

STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

Manchester Education Association, NEA-NH

v.

Manchester School Board

Case No. E-0140-10

**MANCHESTER SCHOOL DISTRICT'S OJECTION TO
REQUEST OF CEASE AND DESIST ORDER**

NOW COMES the Manchester School District by and through its attorneys, Drummond Woodsum & MacMahon, and in support of this objection to the Association's Motion for Cease and Desist Order ("Complaint") states as follows:

A. The PELRB lacks jurisdiction over the Complaint because the CBA negotiated by the Parties includes a provision that mandates that disputes are to be resolved by binding arbitration.

1. The Supreme Court of New Hampshire has repeatedly held that if a grievance procedure in an applicable CBA is "specifically negotiated and agreed upon by the parties...it is binding." *In re Silverstein*, 163 N.H. 192, 196 (2012) citing *Appeal of Berlin Board of Education*, 120 N.H. 226, 230 (1980). "When the parties include a final and binding grievance procedure in their labor contract...they choose to have disputes resolved through that process, and each party must hold up its end of the bargain." *In re Silverstein*, 163 N.H. 192, 199 (2012). "[G]iving effect to the terms of the grievance procedure advances an independent set of policy interests underpinning the Public Employee Labor Relations Act: respect for the bargaining process between labor unions and public employers, 'harmonious and cooperative relations between public employers and their employees,' and the 'uninterrupted operation of government.'" *In re Silverstein*, 163 N.H. 192 at 202, citing *Laws 1975, 490:1*.

2. Furthermore, the PELRB must abstain from exercising its jurisdiction, if any, over alleged violations of RSA 273-A:5 “until the final administrative disposition of an issue.” *Bd. of Trustees of Univ. Sys. of New Hampshire v. Keene State Coll. Educ. Ass’n*, 126 N.H. 339, 342 (1985) citing *Wisniewski v. Gemmill*, 123 N.H. 701, 706 (1983). “Absent a provision for **binding arbitration** following the grievance procedure...the PELRB, in the context of an unfair labor practice charge, has jurisdiction as a matter of law to interpret the contract...” *In re Silverstein*, at 192 (emphasis added) (citing *Appeal of Hooksett School District*, 126 N.H. 202, 204 (1985)).

3. In this case, Article 25.C(4)(d) of the CBA provides that: “The decision of the arbitrator shall be binding upon both parties,” subject only to appeal by either the Association or the District as set forth in RSA 542.

4. Therefore, the CBA establishes an arbitrator’s decision as the sole procedure for a binding resolution of a grievance under the CBA. The CBA also explicitly limits the review of an arbitrator’s decision to the Supreme Court pursuant to RSA 542.

5. As a matter of law, the Association’s Complaint cannot be considered by the PELRB because the Grievance is pending and there has been no administrative disposition of the issue.

6. Indeed, the Complaint, on its face, alleges the same facts that have been alleged in the Grievance.

7. This dispute regarding the use of temporary leaves of absence for religious observations must be resolved via the CBA’s grievance procedures as it involves the interpretation and/or application of Article 21.A(1) and Article 21.H of the CBA. Indeed, the Grievance is currently pending at Level Three of the CBA’s grievance process.¹ The Association

¹ It is well-settled that this Board shall defer to the arbitration process when the parties have agreed to use arbitration as the mechanism for resolving disputes concerning contract interpretation - even if the resolution of an unfair labor

must adhere to the grievance procedures in the CBA and the PELRB must abstain from hearing the Complaint. “Stated differently, they have agreed to end their dispute with the binding arbitration award and now must now do so.” *Laconia Educ. Assoc. v. Laconia Sch. Dist.*, PELRB Decision No. 2002-078 (July 18, 2002).²

8. Furthermore, if the PELRB considers the Complaint while the Grievance is pending, that would undermine the bargaining process and strip the Parties’ joint agreement of the respect to which it is entitled as the Supreme Court of New Hampshire articulated in *In re Silverstein*.

9. Finally, in denying the Petitioner’s requested Cease and Desist Order, the PELRB would not be depriving the Association of a fair hearing of its grievance over the interpretation of the CBA. In fact, it is because the grievance process includes the requirement that an Arbitrator hear and decide its complaint that the PELRB should defer to the bargained-for grievance procedure in the CBA.

10. As the underlying dispute requires the interpretation and application of a provision of the parties’ CBA, and where the parties have negotiated and agreed to binding arbitration as the mechanism for resolving disputes arising from the interpretation and application of the CBA provisions, the District respectfully requests that this Honorable Board defer to the mutually agreed upon grievance procedure required by the CBA and deny the requested cease and desist order.

practice complaint requires interpretation of the provisions of a collective bargaining agreement. *Appeal of State of New Hampshire*, 147 N.H. 106 (2001); *In re Appeal of City of Manchester*, 153 N.H. 289 (2006). This is not a case where the District has refused to implement an arbitration decision. Even if a party in this case chooses to have an eventual arbitrator’s decision reviewed after Level D, such review would not necessarily be within the jurisdiction of the PELRB and it certainly would not be appropriate at this stage of the grievance process in the CBA. See *Bd. of Trustees of Univ. Sys. of New Hampshire v. Keene State Coll. Educ. Ass’n*, 126 N.H. 339, 342-343, 493 A.2d 1121, 1124 (1985).

² See pages 5-9 as well as footnote 2 of the *Laconia* decision for a lengthy discussion of exhaustion/PELRB jurisdiction case law.

11. Notwithstanding the foregoing, only in two sentences of the entire complaint does the Petitioner claim any violation of the law that does not involve a violation of the CBA. Specifically, in Paragraph 12 of the Complaint the Association asserts that the District's offer to provide two hours of paid time off for members to attend service involved the "adoption of new criteria for granting leave not contemplated by the CBA is in violation of RSA 273-A: I (A) and (i)" is "tantamount to a refusal to bargain" in violation of RSA 273-A:3 and RSA 273-A:I, I (g).

12. The District's offer to provide two hours of paid time off for employees to attend religious services was done so to accommodate employees' firmly held religious beliefs under Title VII of the Civil Rights Act of 1964 and the District has never refused to bargain over the appropriate accommodation for religious observation on religious holidays that generally do not require work restrictions.³ Further, the Association has never requested to bargain over this issue and instead chose to file the instant action. Most importantly, in the absence of an express refusal to bargain, the remedy if the Parties are unable to reach agreement on an appropriate accommodation is not though an Unfair Labor Practice Charge. It is through the dispute resolution mechanisms provided for in RSA 273-A: 12.

B. The Parties' contract does not allow for the grant of a temporary leave of absence for the purpose of extending a school vacation.

13. Article 21.A(1) prohibits the grant of a temporary leave of absence to extend a school vacation. This provision of the CBA provides as follows:

Two (2) days leave of absence for personal or legal business, household or family matters or for the observance of religious holidays. A teacher desiring such leave must request the leave five (5) school days prior to the leave day. In the event of an emergency, the teacher will follow the normal sick leave procedure for calling in. Leave of absence for personal or legal business, household or family matters are to

³ In fact, Section 12 of EEOC's guidance on Religious Discrimination recognizes that an appropriate accommodation for Good Friday is a schedule change so that the employee can attend church services. This is precisely what has been offered by the District. Furthermore, under Title VII the employer is entitled to consider whether the request is being made pursuant to sincerely held religious beliefs or for secular reasons such as extension of a vacation week.

be used for sound, pressing and unavoidable reasons only. **Such leave cannot be used to extend a vacation week or a long weekend.** Long weekends are defined as a Monday or Friday or Thanksgiving break when schools are closed to celebrate a holiday. The proper use of leave of absence for personal or legal business, household or family matters or for the observance of religious holidays may be subject to verification provided that the Superintendent has a bonafide reason to believe that the day was not taken in compliance with the aforementioned provisions. *Emphasis not in the original.*

14. The District asserts that the reference to “such leave” as included in the above-referenced provision of the CBA applies to all temporary leaves of absence covered by Article 21.

15. The express language of the contract does not allow for the grant of the temporary leave of absence to extend a vacation week.

16. The District has taken the position that under the terms of the CBA, it believes that those employees that have requested the days in the past will be granted the day off (although not required by the CBA). As to those that have newly requested the day, the District has taken the approach of granting such employees the accommodation (a schedule change allowing for two hours off to attend religious services) which has been specifically acknowledged by the EEOC as appropriate under Title VII.

17. Even though the contract does not require the employer to grant a leave of absence if the effect is to extend a vacation week, the District is nonetheless required to provide a statutorily mandated accommodation under Title VII, which is separate and distinct from any requirement in the CBA.

18. Accordingly, the denial of the requested Cease and Desist Order will not result in any employee being prohibited from pursuing their legally-protected right of religious observation as required by Title VII.

C. Grant of the Association’s Request for a Cease and Desist order would essentially amount to a final order in this matter without a hearing and would deny the District substantive and procedural due process.

19. The District has been provided with approximately eighteen hours to respond to the Association's request for a Cease and Desist Order.

20. This case involves complex legal and factual issues of contract interpretation and/or application.

21. Granting the requested Cease and Desist Order will in effect act as a final determination in the matter in that a final hearing cannot be held prior to the Good Friday.

22. The District is entitled to submit evidence and to call witnesses to defend its position. For the PELRB to grant the relief requested based upon an unverified complaint would deny the District substantive and procedural due process.

WHEREFORE, the District respectfully requests that this Honorable Board:

A. Deny the request for the Cease and Desist Order; and

B. Award such other relief as justice may require.

Respectfully submitted,

MANCHESTER SCHOOL DISTRICT
By its Attorneys,
DRUMMOND WOODSUM & MACMAHON, P.A.

Dated: April 18, 2019

By: /s/ Matthew H. Upton
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objection to Request for Cease and Desist Order has been forwarded electronically to Esther Kane Dickinson and Lauren Snow Chadwick, counsel for the Union.

Dated: April 18, 2019

By: /s/ Matthew H. Upton
Matthew H. Upton