



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Local 2932, Dover Custodial & Grounds Employees		*	
	Complainant	*	Case No. E-0058-1
v.		*	
Dover School District	Respondent	*	Decision No. 2008-093
		*	

APPEARANCES

Representing AFSCME Local 2932, Dover Custodial & Grounds Employees:

Karen E. Clemens, Esq., AFSCME Council 93, Boston, Massachusetts

Representing Dover School District:

Timothy A. Gudas, Esq., Sulloway & Hollis, PLLC, Concord, New Hampshire

BACKGROUND

AFSCME Local 2932, Dover Custodial & Grounds Employees (the "union") filed an Unfair Labor Practice Complaint and Request for Immediate Cease and Desist on March 14, 2008. The union's complaint arises from the school board's March 10, 2008 vote to contract out, or privatize, custodial services currently performed by bargaining unit members. This reversed an earlier school board vote taken on December 10, 2007. The union complains that the district pursued privatization of custodial services for 2007, 2008 and 2009 while simultaneously negotiating and ultimately approving a July 1, 2007 to June 30, 2010 contract (the "2007-10 CBA") with the union for the same services. The union contends that:

- 1) The district refused the union's request in March, 2008 to renegotiate the cost of the 2007-10 CBA before voting to proceed with privatization by awarding the custodial services contract to Unicco, a company that responded to the board's September 14, 2007 request for proposals;

- 2) A school board member who negotiated the 2007-10 CBA made the motion that nullified it and cast the deciding vote to privatize;
- 3) The district was aware of a pending tax cap and the related need to fund school board programs such as all-day kindergarten during the time period when the 2007-10 CBA was approved; and
- 4) The district is allowing Unicco to begin distributing literature to bargaining unit members during work hours.

The union claims that as a result of these actions the district has failed to bargain in good faith in violation of RSA 273-A:5 I (a), (b), (c), (e), (g) and (i). As remedies, the union requests that the PELRB: 1) order the district to bargain in good faith; 2) order the district to cease and desist from allowing the distribution of literature on school property that promotes privatization; 3) order the district to publicly post the board's findings for 30 business days; 4) order the district to make the union whole for any and all cost and expenses incurred to pursue the prohibited practice charge; and 5) order any and all other relief as the board deems necessary and appropriate.

The district's answer was filed on March 31, 2008. The district denies that it has violated the provisions of RSA 273-A:5, I and contends that is exercising its right to privatize as authorized by Article 25.1 of the 2007-10 CBA. The district contends that is has bargained in good faith and that the subject matter of the union's complaint is, in substance, a dispute as to whether the district has the right to privatize under the 2007-10 CBA and should be resolved pursuant to the contract grievance procedure. As to the tax cap, the district asserts that its precise impact was initially uncertain and that the tax cap has in fact placed substantial financial constraints on the district. On April 7, 2008 the district filed a Motion to Dismiss, or in the Alternative, to Defer this Matter to Arbitration.

The board conducted a hearing on April 8, 2008 at the PELRB offices in Concord, at which time the parties addressed the issues raised in the district's motion to dismiss or, in the alternative, defer to arbitration, through offers of proof and argument. The parties' executed stipulations of fact were received into the record and are incorporated as Findings of Fact 1-20 in this decision. The board also received union exhibits 1-20 and district exhibits A-L.

FINDINGS OF FACT

1. AFSCME is the certified representative for the Dover school custodians, under certification case A-0584, Decision 2001-088, issued by the Public Employee Labor Relations Board (PELRB).
2. The Dover school district is the public employer within the meaning of RSA 273-A:I:X.
3. The Dover school district and the school custodial union are parties to a collective bargaining agreement effective July 1, 2007 through June 30, 2010

4. On June 9, 2006 The American Federation of State County and Municipal Employees (AFSCME) Council 93, Local #2932 sent the Dover school district a letter of intent to negotiate. The district entered into negotiations with the union and despite numerous meetings, negotiations were unsuccessful.
5. Article XXV ("Contracting/Subcontracting Out"), was not discussed during negotiations.
6. On May 8, 2007 AFSCME petitioned the PELRB for appointment of a mediator. The parties selected Sarah Kerr Garraty, Esq. to serve as the mediator.
7. On May 16, 2007 the superintendent of schools, Dr. John O'Connor, presented Mr. Ken Hall, president of AFSCME Local 2932, with a letter notifying the union of the district's intent to privatize.
8. On August 30, 2007 contract mediation occurred resulting in a tentative agreement between the parties for 2007, 2008 and 2009.
9. The tentative agreement provided for a 3% rate increase plus a 3% step increase for a total of 6% per year which equals an 18% wage increase over the 3 year contract for 21 junior employees. Additionally, 9 senior employees received a 3 % increase and 3% step increase the first year of the contract, and a 3% rate increase for the next two years totaling a 12% increase over the three year contract.
10. The district sent out an RFP on or about September 14, 2007 for the years 2008, 2009 and 2010 with an October 22, 2007 deadline for submission.
11. On October 8, 2007 the Dover school board voted 6/0 to approve the tentative agreement with Local 2932 knowing that an RFP had been sent out (after reaching the tentative agreement) and two weeks before the district's deadline of October 22, 2007 for the bids to arrive.
12. On or about October 22, 2007 the district received certain bid proposals from the private companies.
13. On October 24, 2007 the Dover city council approved the funding presented to them by the Dover school district, for the contract with Local #2932.
14. On November 1, 2007 the Dover school board signed the union contract with AFSCME Local #2932.
15. On November 6, 2007, a spending/tax cap was enacted by a petitioned vote that thereby amended the city charter of Dover.
16. On December 10, 2007 the Dover school board voted to award the outsourcing contract. "A roll call VOTE FAILED 3/4 (SETEAR, FOYE, MEBERT, FISHER OPPOSED)."

17. On January 3, 2008 after receiving the funding from the city council and signing the contract with AFSCME Local #2932 the superintendent of schools delivered a new letter to the president of AFSCME Local #2932, again notifying the union of the district's intent to privatize.
18. On January 21, 2008 Carolyn Mebert, the Dover school board member who served on the negotiating committee that reached the tentative agreement with the union, presented a motion to rescind the December 10, 2007 vote that rejected the bids for contracted services and to further discuss the outsourcing bids. The motion passed 6/1 (SETEAR OPPOSED).
19. On March 10, 2008 at the Dover school board meeting, the union requested that the board table privatization until the union is given the opportunity to try and reach an agreement with the district that would save the necessary money allowing for the custodial services to stay in house. The board voted 4 to 3 to contract out the custodial services awarding the contract to UNICO, one of the companies that presented its bid on October 22, 2007. Carolyn Mebert, the board member who served on the negotiating committee for the union negotiations voted in the majority.
20. On March 10, 2008, at the Dover school board meeting, the school board voted to cut \$1,678,928 from the 2008-2009 proposed budget in order to come within the school district's "guaranteed maximum budget dollar value."
21. Article 4.1 (Grievance Procedure) of the parties' 2007-2010 collective bargaining agreement provides that "[t]he purpose of this Article is to establish a procedure for the settlement of grievances, which involve an alleged violation of a term or provision of this Agreement. All such grievances will be handled as provided in this Article." Step 5 is the final step of the parties' grievance procedure, and consists of a final and binding decision by an arbitrator. *See* Article 4.3.

DECISION AND ORDER

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I. PELRB jurisdiction is proper in this case as the union has alleged violations of different provisions of RSA 273-A:5, subject to the board's ruling on the district's motion to dismiss or, in the alternative, defer this matter to arbitration.

DISCUSSION

At the hearing the board heard each party's argument on the district's motion to dismiss or, in the alternative, defer this matter to arbitration. The board granted the district's motion to defer the matter to arbitration, and ordered that "the parties shall complete arbitration in this

matter, including obtaining an arbitration decision, on or before June 30, 2008. A more detailed written order will follow." This decision constitutes the more detailed written order referenced in the board's April 8, 2008 ruling.

The framework in which to analyze the arbitrability of this case and the PELRB's role in the analysis is discussed in *Appeal of the City of Manchester*, 153 N.H. 289 (2006); *Appeal of Police Comm'n of City of Rochester*, 149 N.H. 528 (2003); *Appeal of State*, 147 N.H. 106 (2001); and *Appeal of Town of Bedford*, 142 N.H. 637 (1998). While the PELRB has primary jurisdiction of all ULP claims alleging violations of RSA 273-A:5, see RSA 273-A:6, I, it does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration. Absent specific language to the contrary in the CBA, however, the PELRB is empowered to determine as a threshold matter whether a specific dispute falls within the scope of the CBA. Thus, as a threshold matter, the PELRB is empowered to interpret the CBA to the extent necessary to determine whether a dispute is arbitrable.

"The extent of the parties' agreement to arbitrate determines the arbitrator's jurisdiction, and the overriding concern is whether the contracting parties have agreed to arbitrate a particular dispute." *Appeal of the City of Manchester* at 2 (quotations and citations omitted). Additionally:

A presumption of arbitrability exists if the CBA contains an arbitration clause, but the court may conclude that the arbitration clause does not include a particular grievance if it determines with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute. Furthermore, the principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties.

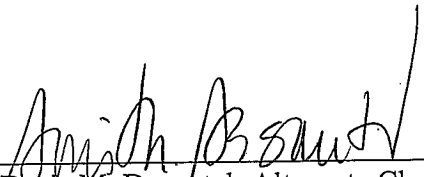
Appeal of Town of Bedford, 142 N.H. at 640 (quotations and citations omitted).

In this case, the parties have agreed to arbitrate alleged violations of the terms and provisions of their contract. See Article 4.1. The crux of the dispute in this case involves the nature, scope and extent of the district's right to proceed with privatization under Article 25.1 of the parties' 2007-2010 CBA. The parties' contract reflects that they have bargained with respect to the subject of privatization. The fact that the specific language in Article 25.1 was not negotiated in connection with the current contract doesn't diminish the significance of this fact. The union's claims are inextricably intertwined with the parameters of the parties' agreement concerning privatization, and in particular with the operation and effect of Article 25.1, as well as the contract's implied covenant of good faith and fair dealing. *Appeal of Sanborn Regional School Board*, 133 N.H. 513, 518 (1990). Given the evidence submitted at hearing, the board cannot say, with positive assurance, that the parties' contract is not susceptible of an interpretation that covers this dispute. The district has specifically requested that the board defer this matter to arbitration, and has in substance represented to the board that it will in fact proceed with arbitration on the merits should the board so order, notwithstanding any failure of the union to file and prosecute a grievance.

Accordingly, the parties shall complete arbitration in this matter, including the issuance of the arbitrator's decision, on or before June 30, 2008.

So ordered.

Signed this 15th day of April, 2008.


Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Members E. Vincent Hall and Carol M. Granfield also voting.

Distribution:

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