Appeal withdrawn 3-11-13 per Supreme Court order in Appeal of Monadnock Regional School District, Supreme Court Case No. 2012-0722

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Monadnock Regional School District

v.

Monadnock District Education Association/NEA-NH

Case No. E-0028-5
Decision No. 2012-126

Appearances: Margaret-Ann Moran, Esq., Upton and Hatfield, LLP Hillsborough, New Hampshire for the Complainant

Michelle Couture, UniServ Director, NEA-NH, Concord, New Hampshire for the Respondent

Background:

The District filed an unfair labor practice complaint on December 5, 2011 claiming that the Association violated RSA 273-A:5, II (f) when it requested arbitration of the District's denial of an employee's request to rescind her notice of intent to retire in June, 2012. The District argues that whether to allow an employee to withdraw a previously submitted notice of intent to retire is not covered by the collective bargaining agreement (CBA). According to the District it is a discretionary matter reserved to the District's management rights. Therefore, District action on an employee request to rescind a notice of intent to retire is not subject to the CBA grievance procedure and it is not subject to grievance arbitration. The District requests that the PELRB: 1) find that the grievance is not arbitrable; 2) find that the Association has breached the CBA in violation of RSA 273-A:5, II (f) by requesting an arbitration of non arbitrable matter; 3) issue a

cease and desist order prohibiting the arbitration of the Association's grievance; and 4) award the District all costs and attorney's fees associated with this dispute.

The Association denies the charges and claims that the dispute is arbitrable because it involves interpretation of Article XIII of the CBA (Retirement). The Association requests that the PELRB: 1) find that the grievance is arbitrable; 2) order the parties to proceed to arbitration; and 3) deny the District's claims and requests for relief.

An adjudicatory hearing was held on January 18, 2012 at the PELRB offices in Concord. Both parties had the opportunity to present evidence in the form of witness testimony and exhibits, and both parties submitted post-hearing briefs following the conclusion of the hearing. The decision is as follows.[1]

Findings of Fact

1. The Association is the exclusive representative of certain bargaining unit employees of the Monadnock Regional School District, including Lori Martin, by virtue of the Association's certification by the Public Employee Labor Relations Board.

2. The District is a public employer as that term is defined by RSA 273-A:1, IX.

3. Joint Exhibit 1 is the parties' 2008-2012 collective bargaining agreement (CBA). Article XIII is titled "Retirement," and it includes the following provisions:

> The Monadnock Regional School District offers both regular retirement and longevity to teachers employed by the District. The time frames indicated for application are to allow for easy transitioning and budgeting purposes. The member should make an appointment with the New Hampshire Retirement System for discussions of their retirement options.
>
> 13.1 Any full time member of the Association who is at least fifty-five (55) years of age and whose age, plus years of service in the District equals seventy-five (75) may apply for regular retirement, as long as they have at least fifteen (15) years of service in the District. A letter

[1] The District submitted a request for findings of fact and rulings of law. As noted in *Bedford Education Association/NEA-NH v. Bedford School District*, Case No. E-0099-1, PELRB Decision No. 2011-059, action on such requests is only required under RSA 541-A:35 when they are submitted in accordance with PELRB rules, which are set forth in Pub 100-300. The District's requests will not be acted upon since they are not authorized under PELRB rules and the PELRB did not request them in this case.

of application declaring the intent to retire shall be sent to the School Board via the Superintendent of SAU #38 eighteen (18) months prior to the retirement date. The member may retire in June with written notice given in the preceding January; however, benefits will be paid in eighteen (18) months from the date of the notice.

A. The member shall be paid the following as part of the retirement:

1. Any member retiring pursuant to the provisions of Article 13.1 shall be paid $75.00 per day for all accumulated leave days.

2. Members retiring pursuant to the provisions of Article 13.1 shall be paid an amount per year of service on the following schedule:

a. 15-19 years of employment with the District: $75.00 per year;
b. 20-24 years of employment with the District: $100 per year;
c. 25-29 years of employment with the District: $125 per year;
d. 30 or more years of employment with the District: $175 per year.

4. Per Joint Exhibit 9, Ms. Martin sent letters dated October 28, 2010 and November 1, 2010 to Superintendent Hodgdon:

> I respectfully would like to submit my letter of intent to request retirement in June of 2012.
>
> I was hired by Monadnock Regional School District August of 1990 and have taken one and a half years of leave of absences, yielding 20.5 years of service.
>
> I will be 56 years old in March of 2012. When adding years of service and age I will total 76.5 years, therefore meeting the Teacher's agreement of Article XIII starting on p. 27.
>
> Thank you for your time and interest in this matter.

5. Per Joint Exhibit 10, minutes of the November 2, 2010 School Board meeting included the following:

> MOTION: ...MOVED to accept the retirement of Laurie Martin as of June 30, 2012. SECOND...VOTE...Motion passes.

6. Per Joint Exhibit 11, Superintendent Hodgdon sent Ms. Martin a letter dated November 4, 2010 which provided as follows:

> Dear Lori,
>
> At the November 2, 2010 meeting of the Monadnock Regional School Board, I read your letter of retirement effective June 30, 2012. The Board accepted your

> resignation and asked that I extend their appreciation for your service on behalf of our students.
>
> Best wishes in the future and thank you again for your years of service to the students of the Monadnock Regional School District.

7. Per Joint Exhibit 12, on September 3, 2011 Ms. Martin wrote to Superintendent Hodgdon stating that "I respectfully would like to retract my letter of intent to retire in 2012. I would like to resubmit my intent for retirement for June 2013. I apologize for the inconvenience this may cause you or the Human Resource department."

8. Per Joint Exhibit 13, at a September 20, 2011 School Board meeting, Superintendent Hodgdon informed the School Board of Ms. Martin's request. The non-public meeting minutes provide that "[a]fter a discussion the Board had decided to take no action." The School Board also took no action in response to a more detailed letter provided by Ms. Martin. See Joint Exhibits 16 and 17.

9. The Association filed a grievance. See Joint Exhibits 5 and 8. In a letter of November 28, 2012 the Association president wrote that:

> The grievance is regarding the refusal of the MRSDBoE to approve Ms. Martin's request to rescind her previously submitted intent to retire. The article in question is XIII (1) of the Collective Bargaining Agreement. The MDEA believes that this refusal is in violation of precedence established by past board practices regarding the rescinding of retirements. Additionally, it is the belief of the MDEA that whether a grievance is allowed to proceed to arbitration is not the decision of the MRSDBoE but the decision of the arbitrator.

10. Superintendent Hodgdon responded to the grievance by stating "I deny the grievance because there is no violation of a provision of the contract. The basis of the grievance is not arbitrable." See Joint Exhibit 6. The District subsequently responded to the Association's request to proceed to arbitration by filing the present unfair labor practice complaint, claiming the Association has made a wrongful demand for arbitration.

11. Article X of the CBA is titled "Grievance Procedure, and Article 10.1 provides as follows:

10.1 Definition

A "grievance" is a claim based upon an event or condition which affects the welfare and/or terms and conditions of employment of a teacher or group of teachers based upon the interpretation, application, or violation of any of the provisions of this Agreement. An "aggrieved teacher" is the person or persons making the claim. All time limits specified in this Article shall mean school days. School days for the purposes of this Article are defined as days that are scheduled as instructional or teacher workshop days on the published school calendar. Snow or emergency days are considered school days.

10.5 Formal Procedure

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Level D. If the grievance remains unsettled, then the matter may be referred by the Association to arbitration....

Decision and Order

Decision Summary:

Under the standards applicable to determining the arbitrability of a grievance the Martin grievance is arbitrable, and accordingly the District's charge that the Association has made a wrongful demand for arbitration in violation of RSA 273-A:5, II (f) is denied. The parties shall proceed to arbitration as demanded by the Association.

Jurisdiction:

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

Discussion:

The question presented in this case is whether the dispute over Ms. Martin's effort to revoke or withdraw her notice of intent to retire is "arbitrable," i.e. whether it is subject to the CBA grievance procedure and ultimately to grievance arbitration. This depends upon whether the CBA is "susceptible of an interpretation that covers the dispute."

> A presumption of arbitrability exists if the CBA contains an arbitration clause, but the court may conclude that the arbitration clause does not include a particular grievance if it determines with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute. Furthermore, the principle that doubt should be resolved in favor of

arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties.

Appeal of Town of Bedford, 142 N.H. 637, 640 (1998).[2] The PELRB has jurisdiction to determine, as a threshold matter, whether the dispute at issue is arbitrable because the parties did not confer this power upon an arbitrator in their CBA (See Joint Ex. 1, Article X). *Appeal of Police Comm'n of City of Rochester*, 149 N.H. 528, 533 (2003). The PELRB therefore must interpret the CBA in this case to a limited extent in order to decide the question of arbitrability and determine whether the Association has made a wrongful demand for arbitration, as charged by the District. *See also Appeal of Silverstein,* 163 N.H. 192 (2012).

In this case, the subject matter of the dispute (a notice of intent to retire) is the topic of section 13.1 of Article XIII of the CBA. Not only is the genesis of the current dispute Article XIII of the CBA, but the parties' disagreement centers around the meaning of language used in Article XIII and the consequence of employee and employer action taken pursuant to Article XIII. For example, Article XIII grants to Ms. Martin a right to "apply for regular retirement".... by writing a "letter of application declaring the intent to retire." See Finding of Fact 3. The subsequent dispute between the parties revolves around the respective rights and obligations of the parties once Ms. Martin provided her Article XIII notice of intent to retire in circumstances where the School Board has provided its approval of the notice, as reflected by the exchanges referenced in the Findings of Fact. Among the specific questions raised in the circumstances of this dispute are: 1) whether Ms. Martin retained any right to withdraw her stated intent to retire in the event of a change in circumstances, as argued by the Association; 2) whether the District's treatment of other bargaining or non-bargaining unit employees in similar circumstances is

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[2] The board does have jurisdiction to interpret collective bargaining agreements and resolve disputes that are covered by a collective bargaining agreement in the context of an unfair labor practice charge when, for example, the filing of an unfair labor practice complaint with the PELRB is the agreed upon final step in the grievance process, *Appeal of Nashua Police Commission,* 149 N.H. 688 (2003), or when the grievance procedure does not conclude with a final and binding last step, *Appeal of Hooksett School District,* 126 N.H. 202 (1985).

relevant; and 3) whether, from the District's perspective, the provisions of Article XIII mean that once an employee has provided a notice of intent to retire and the School Board has acted the matter is closed, and the employee's status has been finally determined.

Taken the foregoing into account, and given the parties' differing views on the effect of action taken pursuant to the provisions of Article XIII, it is evident that there is a dispute as to the interpretation and application of Article XIII that must be addressed to settle the current controversy. Given the CBA's definition of a grievance (see Finding of Fact 11), the provisions of Article XIII, and the circumstances of this case, and in accordance with the applicable authority, I cannot find with positive assurance that the CBA is not susceptible of an interpretation that covers this dispute. Therefore, the present dispute over Ms. Martin's attempt to withdraw her notice of retirement is arbitrable. Accordingly, the District's charge that the Association committed an unfair labor practice and made a wrongful demand for arbitration is denied. The parties shall proceed with arbitration as demanded by the Association.

So ordered.

June 1, 2012

Douglas L. Ingersoll, Esq.
Presiding Officer/Executive Director

Distribution:

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