, 2020 MOA provides in part as follows:

> ... the Covid shutdown period has been an unprecedented emergency situation, in which the Newmarket School Board and NSSA have had to work collaboratively to identify and implement temporary safety measures and protocol during the 2020-2021 school year that will modify "normal" working conditions in order to ensure the safety of employees, students and the community.
>
> ***
> Remote Working Conditions:
>
> 10. When/if schoolwide instruction switches to the remote model, some may have the option to remain at home if they have an approved reason, not limited to ADA accommodations – or to work from [the] building unless a building closure is enacted at which point all instruction will be remote. If working in the school building, staff must remain on campus for the entire school day.
>
> 11. The district is committed to working with the support staff to support students in a remote learning situation. This may include expanding the typical role of some support staff (example – helping to coordinate the needs of students in remote learning). If the district is unable to provide meaningful work, a reduction in force may be necessary, in which case the President of the Association will be notified. In this case, the district will determine how many positions need to be reduced and first start with any volunteers. Next, the district will move to probationary staff members – unless a probationary staff has specific training required by a student. If further reductions need to be made, these will be at management discretion.
>
> ***
> The parties agree that this is a non-precedence [sic] setting agreement and will only be in effect for the 2020-2021 school year. The parties also agree that this MOA does not replace the current collective bargaining agreement which is still in full force and effect provided they do not conflict with this MOA...

Joint Exhibit 2.

16. On March 21, 2021, the Newmarket Elementary School transitioned to remote learning, for two weeks, due to a COVID-19 outbreak. Stipulated Facts at 20.

17. On that date, Superintendent Givens posted the following message:

> We were just informed of a confirmed case of COVID-19 at our elementary school... To give elementary school teachers a chance to prepare for a shift to remote learning, school is cancelled for all elementary school students tomorrow, March 22nd. Remote learning will begin on March 23, and continue through April 5th. This shift only impacts Newmarket Elementary students. On campus learning will continue at the Junior Senior High School at this time...

> ... On a related note, I have reached out to Aimee Gigandet, Newmarkets [sic] Recreation Director and she will meet with her staff in the morning to see if they might be able to provide families with a supervised option for students. More information to follow about this tomorrow.

See District Exhibit 2.

18. The elementary school had been shut down for in person learning before but this situation was different. Previously, both the elementary and High School were shut down at the same time, thereby affording older siblings the opportunity to supervise their younger siblings-elementary school students. However, this time, because only the elementary school transitioned to remote learning, some elementary school students no longer had older siblings available to provide necessary supervision. In addition, previous shutdowns were planned but, this time, the District didn't have time to prepare. According to Superintendent Givens, the District had to find a solution quickly.

19. Superintendent Givens and Director of Student Services Erica MacNeil asked Assistant Principal Ruffo for suggestions as to how to support the Town Recreation Center (Rec Center) program which was supposed to provide a supervised remote learning option. Ms. Ruffo suggested that they ask paraprofessionals to help support the program.

20. On March 22, 2021, Director MacNeil emailed all elementary support staff explaining that the Rec. Center was willing to provide an in-person coverage option for parents for the two weeks that the elementary school would be engaged in remote learning. Stipulated Facts at 21. The email stated in part as follows:

> ...we are hoping to be able to support the Newmarket Rec Department as they are willing to provide in-person coverage for families during these two weeks. Unfortunately – they have staff members who are unable to come in for these two weeks and if we cannot help them with coverage – they may not be able to support families. I am looking for one person (or maybe two people who can split the day AM/PM) to help support our kiddos at the Rec Center. Please email me directly if you are able to help!

See Joint Exhibit 11.b.

21. The Rec. Center is a part of the Town's Recreations department. It is not part of the School District. Parents pay a fee to have their children attend the Rec. Center program.

22. In the past, some elementary school employees volunteered to work at the Rec. Center as well as other places outside the District (e.g. library).

23. On March 22, 2021, Dr. Givens sent an email to all elementary school parents in the District, informing them that the District was working with the Rec. Center to provide a supervised remote learning option. Stipulated Facts at 22. The email provided in part: "Recognizing that this would present challenges for families, we have been working with the Recreation Department to provide a supervised remote location for families in need. If you are struggling to find a supervised option for your child(ren) this week, contact the Recreation Department via email..." See Joint Exhibit 11.a.

24. Some bargaining unit employees received schedules showing that they were assigned to the Rec. Center. They did not volunteer to work there.

25. Assistant Principal Ruffo, who erroneously believed that paraprofessionals would like to volunteer to work at the Rec. Center, created a schedule of paraprofessionals to work there before talking to most of these employees. According to Ms. Ruffo, as there was not sufficient time to ask for volunteers because the Rec. Center needed support for the following day, she decided that a particular group of paraprofessionals was a "logical choice." She then created a schedule under which each paraprofessional would work one afternoon a week and sent it to the administration. After creating the schedule, Ms. Ruffo talked to the paraprofessionals about volunteering to work at the Rec. Center.

26. On March 22, 2021, Director MacNeil sent the following email to the Newmarket Recreation Director:

> This is what we have been able to find for coverage:
>
> M-Th 8:00-11:30 – Amanda Belanger
> T 11:30 – 3:00 – Kristina Napatalano [sic]
> W 11:30 – 3:00 – Kelly Gallion
> T 11:30 – 3:00 – Hollie Geekie
>
> Both Amanda and Kristina are ready to go for tomorrow if you have kids coming in. They are standing by and waiting for confirmation. We are continuing to try to find additional support...

By the end of the day, 3 students had registered for Tuesday (March 23), 4 for Wednesday, and 4 for Thursday. See Association Exhibit 2.

27. Neither Hollie Geekie nor Kelly Gallion volunteered to work at the Rec. Center. Ms. Gallion later informed the school that she would not work there. Neither Geekie nor Gallion ended up working at the Rec. Center.

28. When Ms. Ruffo spoke with several paraprofessionals regarding supporting the Rec. Center, they informed her that they were very uncomfortable with working there.

29. According to Ms. Ruffo, the administration decided that Rec. Center solution was not going to work, and she informed paraprofessionals that they did not have to work there. One paraprofessional from those listed on the schedule ended up working at the Rec. Center because Ms. Ruffo wasn't able to inform her in time that the program was cancelled. Amanda Belanger volunteered but did not work at the Rec. Center because Ms. Ruffo removed her from the schedule and assigned her to support a 1st year substitute teacher instead.

30. On March 23, 2021, then-President Pam Young emailed a letter to Dr. Givens on behalf of the Association, demanding to bargain the Rec. Center program. Stipulated Facts at 23. The letter stated in part:

> It has come to the Newmarket Staff Association's (NSSA) attention that the district has assigned NSSA paraprofessionals to be monitors for students at the Newmarket Recreation center. While we recognize that the assignments you have made are in effort to assist the Newmarket Recreation center, during a period where they are understaffed

due to COVID concerns, employees in the NSSA bargaining unit cannot be unilaterally assigned to such duties.

Assignment of Paraprofessionals to the Newmarket Recreational department is well outside the scope of paraprofessionals' expected duties. Further, this assignment requires employees to report to sites outside the Newmarket school buildings in which Paraprofessionals are normally assigned. This involuntary assignment violated the district's agreements with the NSSA support staff group, as memorialized in the parties Collective Bargaining agreement, the COVID Memorandum of agreements, [sic] and the established past practice for Paraprofessional employees who work for the Newmarket School District.

As we have stated on numerous occasions, NSSA wants to work collaboratively with the district to address issues as they arise. However, we are unable to do so, if the District does not engage in discussion with us related to desired changes in working conditions, Health and Safety issues and/or benefits and protections, as required by law. Please accept this letter as NSSA's formal demand to bargain over the changes in working conditions that the district desires to implement for this unit. In the interim, we respectfully request that all actions that violate the CBA, MOA's, health and safety, and past practice be ceased immediately, while the parties attempt to work through this issue.

We look forward to sitting down with you and your team to discuss this matter. We do believe that there is the potential for a temporary agreement that can be reached, which will address the needs of the Recreation center while fulfilling the parties' legal obligation to negotiate over such matters....

See Joint Exhibit 11.c.

31. Director MacNeil responded as follows:

I am sorry you see this as a change in your conditions – I viewed this as a way to ensure that we had meaningful work for our support staff. With us not having many students in the building – I was informed that many support staff were left with no work time or half days open. I have not authorized additional support staff to work remotely – however today I found out that many support [sic] are not working from the building and some did not come in yesterday either.

Could you direct me to where you feel the CBA is not being followed so I can see where you are coming from?

See Joint Exhibit 11.c.

32. On March 24, 2021, Assistant Principal for Student Services Kristina Cochran sent the following to paraprofessionals:

> As with all past shifts to remote, please submit to me your DETAILED schedule with the updated times you are assisting children. Please remember to include the students you are working with/services being covered. Please get those to me by the end of the day.

See District Exhibit 3 (emphasis in original).

33. On March 29, 2021, UniServ Director Nicole Argraves sent a formal demand to bargain on behalf of the Association to School Board Chair Kim Shelton and Superintendent Givens. Stipulated Facts at 24.

34. On April 2, 2021, Attorney Michael Elwell emailed Nicole Argraves on behalf of the District and asserted that assignment of paraprofessionals to the Rec. Center for work was a managerial right and that the subject of assignment to the Rec. Center was not a mandatory subject of bargaining. Stipulated Facts at 25. On April 6, 2020 Ms. Argraves responded to this email reaffirming the Association's positions and its request to bargaining. Attorney Elwell responded as follows:

> There was no directive to paraprofessionals to work at the Recreation center. The administration informed support staff that there was an opportunity to serve students at the Recreation Center while school was closed due to the pandemic and asked whether they were willing to help out... The School District does not believe that it is obligated to bargain over this... In any event, the issue is moot because the last day of this service at the Recreation Center was April 1, and because on April 2 the Governor issued Emergency Order #89 which requires schools to be open for in-person instruction five days per week. Accordingly, the School District does not agree to bargain over this.

See Joint Exhibit 11.f.

35. There has been no bargaining regarding assignment of paraprofessionals to the Rec. Center. See Stipulated Facts at 26.

36. Paraprofessionals, who were not on leave, continued to report to work at the elementary school building during the remote learning period.

37. There was no reduction in force or hours related to remote learning period or to employees' refusal to work at the Rec. Center.

38. The District did not discipline paraprofessionals who refused to work at the Rec. Center or who questioned their assignment to the Rec. Center.

39. In April, 2021, the District made inquiries regarding the timecards and hours of work of several paraprofessionals. This sparked a disagreement between the Association and District regarding hours of work and working conditions that lasted through May, 2021. Stipulated Facts at 27.

40. When Ms. Young's and several other paraprofessionals' hours were questioned for the week of March 28, 2021, she sent an email to Director MacNeil to inquire about it. Director MacNeil responded:

> This is the first time we went remote and did not have very many students in the building. Each para gave their schedules to Kristina and as I told you – there are 2.5-4 hours per day scheduled for many of the support staff... many reported a normal day (7:45-3:45). Time cards are a certification of the hours you have worked which are also directed by the building admin. It would beg the question – what was the rest of the day if that time was not directed???

See Joint Exhibit 11.g., page 6. Thereafter, UniServ Director Argraves inquired from Director MacNeil why only some of the employees had their timecards questioned. Director MacNeil responded as follows:

> The email sent was a simple question. What was asked is why the time card reported working 7.25-7.5 hours each day, however, the staff member's schedule that they provided the building AP only indicated between 3-4 hours a day of scheduled direct student support per day. So why there is a discrepancy on the time card versus the schedule [sic]. Some paras had very full schedules – therefore they were not asked because they had a day full of meetings with students... In addition, the CBA item 9.3 states that employees shall be paid for the hours that they actually work. The district did offer meaningful work and also allowed time in a paras day to be the "remote coordinator" to further fill the hours. Very few paras reached out to the "remote coordinator" to find meaningful work beyond these hours and the meaningful work that I was able to find was refused by some who had time in their schedule.

See Joint Exhibit 11.g.

41. The District did not discipline any paraprofessionals whose timecards were questioned and the paraprofessionals were paid in accordance with their submitted timecards.

42. The Association did not grieve the District's timecard audit or the Rec. Center schedule. According to UniServ Director Argraves, the Association did not file a grievance because the parties' dispute falls under "labor law" and is not a violation of a specific CBA article.

43. The Association conducted a survey of members concerning morale and working conditions during the spring semester of 2021. Stipulated Facts at 30.

44. Pam Young later received a performance evaluation, dated March 25, 2021 but received in May, 2021, that stated, in part: "Pam can be a leader in the building, however, sometimes this leadership may not be felt by all her paraprofessional colleagues and ensuring that the voices of all are heard is integral to being a true community leader." Stipulated Facts at 28.

45. In May, 2021, then-Association Member and current Co-President Valerie Mitchell received a performance evaluation stating in part: "Val has taken on the role of a leader of the support staff. Through that role, she has advocated for her support staff and has opened up communication between the administration and support staff. This has helped to build a positive climate and culture for all of the support staff in the building as evidenced by the very few concerns we have had to navigate together this year." Stipulated Facts at 29.

46. Nothing in the paraprofessional's job description requires that paraprofessionals demonstrate leadership skills or act as leaders for other paraprofessionals. See Joint Exhibit 8.

47. The District's Paraprofessional Evaluation Form contains the following rubrics: Commitment to Assignment, School Community Relationships, Responsiveness to Student Needs, Instructional Knowledge & Skills, and Professional Responsibility. None of the rubrics or subheadings contain any reference to a paraprofessional's "leadership" role. See Joint Exhibit 7.

48. Unlike the evaluations of Valerie Mitchell and Pam Young, evaluations of other paraprofessionals do not contain a specific reference to an employee's role as a leader of support staff or other paraprofessionals. See District Exhibit 6.[2] Rather, any reference to leadership concerns a general paraprofessional's responsibility to help "lead" students to success, and not to leadership of support staff.

49. Since at least July 12, 2021, Pam Young had been trying to find out from the Superintendent's Executive Assistant the date of the next School Board meeting. Initially, she thought the meeting was scheduled for July 15, 2021 but the Executive Assistant informed her that nothing was scheduled until August 5, 2021. On July 12, 2021, she wrote to the Superintendent's Executive Assistant: "I was wondering if the next school board meeting on August 5 will allow for public comments?" The Superintendent's Executive Assistant responded: "The next meeting is scheduled as a School Board retreat but that may be rescheduled to the fall. The next regular meeting is August 19th and yes you can make a public comment on agenda items." See District Exhibit 11, page 1.

50. The School Board held a meeting on August 5, 2021, which started at 7:00 pm. During the meeting, the Board was to consider renewing Superintendent Givens' employment contract. Superintendent Givens' contract with the District was in effect for the period July 1, 2019 to June 30, 2022. Stipulated Facts at 32 & 33.

51. Pam Young and Holly Geekie are residents of Newmarket and they both attended the August 5, 2021 School Board Meeting. Stipulated Facts at 34. During the public comment period, Pam Young spoke to the Board stating in part as follows:

> Right now I am the current vice president and former president of Newmarket Support Staff Association. I am speaking tonight on behalf of our membership regarding

[2] I find that District Exhibit 6 has limited probative value because the names of the employees are redacted and there is no evidence as to whether any of these evaluated employees were actively involved in union activity akin to the union activity of Pam Young or Valerie Mitchell.

concerns with culture and climate that have evolved with our Newmarket Support Staff and the current administration at the SAU level...

***

The leadership of this unit has been unable to secure a meeting with the full board to address the concerns of climate and culture among other issues that this unit has raised since May. Based on our most recent survey results, this presentation represents the feelings and the will of the entire bargaining unit, not just those who have chosen to be association members.

The numbers are [sic] overwhelmingly show that the support staff do not feel supported or respected. The most concerning is the number of support staff who are contemplating not returning to the district. This number is staggering – it's over 50%. This, in part, is due to heightened levels of anxiety and overwhelming feeling of being undervalued, disrespected, and not seen as important to the district. At a time when staff has already been under a great deal of stress related to COVID, feeling undervalued and unsupported by the SAU is not acceptable. This can no longer be ignored. We cannot risk losing the committed, experienced and caring support professionals who work with this community's children. These children deserve the best teachers and the best support professionals to be successful.

I would like to read some comments to you that were received from the survey....

***

The survey results were clear. We have a climate and culture issue in Newmarket. In closing, we know that we can do better, and we owe it to our children and community to do it better. This means reaffirming Newmarket's values and commitment to all staff.

Thank you for your time tonight and for listening to the information this association had for you this evening. I hope that after reflection on the information, the board can arrive on [sic] an informed decision that will improve the climate and culture for all staff in the Newmarket School District.

See Joint Exhibit 10. None of Ms. Young's comments at the meeting specifically referred to or mentioned the Superintendent.

52. Other residents of the Town, who attended the August 5, 2021 meeting, made comments during the public comment period expressing their opinion regarding Superintendent Givens' work performance. Most, but not all, comments were positive.

53. The Association subsequently shared a portion of the survey results with Superintendent Givens and the School Board by electronic mail. Stipulated Facts at 35.

54. SAU 31 School Board Policy BHC provides as follows:

> The Board desires to maintain open channels of communication between itself and the employees. The basic line of communication will, however, be through the Superintendent of Schools.
>
> **Staff Communications to the Board**
> All communications or reports to the Board or any Board committee from principals, supervisor, teachers, or other employee members shall be submitted through the Superintendent.

See Joint Exhibit 5. This policy has not been negotiated with the Association.

55. Superintendent Givens' employment contract was renewed.

Decision and Order

Decision Summary:

Case E-0231-2: The District's motion to dismiss is granted as to any claims based on events that occurred more than 6 months prior to the filing of the complaint and as to any subsection (h) claims. The District did not commit an unfair labor practice when it asked paraprofessionals to volunteer to work at the Town Rec. Center or when it questioned the timecards of some paraprofessionals for the remote learning period. Therefore, the Association's claims related to these events are denied. The District did commit an unfair labor practice in violation RSA 273-A, I (a), (b), and (g) when it commented on Association representatives' union activity/leadership in their work performance evaluations. The District is ordered to cease and desist from further violations and to remove any reference to their support staff leadership role from affected employees' evaluations and personnel files.

Case E-0231-3: The Association's motion to dismiss is denied. As to the merits, the District's complaint against the Association is dismissed and the request for relief is denied because the evidence is insufficient to prove that the Association violated RSA 273-A:5, II (b), (d), (f),

and/or (g) when it filed an unfair labor practice complaint or when Association representatives spoke during the public comment portion of the August 5, 2021 meeting.

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 but does not have jurisdiction to hear subsection I (h)(to breach a collective bargaining agreement) claims when the final step of a CBA grievance procedure provides for final and binding arbitration. See *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006). See the decision on the District's motion to dismiss below.

Discussion:

Case E-0231-2

I. District's Motion to Dismiss

a. RSA 273-A:6, VII Six-Month Limitation Period.

The District argues that certain portions of the Association's complaint are barred by the six-month statute of limitations contained in RSA 273-A:6, VI. The Association counters that the statute "does not prohibit the inclusion of facts relevant to the history, which are provided for context rather than submitted for the purpose of claiming said facts constitute an independent violation of RSA 273-A:5." RSA 273-A:6, VII provides that "[t]he board shall summarily dismiss any complaint of an alleged violation of RSA 273-A:5 which occurred more than 6 months prior to the filing of the complaint with the body having original jurisdiction of that complaint." Nothing in the statute allows for a "background" or "course of conduct" exception or an exception to prove an employer's motivation that would permit a party to allege potential violations dated prior to the statutory 6-month limitation period. In this case, many of the Association's allegations, under the Background sub-heading portion of the complaint, refer to events which allegedly occurred more than 6 months prior to the filing of this complaint, some of which, if proven, could arguably

constitute a separate unfair labor practice. They are, however, unproven and cannot be used in this case to establish a pattern of conduct or motivation. Therefore, to the extent the Association claims any violation of the statute by actions that occurred prior to 6 months from the date of filing, these claims are dismissed and they are not relied upon in this decision. However, the stipulated facts and the Association's presentation at the hearing were limited, for the most part, to the events that have occurred within the 6-month period prior to the filing of the complaint and, therefore, are not precluded from consideration.

b. Jurisdiction Over Subsection (h) Claims.

The District also argues that the PELRB lacks jurisdiction to consider the RSA 273-A:5, I (h) portion of the complaint because the parties' CBA grievance procedure provides for final and binding arbitration. The Association counters that its complaint concerns the matters specifically excluded from the CBA grievance procedure under CBA Article 6.1 and, therefore, the grievance procedure does not preempt the filing for the unfair labor practice complaint.

The primary purpose of the arbitration process is "expeditious and economical dispute resolution." See *Appeal of the City of Manchester*, 153 N.H. 289, 295-96 (2006). 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). Further, the PELRB "does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration." *Id.* at 293. See also *Appeal of Silverstein*, 163 N.H. 192 (2012). 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... Thus, as 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, supra, 153 N.H. at 293 (Citations omitted). It is well settled that a grievance is arbitrable "unless we can say with positive assurance that the CBA's arbitration clause is not susceptible of a reading that will cover the dispute." *Appeal of City of Concord*, 168 N.H. 533, 536 (2016). The analysis of arbitrability disputes is governed by four general principles:

> (1) arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that it has not agreed 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.

Id. "Under the positive assurance standard, we may conclude that the arbitration clause does not include a particular grievance only if we determine with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute." *Id.* "To determine whether the subject grievance is arbitrable, we first examine the relevant language of the CBA as that language reflects the parties' intent. 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." *Id.* (Citation and quotation marks omitted).

In order to assert and prove, by a preponderance of the evidence,[3] a violation of RSA 273-A:5, I (h)(breach of CBA), a party much first identify which specific provision of a CBA was allegedly breached. Here, the Association claims, in a conclusory manner, that the District breached the CBA when it unilaterally directed support staff to the Rec. Center to work without negotiating this proposed change with the Association and when it retaliated against employees who refused to work at the Rec. Center by questioning their timecards. However, the Association

[3]Admin. R. Pub 201.06 (c) provides that, in all adjudicatory hearings, the party asserting the affirmative of a proposition, "shall bear the burden of proving the proposition by a preponderance of the evidence."

does not clearly identify specific provisions of the parties' CBA that were allegedly breached making it impossible to determine whether subsection (h) was violated.[4] In addition, the Association's complaint here runs afoul of Admin. R. Pub 201.02 (b) which provides that the complaint "shall set out ... (4) A clear and concise statement of the facts giving rise to the complaint, including the date, time, and place of the occurrence, and the names of all persons involved in or witnessing the occurrence, *characterizing each particular act in terms of the specific provision(s) of RSA 273-A:5 or RSA 273-A:6* alleged to have been violated ..." (emphasis added). Therefore, the Association failed to properly allege a violation of RSA 273-A:5, I (h).

Furthermore, even if it could be inferred from the complaint that the Association claims a breach of the parties' MOA, or of the CBA reduction in force/hours provision, or of any provisions related to hours of work or assignment (e.g. Article 8 or Article 9), the PELRB lacks jurisdiction over such breach of contract claims for the following reasons. In this case, the presumption of arbitrability exists, because the CBA here provides for final and binding arbitration, and therefore, "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 Concord*, supra, 168 N.H. at 536. There is no express provision in the CBA or MOA excluding any of the Association's "breach of contract" claims from arbitration, and the Association failed to offer "forceful evidence" of a purpose to exclude either Rec. Center or timecards audit claims from arbitration. Although CBA Article 6.1 excludes some matters from the grievance procedure, contrary to the Association's assertion, none of the Article 6.1 exceptions

[4] The NEA-NH UniServ Director actually testified that the Association did not file a grievance over the Rec. Center and the "audit" of timecards because these disputes fall under "labor law" and are not a violation of a specific CBA provision.

apply to the Association's claims here.[5] Therefore, there is no "positive assurance that the CBA is not susceptible of an interpretation that covers" the claims in this case and these claims are subject to the final and binding arbitration.

For the foregoing reasons, to the extent the Association does claim that any of the CBA or MOA provisions related to the Rec. Center assignment or timecard audit have been breached by the District, these breach of CBA claims are dismissed for lack of jurisdiction.

II. The District's Alleged Violations of RSA 273-A:5, I.

The Association claims that the District violated RSA 273-A:5, I (a), (b), (c), (d), (e), (g), and (i) when, in early spring of 2021, it unilaterally directed paraprofessionals to work for the Town Rec. Center and retaliated against those paraprofessionals who refused to work for the Rec. Center by questioning their timecards/hours worked.

RSA 273-A:5, I provides in relevant part as follows:

It shall be a prohibited practice for any public employer:

(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;

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

[5] In its objection to the motion to dismiss, the Association, among other things, argues that the PELRB has jurisdiction because the complaint "partially concerns the evaluation of employee performance" and because "the District's defenses concern the interpretation of management rights enumerated in Article 4" both of which are excluded from the grievance procedure under Article 6.1. If the Association did plead that the evaluations were issued in breach of a specific provision of the CBA or that the District breached the Management Rights Article, the PELRB could arguably exercise jurisdiction over such claims. However, the Association did not plead that the evaluations were issued in violation of RSA 273-A, I (h). Likewise, the Association did not plead that the District breached CBA Management Rights Article in violation subsection (h). See Association Unfair Labor Practice Complaint. Therefore, the Association's objection to the motion based on the Article 6.1 evaluation and Management Rights exceptions is without merit.

(d) To discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under this chapter;

(e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations;

***

(g) To fail to comply with this chapter or any rule adopted under this chapter;

(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 making or adopting such law, regulation or rule.

a. Recreation Center Work & Timecards Inquiry

The Association argues, among other things, that the assignment of employees to work at the Rec. Center is a unilateral change in terms and conditions of employment. The Supreme Court has recognized that "[a] public employer's unilateral change in a term or condition of employment ... is tantamount to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations." *Appeal of Hillsboro-Deering Sch. Dist.*, 144 N.H. 27, 30 (1999). RSA 273-A:1, XI defines "terms and conditions of employment" as:

> 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.

In this case, the evidence shows that the District did not unilaterally changed terms and conditions of employment by assigning bargaining unit employees to the Town Rec. Center. Rather, the District asked for a volunteer or two to help staff the Rec. Center because the Center

was understaffed due to Covid-related absences. The District simply was trying to find a solution to a very difficult situation in a very short time. Because of the suddenness of the shutdown and a premature drafting of a list of volunteers based on Assistant Principal Ruffo's misguided assumption that the paraprofessionals would like to volunteer, one paraprofessional ended up working at the Rec. Center. Employees who did not volunteer to work at the Rec. Center were not forced to work there. In addition, none of the bargaining unit employees were disciplined or lost pay for refusing to work at the Center. These facts and the language used by Director MacNeil in her appeal to the paraprofessionals support the conclusion that the assignment was voluntary, not mandated. Furthermore, the Association did not grieve the assignment to the Rec. Center, which it should have done if it believed that any part of the parties' agreements had been violated.

The Association also claims that the District retaliated against paraprofessionals who refused to work at the Rec. Center by questioning their timecards/hours and that such retaliation constitutes an unfair labor practice. However, nothing in the statute or the CBA prohibits an employer from inquiring into the veracity of timecards submitted by employees and the evidence here is insufficient to show that the timecards were questioned in retaliation for paraprofessionals' refusal to work at the Rec. Center.

In cases involving claims of retaliation, the Supreme Court held that a complainant must prove illegal motivation at least to some degree. See *Appeal of Sullivan County*, 141 N.H. 82, 84 (1996). See also *AFSCME Council, Local 863/Rochester Public Works Dept., Buildings and Grounds v. City of Rochester, Dept. of Public Works and Buildings and Grounds*, Decision No. 2009-131. "[T]he union bears the burden to prove some minimal degree of proscribed motivation in order to establish an unfair labor practice under RSA 273-A:5." *Appeal of Sullivan County*, supra, 141 N.H. at 85. "This burden cannot be met simply by the union making a claim of retaliation and producing some evidence to support the claim." *Appeal of Professional Firefighters*

of East Derry, 138 N.H. 142, 145 (1994). The Union "must prove by a preponderance of the evidence some element of retaliatory action." *Id.* Furthermore, the employer can meet the union's evidence of retaliatory motivation with its own evidence; and if the Board finds by a preponderance of the evidence that the employer was unlawfully motivated to some degree, an employer can still avoid being adjudicated a violator by proving by a preponderance of the evidence that regardless of the unlawful motivation, the employer would have taken the same action for wholly permissible reasons. See *id.* at 144-45. See also *Hampton Firefighters Local 2664, IAFF, AFL-CIO, CLC v. Town of Hampton*, Decision No. 2008-068.

In this case, the Association failed to prove by a preponderance of the evidence that the audit of some of the paraprofessional's timecards was motivated by the District's desire to retaliate. As the shutdown created a unique situation of having no students at the school and, taking into consideration that the majority of paraprofessionals' regular duties during in-person learning is working directly with students, it was not unreasonable for the administration to question the hours of work submitted by paraprofessionals during the shutdown period. Furthermore, none of the timecards submitted were denied and none of the paraprofessionals lost pay for the week in question. To the extent the Association claims that the inquiry into timecards violated the parties' CBA or the MOA, this claim is dismissed because, as stated above, the PELRB lacks jurisdiction to interpret the contract where a CBA provides for final and binding arbitration.

For the foregoing reasons, the Association's claims that the District violated RSA 273-A:5, I (a), (b), (c), (d), (e), (g), and/or (i) by assigning employees to the Rec. Center and questioning their timecards/hours worked are dismissed and the related requests for relief are denied.

b. Evaluations.

The Association also claims that the District violated RSA 273-A:5, I (a), (b), (c), (d), and (g) when it retaliated against the Association leaders for their union activity by including

comments about their performance as union representatives in their performance evaluations. Specifically, in Ms. Young's evaluation, the District stated that she "can be a leader in the building, however, sometimes this leadership may not be felt by all her paraprofessional colleagues and ensuring that the voices of all are heard is integral to being a true community leader." In addition, in Ms. Mitchell's evaluation, the District stated: "Val has taken on the role of a leader of the support staff. Through that role, she has advocated for her support staff and has opened up communication between the administration and support staff. This has helped to build a positive climate and culture for all of the support staff in the building as evidenced by the very few concerns we have had to navigate together this year." Both Pam Young and Valerie Mitchell are active members of the Association and Pam Young was one of the Association leaders who questioned the Rec. Center work assignment and inquiry into timecards and who was involved in conducting a "culture and climate" survey among the paraprofessionals.

Nothing in a paraprofessional's job description requires that paraprofessionals demonstrate leadership skills or act as leaders for other paraprofessionals. In addition, none of the District's Paraprofessional Evaluation Form rubrics or subheadings contain any reference to a paraprofessional's "leadership" role. Furthermore, District Exhibit 6 demonstrates that none of the other evaluations contained specific reference to an employee being a leader of the support staff or other paraprofessionals. Rather, any mention of leadership refers to leading students to success, not to leading other paraprofessionals. Therefore, the evidence shows that the District, in its evaluations of Young and Mitchell, referred to their activity as union leaders.

An employer's reference, whether positive or negative, to an employee's role as a union leader is inappropriate and constitutes an interference in employees' statutory rights and the administration of a union in violation of RSA 273-A:5, I (a) and (b), respectively. I find that, in this case, for the reasons stated above, the District committed an unfair labor practice in violation

of RSA 273-A:5, I (a), (b), and, by extension, (g) when it entered comments regarding their leadership role in Young's and Mitchell's annual performance evaluations. The District is ordered to remove these comments, set forth above, from Young's and Mitchell's annual performance evaluations and personnel files and to cease and desist from further violations. The evidence is insufficient to prove that the District violated RSA 273-A:5, I (c) or (d) and, therefore, these claims are dismissed.

Case E-0231-3

I. Association's Motion to Dismiss

The Association argues that the filing of an unfair labor practice complaint against the District cannot be construed as a violation of RSA 273-A and that the Association's representatives' comments were constitutionally protected speech and cannot serve as a basis of a violation of RSA 273-A or the CBA. The District counters that, because the Association's untimely "background" allegations "have no relevance to the remaining allegations contained in the Association's complaint, they have no purpose but to interfere with the School Board's considerations of the Superintendent Given's contract renewal." The District also argues that the timing of the Association's representatives' presentation at the August 5 meeting was not "coincidental." The District further asserts that, the Association representatives' constitutional rights notwithstanding, they are subject to RSA 273-A, the CBA, and board policies, and that their attempt to circumvent a contractual grievance procedure by making a presentation directly to the School Board is, among other things, a breach of the Association's duty to negotiate in good faith.

I find that the Association's assertions in the motion to dismiss and the District's response concern the crux of the District's complaint, and not the PELRB's jurisdiction over the District's claims, and the Association's motion to dismiss is denied on this basis. The issues raised in the motion to dismiss and the objection are addressed below.

II. Association's Alleged Violations of RSA 273-A:5, II.

The District claims that the Association violated RSA 273-A:5, II (b), (d), (f), and (g) when the Association filed an unfair labor practice complaint two days before the August 5, 2021 School Board meeting involving the Superintendent's employment contract renewal and when the Association's leadership appeared "without warning or notice" and criticized the Superintendent during the "public comment" portion of the meeting. The District argues that, by expressing their concerns directly to the School Board in this fashion, the Association circumvented the contractual grievance process, and that the Association's actions constitute a breach of the CBA, an interference with the District's selection of its agent to represent it in labor negotiations and settlement of grievances, and a refusal to negotiate in good faith.

RSA 273-A:5, II provides in relevant part as follows:

> It shall be a prohibited practice for the exclusive representative of any public employee:
>
> ***
>
> (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;
>
> ***
>
> (e) To refuse to negotiate in good faith with the public employer;
>
> ***
>
> (f) To breach a collective bargaining agreement.
>
> (g) To fail to comply with this chapter or any rule adopted hereunder.

The Public Employee Labor Relations Act, RSA 273-A, confers on public employees and public employers a right to file unfair labor practice complaints. The District here requests a finding that a filing of an unfair labor practice complaint constitutes, among other things, an interference with public employers in their selection of agents. However, the District has not cited any authority to support such a claim. Such a claim, if sustained, would have a significant chilling effect on public employees' and unions' ability to avail themselves of protections provided by RSA

273-A and ultimately on the parties' ability to "foster harmonious and cooperative relations."[6] Furthermore, the evidence is insufficient to prove, by a preponderance of the evidence, that the Association's complaint was filed solely for the purpose of causing a non-renewal of the Superintendent's employment contract or otherwise interfering with the District's selection of its agents. The District here primarily relies on the fact that the Union filed its complaint two days before the School Board meeting during which, among other things, the Board addressed the Superintendent's employment contract renewal. This fact alone is insufficient to prove interference in violation of RSA 273-A:5, II. Moreover, the finding that the District did commit an unfair labor practice, as set forth above (see subsection II, b. Evaluations of this decision), proves that the Association's complaint was justified and wasn't filed in bad faith. In addition, the evidence shows that the filing of the complaint had no effect on the employer's selection of its agent, here, the Superintendent. Based on the foregoing, I find that the Association did not violate RSA 273-A, II when it filed a complaint in this case.

Further, the District's assertion that the Association representatives' presentation at the August 5 School Board meeting constitutes an interference with the employers' selection of its agents and a failure to negotiate in good faith is likewise without merit for the following reasons. "The Union's and bargaining unit employee's self-determination rights protected under the statute ... are an integral part of the right of public employees to organize and act collectively in the RSA 273-A bargaining process." See *AFSCME, Council 93, Local 3657/Milford Police Employees v. Town of Milford*, PELRB Decision 2011-084. In *Milford*, the PELRB found that "the Town did dominate and interfere in the administration of the Union in areas such as how the Union and

[6] "The legislative purpose behind RSA chapter 273-A is to foster harmonious and cooperative relations between public employers and their employees by, among other things, establishing a PELRB 'vested with broad powers to assist in resolving disputes between government and its employees.' Laws 1975, 490:1, III." *Appeal of the City of Manchester*, 153 N.H. 289, 295-96 (2006).

bargaining unit employees determine to interact and administer the business of the Union" when the Town Administrator interfered with the Union's right to publicly advocate for a fact-finding report and to openly criticize the Town Administrator's presentation regarding the report at a deliberative session of the Town Meeting. *Id.* The PELRB also found that the Town coerced and interfered with bargaining unit employees in the exercise of their statutory rights, including their right to choose how to exercise their rights to engage in concerted union activity and participate in union business. *Id.*

Similarly, in *Pittsfield Town Employees, AFT Local #6214, AFT-NH, AFL-CIO v. Town of Pittsfield, Board of Selectmen*, PELRB Decision No. 2012-278 (December 26, 2012), the union claimed, among other things, that the Town's policy prohibiting bargaining unit employees from communicating with the public without the Board of Selectmen's prior approval constituted an interference with the employees' rights in violation of RSA 273-A:5, I (a). The hearing officer found that the Town violated RSA 273-A:5, I (a) because the Town's policy "interfered with the bargaining unit employees' right to advocate their or the Union's position regarding the changes to terms and conditions of employment and their right to be free from intimidation or coercion by the public employer in exercise of their statutory rights." *Id.* Likewise, in *Hillsboro-Deering Federation of Teachers, AFT Local #2348, AFT-NH, AFL-CIO v. Hillsboro-Deering School District*, PELRB Decision No. 2008-175, where a public employer representative expressed his opposition to the union members' vote of "no confidence" during a mandatory faculty meeting attended by union members, the PELRB found that the public employer's remarks violated RSA 273-A:5, I (a). *Id.* The PELRB held that RSA 273-A:5, I (a) prohibits the public employer from interfering with employees' actions in support of what they believe to be an improvement in their working conditions and protects employees from being subjected to statement by public employer that could be reasonably foreseen to result in intimidation. See *id.*

Furthermore, although the PELRB doesn't have jurisdiction over RSA 98-E, RSA 91-A, and provisions of the State and Federal Constitutions, the Supreme Court has recognized "our need to be cognizant of the constitutional provisions that raise the freedom to communicate one's views to the highest level of protection that can be provided." *Appeal of City of Portsmouth, Bd. of Fire Comm'rs*, 140 N.H. 435, 439 (1995)(citations and quotation marks omitted)(finding that employer's public criticism of union did not constitute interference or unfair labor practice).

In this case, the Association's representatives, who are residents of the Town, attended a public School Board meeting and made a presentation to the Board during the public comment session. The Town residents were allowed to speak to the Board during the public comment session. Being a member or a leader of an employee organization does not, under RSA 273-A, deprive any resident, contrary to the District's assertion, of the right to participate in public meetings. Ms. Young spoke to the Board about the school's "culture and climate." In her presentation, Ms. Young did not mention Superintendent Givens either by name or by position and didn't resort to personal attacks on the Superintendent. Contrary to the District's contention, nothing in the statute prohibits bargaining unit employees, the union, or Town residents, from expressing their opinion of the District management or from advocating on behalf of bargaining unit employees before the employer, here, the School Board. Such actions are at the core of the union's statutorily protected concerted activity. Conducting a culture and climate survey and presenting it to the School Board are protected union activity similar to the "vote of no confidence" in *Hillsboro-Deering*. Therefore, prohibiting the Association from conducting or presenting it to the School Board might constitute a proscribed interference with the employees' exercise of their statutory rights and with the administration of the union akin to the employers' interference the PELRB found in *Pittsfield*, *Milford*, and *Hillsboro-Deering* cases. For the going reasons, the

Association representatives' presentation at the August 5, 2021 meeting is not an unfair labor practice.

The District also asserts that, by expressing their concerns directly to the School Board in this fashion, the Association circumvented the contractual grievance process and, thereby, breached of the CBA and its obligation to bargain in good faith. This assertion is likewise unpersuasive. The "culture and climate," which were the subject of the August 5, 2021 presentation, do not appear as express terms of the parties' CBA and, therefore, could not have been addressed through the contractual grievance procedure which defines a grievance as "a claim by a member of the bargaining unit or by the Association that there has been a violation of a *specific provision of this agreement*." (Emphasis added.) In addition, an alleged breach of the School Board BHC policy, which requires all employees to communicate with the School Board through the Superintendent but which was not negotiated with the Association, does not constitute a breach of the CBA or a violation of RSA 273-A:5, II.

Based on the foregoing, the Association did not violate RSA 273-A:5, II (b), (e), (f) or (g). Accordingly, the District's complaint is dismissed and its requests for relief are denied.

So ordered.

Date: 02/08/2022

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

Distribution: Sean List, Esq.
Peter C. Phillips, Esq.