State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Conway School District/ School Administrative Unit # 9	*	
v.	*	Case No. A-0453-9
American Federation of State, County, and Municipal Employees, Council 93/ Conway School Bus Drivers, Custodians And Kitchen Help Respondent	*	Decision No. 2003-115

APPEARANCES

For the Complainant: Lauren S. Irwin, Esq.

For the Respondent: Katherine McLure, Esq. New Hampshire Counsel to AFSCME

BACKGROUND

The Conway School District ("District") filed a complaint with the Public Employee Labor Relations Board ("PELRB") on July 8, 2003 against American Federation of State, County, and Municipal Employees, Council 93/ Conway School Bus Drivers, Custodians and Kitchen Help ("Union"). The basis of the District's complaint was the allegation that the Union had wrongfully demanded that the District arbitrate a grievance in breach of the parties' Collective Bargaining Agreement ("CBA") in violation of RSA 273-A:5,II (f). The complaint raised the issue as to whether or not the evaluation of a member of the bargaining unit was performed in conformance with the provisions of the parties' CBA. The District also requested interim relief in the form of a temporary order to the Union to cease and desist from pursuing arbitration, pursuant to RSA 273-A:6, III, and that the PELRB award the District its attorney's fees and costs incurred in bringing this complaint against the Union, pursuant to RSA 273-A:6, VI(e).

The Union's response to the District's complaint was filed with the PELRB on July 16, 2003. While the Union's response did not meet the exact requirements of Admin. Rule Pub 201.03 the PELRB allowed that response on this occasion, and deemed it sufficient to answer the numbered allegations set forth within the District's complaint. The Union's response, in essence, states that the grievance sought to be arbitrated does not involve the grievant's evaluation score, but rather the grievant's entitlement to a clear statement of the sources of information used in the evaluation of the grievant's performance. The Union's position asserts that the parties' CBA does not prohibit it from grieving all provisions within the evaluation clause providing that does not constitute a grievance of the express prohibition that "no evaluation shall be grievable". Instead, the Union's answer, and its underlying grievance is based upon a second phrase in the evaluation clause which it asserts obligates the District to provide the "sources of information" upon which the evaluation is based.

A hearing was convened at the offices of the Public Employee Labor Relations Board on September 18, 2003 at which time the parties stipulated that the issue presented to the Board could be expressed as "Is Mr. Bean's grievance arbitrable?" At the Board's request, both parties then presented offers of proof and made legal arguments in support of their respective positions.

FINDINGS OF FACT

1. The Petitioner, Conway School District, employs persons to provide transportation, custodial and food services within the public schools located within the district and therefore qualifies as a public employer within the meaning of RSA 273-A:1 X.

2. The Respondent, AFSCME Council 93, Local 859, is the exclusive bargaining representative of a bargaining unit comprised of certain employees of the Petitioner that may be generally classified as bus drivers, custodians and kitchen workers who perform work for the Conway School District.

3. At all times relevant to these proceedings, the District and the Union were parties to a collective bargaining agreement ("CBA"), effective July 1, 2002 through June 30, 2003.

4. The parties' CBA does not grant the arbitrator the authority to determine the issue of arbitrability, *i.e.*whether or not a grievance can be submitted to an arbitrator for determination. (See parties' relevant grievance provision in their CBA)

5. The parties' CBA contains a grievance provision entitled ARTICLE 11, GRIEVANCE PROCEDURE that defines a grievance in the following manner:

> "11.1 A grievance shall mean an alleged violation, misinterpretation, or misapplication with respect to one or more employees, of any provision of the Agreement governing employees."

6. The parties' CBA also contains a provision entitled ARTICLE 29 PERFORMANCE EVALUATIONS , that provides, in relevant part, as follows:

> "29.1 The Superintendent will provide the Union with a copy of the current evaluation form in a timely manner. The Superintendent of Schools, or his/her designee, shall have the right to annually evaluate the job performance of each bargaining unit member covered by this agreement. Evaluations will be completed on a semi-annual basis in November and May of each school year. All evaluations shall be written and according to such form as the Superintendent shall determine. No evaluation, whether favorable or unfavorable, shall constitute a reprimand; but evaluations may take note of and make reference to reprimands. Each evaluation shall clearly state the source of the information upon which the evaluation is based. Each evaluation shall be provided to the employee within ten (10) calendar days after the date of the Superintendent's, or his/her designee's, signature on the evaluation. Any employee may, within twenty (20) days after receipt of an evaluation, provide the Superintendent or his/her designee with a written response to the evaluation. Within his/her discretion, the Superintendent or designee may evaluate an employee more than once annually. No evaluation shall be grievable; however, the employee may appeal an evaluation after meeting with the evaluator to the next immediate supervisor within five (5) days for another objective review."

7. Charles Bean, a bus driver and member of the bargaining unit at the time he was the subject of an employee evaluation, disagreed with its contents. (District Exhibit #2) and subsequently filed an initial official grievance (District Exhibit #3) in a timely manner.

8. The District responded to the grievance in a timely manner that, in part, informed the grievant that the evaluation "is based on personal observations, attendance records, and reports from other personnel". (District Exhibit #4)

9. Correspondence from the Union to the District (District Exhibit #5) subsequent to the District's response to the initial grievance indicates that the Union's express intent was not "grieving the score but rather...to grieve the lack of information explaining to the employee why they received a certain score". (District Exhibit #5)

10. The Union proceeded to elevate the grievance to Step 2 of the parties' agreed procedure requesting that the adjustment to be made by the District was that "The employee shall be given the source(s) of information which the evaluation was based, and that the employee be made whole. (District Exhibit #6)

11. The grievance was denied at the Superintendent's level (Step 2) (District Exhibit #8) and after appeal to Step 3, at the School Board level as well. (District Exhibit #9).

12. The Union then filed a "Demand for Arbitration" in conformance with the procedure expressed within grievance provision of the parties' CBA. (District Exhibit #10).

13. The parties have stipulated that the issue presented for determination by the PELRB is that of arbitrability of instant grievance.

ORDER

Primary jurisdiction is vested in the Public Employee Labor Relations Board (PELRB) to hear all alleged violations of RSA 273-A:5. These filings with the PELRB are commonly referred to as unfair labor practice complaints ("ULP"). In this matter, the District filed a ULP with the PELRB alleging that the Union made a wrongful demand to arbitrate their grievance following denial of relief by the school board which is the third level of the grievance procedure previously agreed upon by the parties and incorporated into their collective bargaining agreement ("CBA").

The parties have provided in their CBA that if a proper grievance receives an unfavorable decision by the School Board, at the so-called "third level", that decision may be appealed to an arbitrator and the arbitrator's decision shall be final and binding upon the parties. Two other relevant provisions of the parties' CBA bear on the validity of the Union's exercise of the grievance process in this instance and the District's refusal to submit to arbitration. The first is ARTICLE 11, GRIEVANCE PROCEDURE wherein a grievance is defined as, "an alleged violation, misinterpretation, or misapplication with respect to one or more employees, of any provision of the Agreement governing employees." (See CBA Article 11.1). The second provision pertains to performance evaluations of employees. This issue is addressed by the parties in ARTICLE 29, PERFORMANCE EVALUATIONS of their CBA. (See Finding of Fact #6).

The Union asserts that there has been a breach of the parties' CBA based on the District's failure to comply with the obligation to "clearly state the source of the information upon which the evaluation is based". CBA, ARTICLE 29. The District essentially alleges that the language expressed in the CBA, "No evaluation shall be grievable;" *(Id.)*, includes the evaluation result or score and all aspects of the evaluation process. The Union's assertion takes the position that the exclusion from arbitration does not prevent it from obtaining the sources of information used to yield an evaluation result or score.

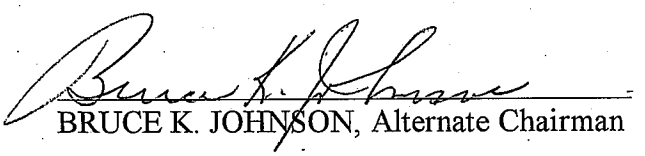
To decide between the two positions taken by the same parties who, in the first instance, negotiated the subject language and agreed on the subject language, requires the PELRB to determine whether the prohibition expressed in ARTICLE 29.1 relates to the evaluative result or score or the evaluative process or components thereto. It is the belief of the PELRB that Article 29.1 of the parties' CBA is capable of two reasonable interpretations.

After considering the evidence before us, including the language previously agreed to by the parties, and having listened carefully to the arguments of counsel for both parties, we find that it cannot be said with the requisite "positive assurance" that the language used by the parties to establish what amounts to an exclusion from arbitration can defeat the presumption of arbitrability. Arbitrability can only be defeated by the most forceful evidence. The evidence before the PELRB reviewed in the context of the parties' own CBA does not, in our opinion, reach the level of forcefulness that we feel is required.

Therefore we find the grievance as asserted by the Union to be arbitrable, deny the District's complaint and direct the following: (1) the parties shall proceed directly to arbitration as contemplated in their CBA; (2) nothing in this order is intended to preclude the parties from resolving this dispute prior to an assigned arbitration date by any means, compromises or other methods mutually acceptable to both of them; and, (3) if there is an arbitrator's decision rendered, the Association shall provide the PELRB with a copy of the arbitrator's decision within ten (10) days of the date thereof.

So ordered.

Signed this 15th day of October, 2003.



BRUCE K. JOHNSON, Alternate Chairman

By unanimous vote. Alternate Chairman Bruce K. Johnson presiding. Members E. Vincent Hall and Seymour Osman present and voting.

Distribution: Lauren S. Irwin, Esq.
Katherine McClure, Esq.