



Appeal to NH Supreme Court
withdrawn on June 11, 1999,
NH Supreme Court Case No.
98-358.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

WENDY WALKER & WAKEFIELD
EDUCATION ASSOCIATION, NEA-NH

Complainant

v.

WAKEFIELD SCHOOL DISTRICT

Respondent

CASE NO. T-0356:4

DECISION NO. 97-114

APPEARANCES

Representing Wendy Walker & Wakefield Education
Association, NEA-New Hampshire:

Steven R. Sacks, Esq.

Representing Wakefield School District:

Michael Elwell, Esq.

Also appearing:

Gary Samia, SAU #64

Diane Gray, NEA-NH

Ted Wells, UniServ Director, NEA-NH

BACKGROUND

On August 18, 1997, the Wakefield Education Association, NEA-New Hampshire, filed an unfair labor practice charge alleging violation of RSA 273-A:5 I (h). The Wakefield School District filed its answer and exceptions on September 5, 1997. The Association filed supplemental pleadings on October 9 and 24,

1997. The matter was scheduled for hearing on October 7, 1997, but rescheduled at the request of the parties. A hearing was held before the undersigned hearing officer on October 28, 1997, at which time the record of evidence was closed. Briefs were filed on November 13, 1997.

FINDINGS OF FACT

1. The Wakefield School District employs teachers and other personnel in the operation of its school system and so is a public employer within the meaning of RSA 273-A:1 X.
2. The Wakefield Education Association, NEA-New Hampshire, is the exclusive bargaining representative for the Wakefield teaching staff of which Wendy Walker was a member for six years.
3. The District and the Association are parties to a collective bargaining agreement (CBA) for the period September 1, 1994, through August 31, 1996, (Association Exhibit No. 7). The CBA provides for a disability plan at Article Fourteen.

Article 14.1 of the CBA reads, in pertinent part:

In an effort to establish protection for a teacher's salary while they are sick or disabled during the school year, the parties have agreed to institute a salary continuation plan for all teachers covered by this Agreement. This Agreement is based upon the premise that teachers are professional employees and, as such, their salary and benefits should be protected from loss due to illness or disability which may occur during the school year. Therefore, when a teacher is not able to work due to an illness or disability, their pay will be continued. In the event the illness or disability is extended and continues beyond 90 consecutive days of absence during the school year, they will become eligible for the long term disability pay benefit provided for under the disability plan. Such a plan will provide for a 60% pay based upon their current salary

to continue for as long as they are disabled, up to the age of 65 and up to a maximum of \$5,000.00 per month.

Article 14.3 reads:

The School Board agrees to provide at no cost to the teachers a long-term disability insurance plan which provides benefits for long or extended illnesses or disability as defined by the plan. Such a plan will be provided for by an insurance carrier chosen by the employer. The plan will provide for pay for 60% of the teacher's annual salary determined and paid over a 12 month period up to a maximum of \$5,000.00 per month and may continue up to age 65.

4. CBA Article Nineteen pertains to various insurances.

Article 19.2 provides:

The Board shall furnish to each staff member long term disability insurance in an amount equal to 60% of a teacher's salary as computed on the teacher's salary schedule. The District shall be responsible for 100% of the long term disability monthly premium. Benefits will be payable to age 65 under the provisions of the long term disability policy.

5. Ms. Walker was employed as a special education teacher for the District beginning in 1989 until the end of the school year in June, 1995, when she was non-renewed for cause as was stipulated by the parties. Ms. Walker applied for long-term disability insurance benefits for mental illness on August 28, 1995, and was assigned by the insurance company an incurrence date of December 20, 1994, and a disability date of June 23, 1995. She was paid a monthly benefit of \$870.00 for two years under the plan until September, 1997, when payments ceased. She received notification of cessation and the final check for multiple months in August, 1997 (Association Exhibits 2A & 2C).

6. The Wakefield School District and the Wakefield Association first negotiated a long-term disability plan into their collective bargaining agreement in 1988. The choice of plan is left to the District. The first policy written with Confederation Life Insurance Company contained a mental illness limitation (School District Exhibit No. 4, pg. 10). The second policy, written with American Bankers Life Assurance Company of Florida, effective December 1, 1994, contains a mental illness disability limitation which is optional and the option was chosen (School District Exhibit No. 3, pg. 11). The signature of Superintendent of Schools Sheldon Damon appears on the same page as the option box in which "yes" for mental illness limitation is checked.
7. District Business Agent Gary Samia testified that he renews the long term disability policy yearly but was unaware of the mental illness limitation it contains. He filled out the employer's portion of Wendy Walker's application in August but told the insurer that the applicant was no longer employed with the District. Mr. Samia testified that he first learned that Wendy Walker had been receiving long-term disability benefits around the time benefits were being terminated because of the two year limitation for mental illness and that he contacted American Bankers Life Assurance and objected for several reasons to their paying benefits at all. Upon examination by Mr. Sacks, Mr. Samia testified that, after investigation, he determined that the District could not purchase a long term disability policy for 1997 which did not include a mental illness limitation.
7. Diane Gray had served on the bargaining team and as chief negotiator for many years. She was on the bargaining team in 1988 when the long-term disability plan was added. She testified that she was never provided a copy of the long-term disability policy but assumed it was on file at the District offices. Ms. Gray testified that neither party had ever raised the issue of a two year mental health limitation in bargaining. She did not negotiate the current CBA. Theodore G. Wells, UniServ

Director, was on the bargaining team for the current 1994-1996 CBA. He first saw the long-term disability policy in January 1995, when bargaining was begun for the next contract. He acquired the policy hoping to make changes in other aspects of coverage and did not notice the disability limitation. Mr. Wells testified that the two year limitation on payment of benefits for those disabled on the basis of mental illness had not been bargained.

DECISION AND ORDER

Article Fourteen of the CBA promises a long term disability plan that continues to pay disability benefits to any teacher found disabled who continues disabled to age sixty-five. The long term disability policy signed by the District in December 1994 and effective through 1995 provides less than was bargained. The fact that Mr. Samia found he could not purchase a policy that would comply with the CBA in 1997 is not dispositive. It does not mean that such policy was not available in December 1994, especially since an option box was provided and the option for the mental illness limitation was chosen. Also, any waiver by the Association in 1997 does not estop this claim based on an earlier policy and CBA.


The District's argument that the insurance company incorrectly paid benefits is collateral to the matter before this hearing officer. The scant evidence on the matter places the all important date "incurred," (Finding of Fact No. 5), on December 20, 1994, presumably the date of onset of the condition which became disabling, within the period of employment and within the period covered by the policy itself. American Bankers Life Assurance made the determination that Wendy Walker was disabled as of June 23, 1995, a date on which she was employed, and it is not for the PELRB to investigate the medical or other bases of the determination of eligibility. Further, it was the denial of continued benefits in August, 1997, that began the running of the six month period, RSA 273-A:6 VII, for filing an unfair labor practice charge under RSA 273-A:I (h). The complaint is properly before the PELRB.

The last sentence of Article 14.1 of the CBA makes clear that the School District agreed to provide a long-term disability plan which is comprehensive in that it is without regard to the source of disability. It has provided something less for a

teacher disabled because of mental illness. This is a breach of contract. The School District has failed to comply with the CBA negotiated between the parties and this amounts to an unfair labor practice pursuant to RSA 273-A:5 I (h). One person has been harmed by this error and remedy is required. The School District shall provide to Ms. Walker the benefits that were to be paid by American Bankers Life Assurance Company from the date of cessation of monthly benefits, so long as she remains disabled, to age 65, in accordance with the terms of the CBA.

So ordered.

Signed this 16th day of December, 1997.



GAIL C. MORRISON
Hearing Officer