New Hampshire Board of Education

Teacher/Newmarket School District

SB-FY-09-05-016

Hearing Officer Report and Recommendation

I. Overview

This case began as an appeal under RSA 189:32 from a removal by the superintendent under RSA 189:31. The school district moved to dismiss the removal proceedings because it was in the process of starting dismissal proceedings against the teacher. The appeal provisions for removals under RSA 189:32 say that a person removed under RSA 189:31 may appeal "unless dismissed."At the prehearing for the removal, the school agreed to stay the removal proceedings until the dismissal proceedings were completed. The school contended that the proceedings would occur shortly and argued that if the teacher were dismissed that his removal appeal should be dismissed as well under the statute. The school agreed to contact the hearing officer after the proceedings were completed. The teacher did not attend the prehearing on the removal matter, nor object to the school's motion to dismiss the removal proceedings at that time. The teacher also did not object to the stay of the removal proceedings. At a subsequent prehearing, the teacher did object to the motion to dismiss the removal proceedings.

The local school board subsequently held a hearing and dismissed the teacher. The teacher then filed an appeal of the dismissal which was sent to the hearing officer. The school district moved to dismiss the appeal on the grounds that the New Hampshire Board of Education does not have jurisdiction to hear an appeal of a local school district/board's decision to dismiss a teacher. The school district argues that the teacher's sole remedy is to appeal such a decision to superior court under RSA 189:14. The teacher objects to the motion to dismiss. The school also renewed its motion to dismiss the removal appeal.

Both the motion to dismiss the removal proceeding and the motion to dismiss the dismissal proceeding are addressed in this report.

II. Parties' Arguments

A. Removal

As noted, the school district argues that the removal appeal should be dismissed based on the language of the statutes which state:

> **189:31 Removal of Teacher.** – Superintendents shall direct and supervise the work of teachers, and for cause may remove a teacher or other employee of the district. The person so removed shall continue as an employee of the district unless discharged by the local school board but may not return to the classroom or undertake to perform the duties of such person's position unless reinstated by the superintendent.

> **189:32 Appeal.** – Any person so removed, unless dismissed by the school board, may appeal to the state board. The board shall prescribe the manner in which appeals shall be made, and when one is made shall investigate the matter in any way it sees fit, and make such orders as justice requires.

The school contends that since the teacher has been dismissed, he no longer has an appeal from the removal under the statute.

The teacher contends that since he is appealing his dismissal, the removal should not be dismissed because if the dismissal is overturned, the next step is to review the propriety of the removal under RSA 189:31 in his specific case.

B. Dismissal

On dismissal, the school district argues that the lack of an express provision under the law providing for an appeal of a dismissal means that the New Hampshire Board of Education cannot hear such an appeal. The school district notes that with removals and non-renewals, state statutes provide an express appeal provision to the New Hampshire Board of Education. See RSA 189:32 and 189:14-b. However, the state statutes regarding dismissals do not. The dismissal statutes state:

> **189:13 Dismissal of Teacher.** – The school board may dismiss any teacher found by them to be immoral, or who has not satisfactorily maintained the competency standards established by the school district, or one who does not conform to regulations prescribed; provided, that no teacher shall be so dismissed before the expiration of the period for which said teacher was engaged without having previously been notified of the cause of such dismissal, nor without having previously been granted a full and fair hearing.
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> **189:14 Liability of District.** – The district shall be liable in the action of assumpsit to any teacher dismissed in violation of the provisions of RSA 189:13, to the extent of the full salary for the period for which such teacher was engaged.

The school district argues that this difference shows legislative intent that the New Hampshire Board of Education should not hear dismissals and that the teacher's sole remedy is the assumpsit action noted in RSA 189:14.

The teacher argues that RSA 189:14 is only one remedy and that another remedy would be appealing to the New Hampshire Board of Education. He argues that a teacher who is interested in monetary damages for their lost salary noted in RSA 189:14 would go to court, but a teacher who is seeking to simply overturn the dismissal, or find that the dismissal was not warranted under RSA 189-13, should be able to appeal to the New Hampshire Board of Education.

The teacher notes that other statutes and the New Hampshire Board of Education regulations provide the authority for such an appeal. For example, RSA 21-N: 11 Duties of Board states:

> The state board of education established by RSA 21-N:10 shall:
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> ...
>
> III. Hear appeals and issue decisions, which shall be considered final decisions of the department of education for purposes of RSA 541, of **any dispute between individuals and school systems** or the department of education, except those disputes governed by the provisions of RSA 21-N:4, III.

Similarly, New Hampshire Board of Education regulations Ed 206.01 Appeal to State Board states:

> (a) A party aggrieved by a decision at the local level may appeal to the state board for review, in accordance with RSA 541-A and Ed 200, provided that such appeal is filed within 30 days of receipt of the written decision of the local board or 7 days after any alternative dispute resolution that did not produce an agreement with parties. Decisions made under RSA 186-C relative to special education shall be appealed directly to a court of competent jurisdiction

The teacher notes that he is an individual and a party as those terms are used in the law and cites to definitions of those terms in RSA 541-A:1(XII) and RSA 541-A:1(XIII) to support his argument.

III. Law

The applicable statutes and regulations are cited in the previous section. There have been a couple of New Hampshire court decisions regarding teacher dismissals and teacher removals, but none of them address the issues present in this case.

There is a prior hearing officer recommendation and New Hampshire Board of Education decision from 2003 on the issue of whether the Board has jurisdiction over an appeal of a teacher dismissal. Teacher/Portsmouth Sch. Dist., SB FY 03-009. In that case, the hearing officer recommended that the Board does not have jurisdiction. The hearing officer noted that RSA 189:14 did not authorize an appeal to the Board and found that the teacher was required to appeal to state court. In addressing the state regulations that provide "any party" the right to appeal a local school board decision, the hearing officer interpreted the language to not apply to school district employees. The regulation at the time was in Ed 216.01 and it appears to have changed some since that time as the language of Ed 206.01 uses the term "parties" and "decision at the local level" whereas the hearing officer used the terms "individual" and "school system." The hearing officer also found that if the regulation did give the Board jurisdiction, the regulation would be beyond the Board's authority. I note that RSA 21-N: 11 (III) does give the board the authority to pass Ed 206.01. The question is whether the statute and regulation are intended to give additional avenues of appeal in dismissal actions beyond an action in assumpsit noted in RSA 189:14.

The New Hampshire Board of Education adopted the hearing officer's recommendation. To my knowledge, there are not any other Board cases addressing the jurisdiction issue, nor any Board cases where the Board addressed dismissal issues.

IV. Analysis

The rights in this matter are controlled by statute, so the question becomes whether the Legislature intended for the teacher to be entitled to choose between an assumpsit action under RSA 189:14 and an appeal under RSA 21-N: 11 (III)/Ed 206.01, or did the Legislature intend the remedy in 189:14 to be the sole remedy. Sometimes the law does permit multiple avenues, or choices. For example, with non-renewals a teacher may appeal to the Board or may request arbitration under their collective bargaining agreement, but may not do both, and the choice is expressly noted in the statute. RSA 189:14-b. That is not the case with dismissals.

Similarly, there are situations where agencies and courts have concurrent jurisdiction over matters and the doctrine of concurrent jurisdiction does exist under New Hampshire law, see *New Hampshire Div. of Human Services v. Allard*, 138 N.H. 604 (1994). However, it generally occurs when the court and the agency have jurisdiction to decide the same issue and when the agency's jurisdiction to hear the issue is clear. *See Wisniewski v. Gemmill*, 123 N.H. 701 (1983) finding that doctrine of primary jurisdiction which holds that a court will allow an agency to decide an issue first under concurrent jurisdiction does not apply when the statute did not give the agency the authority to resolve the issue.

Here, the issues in a potential court proceeding and a Board proceeding over a dismissal would be slightly different as the Board does not have the same authority as a court in this case. For example, in an assumpsit action, a court could order the school district to pay the full salary due under the contract and may even be able to award additional damages. State statutes do not appear to give the Board that same authority. Thus, an appeal to the State Board would be limited to equitable type remedies, and a teacher would have to bring a separate action in state court for monetary damages. Such an approach would likely result in confusion and multiple court actions as there would be the availability of an appeal of the Board's decision under RSA 541, in addition to the action to superior court under RSA 189-14. The relevance of the Board's decision in the state court proceeding under RSA 189-14 would also be an issue since the assumpsit action would not be an appeal of the Board's decision. For example, if the Board found that the dismissal met the statutory requirements, would it preclude an action in assumpsit, or could the court come to a different conclusion?

It is unlikely that the Legislature intended such an approach. It seems more likely that the Legislature intended the appeal of a dismissal to go to superior court because of its contractual nature and the potential for damages which distinguishes it from removal and non-renewal actions. Superior courts can also order the kind of equitable remedies that the Board could order, such as a finding that the dismissal violated the law. In other words, the superior court can resolve all of the issues, whereas the Board cannot.

As a result, I recommend that the Board find that it does not have jurisdiction over the appeal for the dismissal.

On the removal appeal, I recommend that the Board find that it does not have jurisdiction under RSA 189:31 as long as the teacher is dismissed. In effect, the removal no longer exists because the teacher is no longer an employee of the school and does not need to be removed under RSA 189:31. If a superior court were to find that the dismissal was in violation of the law, then the removal may again become active and the teacher should be able to refile the appeal on the removal.

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Date Scott F. Johnson