



NH Supreme Court reversed and remanded this decision on March 15, 1994, Slip Op. No. 92-051, 138 NH 267 (1994).

**State of New Hampshire**

**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

ASSOCIATION OF CAMPTON EDUCATORS/	:	
NEA-NEW HAMPSHIRE	:	
	:	
Complainant	:	
	:	
v.	:	CASE NO. T-0334:5
	:	
CAMPTON SCHOOL DISTRICT, S.A.U. #48,	:	DECISION NO. 91-66
and G. PAUL DULAC In his capacity as	:	
Superintendent	:	
	:	
Respondent	:	

APPEARANCES

Representing the Association of Campton Educators:

James Allmendinger, Esq., Counsel  
Jan Paddleford-Loto, UniServ Director

Representing the Campton School District and Supt. Paul Dulac:

Bradley F. Kidder, Esq., Counsel

Also appearing:

John True, Assistant Principal  
Susan Rubel, Former Campton Principal  
Stacey Peters, NEA-NH  
Patricia Dunphey-Hoyt, NEA-NH  
John Irving, NEA-NH  
Jerry Dunphey, Waterville Valley NH  
John Hoyt, Campton NH  
Wally Cumings, NEA-NH  
Mary Gaul, NEA-NH

BACKGROUND

In September, 1990, the Association of Campton Educators, NEA-NH (Association) filed unfair labor practice charges against the Campton School District (District) and Superintendent G. Paul Dulac alleging a violation of RSA 273-A:5 I (a), (e), (g) and (h) by non-renewing Patricia Hoyt without just cause on or about March 30, 1990. The charge states that the CBA contains an article outlining Fair Treatment procedures (Art. VII, details the obligations of the District to notify an employee of deficiencies (Art. VII-A), contains a "just cause" provision including the rights of employees to information used as the basis for disciplinary action and

includes non-renewal (Art. VII-C), contains as "assistance" procedure (Art. VII-F), does not distinguish between probationary and non-probationary teachers (Art. I-A2) and includes a grievance procedure providing for advisory arbitration (Art. IX).

The affected employee, Patricia Hoyt has been an employee of the District since 1987, During her third year of employment she received a satisfactory evaluation from her principal in October, 1989 and that her first notification of the possibility of non-renewal followed an observation on February 9, 1990. Susan Rubel, principal, met with Ms. Hoyt in February and designed an intensive improvement plan to be used prior to March 31 and the decision to renew. Ms. Hoyt cooperated with the School Administration in fulfilling the improvement plan which included five observations conducted by the administration in the five weeks between February 12 and March 22, 1990. Following the March 22 observation, Ms. Hoyt was given assurances by Ms. Rubel and Asst. Superintendent John True that she would be recommended for renewal to the School Board. She was not recommended to the School Board for renewal by the Administration and was subsequently non-renewed by the School Board. In addition, Principal Rubel attempted to coerce and intimidate Ms. Hoyt by repeatedly advising her to keep the discussions about her evaluations and the possibility of non-renewal between the two of them. Principal Rubel applied the evaluations procedure inconsistently by continuing the intensive assistance plan designed for Ms. Hoyt while eliminating similar recommendations and plans from the files of at least two other Campton teachers in the Spring of 1990.

The Association requested PELRB compel the School Board to bargain in good faith, prohibit it from breaching the CBA, compel the Administration to offer Ms. Hoyt a continuing teaching contract effective 9/1/90, expunge the letter of non-renewal and other related documents and/or references within documents from her personnel file, make Ms. Hoyt whole for lost wages and benefits, in the form of back pay, and order the District to post the PELRB orders in conspicuous locations in all administrative and school buildings.

In April, 1991, the Association amended their complaint stating that on or about March 11, 1991, the District further violated RSA 273-A by taking action against Ms. Hoyt related to her non-renewal in March, 1990 by delivering, by hand of the Principal, a notice of Reduction in Force to Ms. Hoyt during March 1991. This action which came after the District had severed their employment relationship with Ms. Hoyt by non-renewing her in March 1990. Ms Hoyt exercised her rights to file a grievance under the CBA on the non-renewal matter. The grievance advanced to arbitration. PELRB appointed arbitrator Gary Altman heard testimony and accepted evidence in a two-day hearing held on October 19 and November 6, 1990 and on December 19, 1990 sustained the grievance. The School Board did not comply with the arbitrator's decision to reinstate Ms. Hoyt. They allege that Ms. Hoyt has been retaliated against unlawfully by the Campton School Board.

Counsel for the District admitted the basic facts in the charge but denied any violation of RSA 273-A; denied that the CBA distinguished between probationary and non-probationary teachers; that assurance was given Ms. Hoyt by Principal Rubel and Assistant Superintendent True that she would be recommended for renewal; that Ms. Hoyt was subsequently non-renewed by the School Board, and that the evaluations procedures were applied inconsistently by the Principal.

Counsel adamantly denied that the School Board retaliated unlawfully against Ms. Hoyt. As the District was eliminating 2.4 teaching positions and as Ms. Hoyt was the least effective of all current teachers, it would have been foolhardy and a disservice to the students to ignore Ms. Hoyt in this RIF since there is the potential, albeit slight, that she could secure reinstatement through the proceedings with PELRB.

A hearing in this matter was held in the Board's office in Concord with all parties represented. Oral testimony and written evidence including the arbitrator's decision was presented at the hearing.

On the second day of hearing, Counsel for the District requested all witnesses be sequestered; Counsel for the Association objected on the basis that the request was not made at the start of the first day. Request was denied by PELRB.

The Board allowed for closing arguments in the form of briefs to be submitted by the parties no later than July 1, 1991 and limited to three issues; i.e., (1) the deferral of the Board to the arbitrator's decision; (2) the burden of proof; and (3) whether there is a workable grievance procedure.

#### FINDINGS OF FACT

1. A collective bargaining agreement exists between the Campton School District and the Association of Campton Educators, NEA-NH which contains a "Fair Treatment" procedure, a "Just Cause" provision, evaluation procedure, assistance procedure, and a grievance procedure.
2. Ms. Hoyt had been an employee of the School District since September 1987.
3. During Ms. Hoyt's third year of employment she received a favorable evaluation.
4. In a later evaluation of Ms. Hoyt, the Principal found deficiencies and proposed an Intensive Assistance Plan which overwhelmed Ms. Hoyt but which she was determined to follow.
5. The Principal and Asst. Supt. told Ms. Hoyt that they would recommend her for renewal, however, later withdrew their recommendation to nominate her for reappointment.
6. It was later decided by the District that the Assistance Plan was too controversial and another plan substituted for other teachers.
7. Under the Intensive Assistance Plan, Ms. Hoyt was given but a little over a month to correct all deficiencies.
8. The CBA specifies that "a teacher shall not be...non-renewed... without just cause, standard which applies in this case.
9. The issue of whether the School Board had "just cause" to non-renew Ms. Hoyt was arbitrated by PELRB appointed arbitrator Gary Altman.

10. The arbitrator's decision found in favor of Ms. Hoyt after a conclusion that she was non-renewed without just cause and denied a realistic time period to improve her teaching deficiencies and because based on her last evaluation, it was her evaluator's opinion that she had met the standards of performance originally established by her supervisors.
11. The CBA by and between the parties contains a grievance procedure which has as a final step, arbitration, however the arbitration procedure is advisory only. Further, the arbitration provision does not hold that the decision of the School Board is final and binding as may be found in the cases referenced by the Board in support of their position that the Board is entitled to the bargain reached at the table. On the contrary, lacking that language, the Board is entitled to review the matters presented it in the context of an unfair labor practice charge. Appeal of Hooksett School District, 126 NH 202 (1985).
12. The standards for deferral to arbitration awards are that the requirement that an arbitrator has considered the factual issues and that the proceedings are fair, regular and not contrary to RSA 273-A.
13. In regard to the School Board's claim that the appropriate measure of proof in this matter should be clear and convincing evidence as indicated by previous Board decision, the Board has reviewed that assertion carefully. It is the Board's finding that the measure of persuasion of clear and convincing evidence is appropriate in those instances wherein the complainant seeks to have the decision of an arbitrator overruled or vacated. This is so on the basis of a review of the purpose of such a rule. See, generally, 28 AmJur 2d § 1166 and 1167, and 25 A CJS 2d § 1019 and 1020. We do so on the basis that deferral to an arbitrator's decision seek to promote a significant social policy. The labor policy entailed in the development and integrity of dispute resolution is one of long standing. However, the appropriate standard for review in other cases we would deem to be a preponderance of the evidence which is the general rule in civil matters. See, McCormick on Evidence, § 339. It is also the rule in this jurisdiction. Dunlop v. Daigle, 122 NH 295 (1982). Thus, the measure of review in this matter is a preponderance of the evidence.
14. The Board, pursuant to its authority to review grievance claims in matters such as this, was able to make a finding based on the evidence of an unfair labor practice in terms of a breach of contract. In tandem with this finding, however, is the Board's view that the parties, where other circumstances are lacking, are not only entitled to the benefit of their bargain such as the advisory nature of arbitration but also to that part of the bargain that imputes good faith in the performance of a contract. That is, in this case, the Association was well within its bounds when it believed that advisory arbitration would be treated as a matter of good faith by the School Board. The Board failed to produce any evidence which indicated any good faith reason or purpose for refusing to follow the arbitrator's decision. It is axiomatic to the policy underlying labor relations that it must have been understood by the parties to the agreement that such good faith

would be exhibited in the operation of the grievance procedure. The doctrine of good faith is well established in New Hampshire and we find that the standards set forth by the State's Supreme Court have been met in this instance in a finding of failure of a party to comport itself in good faith. See, Centronics Corporation v. Genicom Corporation, 132 NH 133 (1989). Thus the Board finds that the grievance procedure as it exists is unworkable.

DECISION AND ORDER

After considering all the evidence at the hearings held June 6 and June 7, 1991, reviewing all the testimony, arbitrator's decision and written post-hearing briefs, the Board ORDERS:

1. Ms. Hoyt was non-renewed without just cause and should be reinstated to her position at the elementary school and "made whole".
2. Lacking a final resolution under the grievance procedure, we find that the procedure is not workable as required under RSA 273-A as the School Board who is involved in the process is also the body who has the ultimate power to veto any arbitrator's decision. A workable grievance procedure must include a mechanism for resolution of disputes.
3. The parties are ordered to good faith negotiations over a workable grievance procedure and progress reports are to be submitted to PELRB no later than December 31, 1991.
4. Full compliance to the reinstatement order must be submitted to PELRB no later than December 16, 1991.

Signed this 27th day of November, 1991.

  
EDWARD J. HASELTINE  
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members Seymour Osman and Richard E. Molan, Esq., present and voting.