STATE OF NEW HAMPSHIRE

Public Employee Labor Relations Board

KEENE STATE COLLEGE EDUCATION ASSOCIATION, NEA-NEW HAMPSHIRE Complainant, v. UNIVERSITY OF NEW HAMPSHIRE, KEENE STATE COLLEGE Respondent.	CASE NO. U-610 DECISION NO. 85-73

APPEARANCES

Representing Keene State College Education Association, NEA-New Hampshire:

James F. Allmendinger, Counsel

Representing the University System of N.H., Keene State College:

Nicholas DiGiovanni, Jr., Esq., Counsel

HEARING OFFICER'S REPORT

BACKGROUND

This matter, subject of Decision No. 82-56, dated August 9, 1982, comes before the Board after a tortured procedural history. On November 3, 1981, a Board of Arbitration was convened under the provisions of the Collective Bargaining Agreement between the Keene State College Education Association, NEA-New Hampshire and the University System of New Hampshire, Keene State College. This Board of Arbitration, meeting pursuant to the contract, considered charges of arbitrary denial of promotion to five faculty members at the College. This was alleged to be a violation of Article IX, Section B(5) of the Collective Bargaining Agreement. The arbitration panel, comprised of one representative of each party and a neutral arbitrator, Parker Denaco of Maine, found that three denials of promotion were arbitrary and violated the contract and two were not. Relevant portions of the contract language will be quoted in the findings section below.

On January 28, 1982, the Association filed a complaint with the Public Employee Labor Relations Board, alleging that the College had not implemented the arbitration award and thereby violated RSA 273-A:5(I)(h). On March 16, 1982, while the unfair labor practice charges were still pending, the College filed a bill in equity in the Cheshire County Superior Court seeking to vacate the award because the arbitration board had exceeded its authority. On May 4, 1982, the Association filed a Motion to Dismiss the Court action in the Superior Court, partly on the ground that the PELRB was the proper forum in which to decide the propriety of the arbitration award.

On August 9, 1982, the PELRB sustained the unfair labor practice complaint and ordered implementation of the arbitrators' award. The Board did not, however, review the propriety of the award or its substance.

On January 31, 1983, the Superior Court denied the Motion of the Association to dismiss the Court action, ruling that the PELRB lacked jurisdiction to review the award. On February 29, 1984, acting on a recommendation of a master appointed by the Court, the Superior Court vacated the arbitration award. This action was appealed by the Association.

On April 5, 1985, the Supreme Court of the State of New Hampshire ruled that the Superior Court had no jurisdiction to review the award, ruled that the Public Employee Labor Relations Board has primary jurisdiction to review the propriety of an arbitration award if it comes to the Board in the context of an unfair labor practice charge and vacated the finding of the Superior Court on the propriety of the arbitration award. The Supreme Court made no finding on the propriety of the arbitration award.

On April 22, 1985, the College filed a Petition for Review of Arbitration Award with the PELRB. It had previously filed a Motion for Reconsideration of the August 9, 1982 decision of the PELRB.

The parties to this action, having briefed, argued and explored the issues involved before many adjudicative bodies in the past, were able to reach a stipulation on the facts and the issues to be addressed by the PELRB in this case. Specifically, the parties agreed that the following issues are presented by the case before the Board:

1. Whether or not the PELRB should grant the College's Motion for Rehearing and Reconsideration of Decision (August 20, 1982) or Petition for Review of Arbitration Award?

2. If so, whether the November 3, 1981 Opinion and Award of the Board of Arbitration should be enforced or whether the Board of Arbitration exceeded its authority in the collective bargaining agreement and therefore should not be enforced?

A hearing was held before the Board's hearing officer at the offices of the PELRB on July 11, 1985. Argument only was presented, the facts and issues having been stipulated. Briefs were submitted by the parties and all exhibits and evidence had been agreed upon and were submitted.

Because all facts had been agreed upon in this matter, and because all of the submissions were made by agreement, there need be no findings of fact, all of the facts submitted in the record being admitted. Two questions presented require individual rulings of law:

I. Procedural Contacts Before the Board.

The College requested that this matter come before the Board in one of two ways (or, presumably, both of two ways). The College had filed a request for reconsideration of the 1982 Decision, which request for reconsideration was held by the Board because of Court action on the matter. The College now requests that action be taken on this request for reconsideration and that the matter come before the Board in that context. As an alternative, the College filed its request for review of the arbitration decision and seeks to have the matter brought before the Board in that way.

There is no provision in RSA 273-A, the Board rules, Board decisions or the decision of the Supreme Court which would allow a direct petition for review of an arbitration award. Indeed, the New Hampshire Supreme Court in Board Trustees of the University System of New Hampshire v. Keene State College Education Association, et al., (April 5, 1985) stated, at page 2 of the slip opinion,

> "The PELRB has no general authority to review an arbitration award, absent some indication that the parties intended to reserve a right to administrative review of the award. (Citation omitted). In the context of an unfair labor practice proceeding, however, we hold the authority to address the issue of an arbitration award's consistency with the terms of the governing CBA is a necessary incident to the PELRB's jurisdiction under the RSA 273-A:5, I(h) and RSA 273-A:6, I."

It is the opinion of the Board, therefore, that only in the context of an unfair labor practice complaint brought under Board rules and consistent with its statute, will the Board exercise the authority granted to it by the Court, interpreting the statute. There is no place for a "Petition for Review of Arbitration Award." Because of the situation presented in this case from a procedural perspective, the Board will grant the Motion for Reconsideration of its decision in Case No. U-610, Decision No. 82-56, and in that context consider the appropriateness of the arbitration award.

II. Review of Arbitration Award.

As stated, the parties to this case entered into a collective bargaining agreement on March 29, 1980 to be in effect July 1, 1979 through June 30, 1982. This agreement contained the following provisions, pertinent to this consideration:

> "Article III, Management Rights - The Parties agree that all the rights and responsibilities of the College which have not been specifically provided for in this Agreement are retained in the sole discretion of the College and, subject only to specific limitations in this Agreement, shall include but not be limited to the following:
>
> a. The right to direct employees; to determine qualifications, promotional and tenure criteria, hiring criteria, standards for work, curriculum; to grant sabbatical and other leaves, and to hire, promote, transfer, assign, retain employees in positions . . .
>
> Article VII Arbitration Procedure
>
> 3 . . . (d) The Decision of a majority of Board shall be the decision of the Board of Arbitration. The Board shall have no power to add to, subtract from, modify or disregard any of the provisions of this Agreement, nor shall the Board substitute its judgment for that of the College with regard to any grievance based up on a challenge of management right, subject to the provisions of this Agreement. In deciding a case before it, the Board of Arbitration may review whether or not the College has met a specific standard delineated in the Agreement which is alleged to have been violated.

Article IX Evaluation Procedures . . .

B. Evaluation for Promotion and Tenure

1. Each September the Dean of the College will inform those faculty who are eligible for promotion and/or tenure . . . . A copy of this Notice will be sent to the Chair of the Faculty Evaluation Advisory Committee. (F.E.A.C.) . . . .

3. The Dean will inform F.E.A.C. of the deadlines for submission of F.E.A.C.'s recommendations, which are advisory in nature . . .

5. The College shall not arbitrarily reverse recommendations on promotion and tenure made by F.E.A.C."

After the first round of promotion consideration by F.E.A.C., the Dean of the College at Keene State College denied five faculty promotion notwithstanding their favorable recommendations by F.E.A.C. In three of the cases, the recommendations had been unanimous. In two of the cases, the F.E.A.C. recommendations had not been unanimous. Those five faculty brought grievances under the contract claiming that the action of the Dean was arbitrary and therefore violated the contract's provision that F.E.A.C. not be reversed arbitrarily. The Dean and the College denied these accusations and grievances and the grievance procedures in the contract were used, up to and including the constituting of a Board of Arbitration in accordance with the contract. The rules for voluntary arbitration of the American Arbitration Association and the process (but not the result) are admitted by the parties to have been proper. The Board of Arbitration held hearings and issued an Opinion and Award constituting some 30 pages. In the Opinion and Award, the Board of Arbitration upheld two of the decisions of the College Dean and reversed three. The Opinion and Award is extensive and spends a great deal of time discussing matters which were not directly before it, including procedures to be adopted by the next contract, suggestions for smoothing the process, and various other dicta not specifically relevant to the question before it. The only question before the Board of Arbitration was whether the reversal of F.E.C.A. recommendations, and therefore the denial of promotion to the five faculty members who had grieved, was arbitrary.

Critical to the case of the College seeking to set aside the arbitration opinion and award is language throughout the

Opinion which ties the standard for reversal of F.E.A.C. and the finding of arbitrariness to the unanimity of opinion by F.E.A.C. Representative of this language is the following, found on page 21 of the Decision and Award.

> "While the instant grievances are being brought under the first collective bargaining agreement for the parties, we find it unusual, both under that contract and prior to its existence, for the "College" as defined in Article II of the collective bargaining agreement, to deny the promotion or reverse a promotion recommendation when it has been forthcoming with a unanimous recommendation, in this case from the F.E.A.C."

The College claims that the Arbitration Board fell into error and went beyond the contract language when it set a separate standard and required a separate burden be met in connection with unanimous F.E.A.C. recommendations. Indeed, the College points to a proposal presented by the Union to management during the negotiation of the collective bargaining agreement, which would have required a special standard in connection with unanimous decisions by F.E.A.C., which proposal was rejected. It is alleged that the arbitration panel adopted in its reasoning concerning arbitrariness the very standard which was rejected in negotiations.

It is useful when considering the standard for review of arbitration decisions to look to the standards used by the courts in reviewing such awards. While not binding on the Board, federal labor law standards employed by United States federal courts are instructive.

In United Steelworkers of Amer. v. Enterprise Wheel, 363 U.S. 593 (1980), the United States Supreme Court set forth the guidelines by which a court could review an arbitrator's award. The Court stated:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. 363 U.S. at 596.

The Court went on to say that where an arbitrator followed the language of a contract, then his decision is enforceable as long as it is based on the contract, despite looking to other sources.

> The arbitrator may of course look for guidance from many sources . . .
>
> [The award] is legitimate only so long as it draws its essence from the collective bargaining agreement. 363 U.S. at 597.

In a more recent decision, W.R. Grace and Co. v. Rubbers Worker's Local 759, _____ U.S. _____, 103 S.Ct. 2177 (1983), The Supreme Court stated:

> Under well established standards for the review of labor arbitration awards, a federal court may not overrule an arbitrator's decision simply because the court believes its own interpretation of the contract would be the better one . . . . Unless the arbitral decision does not 'draw its essence from the collective bargaining agreement' [citation omitted], a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous. 103 S.Ct. at 2177.

Finally, in Scott & Williams, Inc. v. United Steel Workers of America, 574 F. Supp. 450 (D.N.H. 1983), the New Hampshire Federal District Court held that the court would not review an arbitrator's award where the arbitrator confined himself to the essence of the collective bargaining agreement. The Court stated that

> final adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. [Citation omitted] An arbitration award subject to judicial review would be neither final nor binding. 574 F.Supp. at 454.

Keeping these principles of non-reviewability in mind, the Board will examine the proper standard for review of arbitration decisions before it.

It is the duty of the PELRB in examining arbitration awards to see whether the award answers the question and resolves the dispute presented to the Board of Arbitration in a legal manner. In doing so, the PELRB is not required to examine all dicta but merely find whether the award contains evidence consistent with the requirements of law, contract and the rules under which the arbitration panel acts. As stated above, there is much in the arbitration award in this case which is unnecessary, complicating, and certainly not binding on the parties for

future cases, negotiations or contracts. However, if the award contains evidence of decision based on valid contractual provisions and a clear answer to the question presented to the arbitrators within the legal bounds of the question, the PELRB will not vacate the award or excuse noncompliance with it. It is not the place of the PELRB to substitute its judgment for the judgment of the arbitrator, the parties having selected the arbitration process for resolution of contract disputes.

Applying that standard to the opinion and award in question in this case, there is within the decision sufficient language for enforcement of that award and the sustaining of the Unfair Labor Practice Complaint brought by the Association. Specifically, evidence supporting the finding of arbitrariness is presented in respect to each grievant on pages 9 through 18, presenting the facts in connection with each grievances. In addition, in the decision portion of the document, the Board notes as follows, on page 22

> "Implicit in our disposition of the grievances affecting those individuals who received unanimous recommendations from their F.E.A.C. is the notion that the F.E.A.C. must continue to act responsibly, and, for that matter, even more responsibly than it has in the past. While the gist of this decision may suggest that anyone receiving the uanimous approval of the F.E.A.C. should automatically be subject to and awarded the pending promotion, this is not the case and it is not suggested to be the case . . ."

and on page 23:

> "This is not to say that a unanimous F.E.A.C. recommendation is not properly the subject of reversal by the administration; however, were the administration to do so, it must do so in an extremely compelling evidence that either was not available to or considered by the F.E.A.C."

Further, the arbitration award admits the relevance of the management rights clause and its importance where it states, at page 28:

> "In fashioning the award for successful grievances herein, the Board of Arbitration is mindful of Article III of the collective bargaining agreement providing for management rights . . . . Accordingly, we find that the right to control the promotion process has, in part, been effectively limited by Article IX, Section B, Paragraph 5, concerning the arbitrary reversal of recommendations of promotion and tenure.

In short, the PELRB finds that the Arbitration panel considered the evidence and found that the failure to promote the three faculty members who were awarded promotion by the Decision was found to have been arbitrary, notwithstanding the language and dicta found objectionable by the College. Indeed, as matter of fact and law, the arbitration panel answered the question presented to it under the process which all parties agree had jurisdiction to answer the question. Both parties had an opportunity to present all evidence which they desired to present, the Board had ample opportunity to consider the matter and answered the question definitively.

The award by the panel was consistent with contract Article VII, Section 3(d), which authorized the Arbitration Board to . . . "review whether or not the College has met a specific standard delineated in the Agreement . . ."

The College was not able to persuade the arbitrators that the action by the Dean was not arbitrary when the arbitrators had the facts, the records of the faculty and the prior proceedings before them. They therefore met the burden of the contract and found that the decisions in certain cases were arbitrary.

The decision in this case was not beyond the authority of the arbitrators to make and there is no allegation that the Board of Arbitration had no authority to make the decision it made. In a contract which does not define arbitrariness, it is obviously left to the arbitrators to define such conduct in considering the record as a whole and the arbitrators did that in this case. The PELRB should not and will not reverse that finding.

For all of the reasons stated, the Board believes that the arbitration award complies with the requirements of law and the contract and the failure to observe it is an unfair labor practice.

DECISION AND ORDER

The finding in Decision No. 82-57 that the failure to abide by the arbitration award is a breach of the collective bargaining agreement and an unfair labor practice under RSA 273-A:5, I(h) is reaffirmed. The respondent is ordered to implement the arbitration award at once and report implementation to this Board within 30 days of the date of the Board's adoption of this Decision.

Bradford E. Cook
Hearing Officer

Dated this 7th day of September 1985.

The Decision of the hearing officer is hereby adopted by the Public Employee Labor Relations Board.

John Buckley, Alternate Chairman

Member: Russell F. Hilliard, Esq.

Date: September 19, 1985

Member: Seymour Osman