NH Supreme Court reversed this decision on May 14, 1998, Slip Opinion No. 96-162, 142 NH 768 (1998).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

MERRIMACK COUNTY BOARD OF COMMISSIONERS (CORRECTIONS) Complainant	:	
v.	:	CASE NO. S-0327:8
STATE EMPLOYEES ASSOCIATION Respondent	:	DECISION NO. 95-91

APPEARANCES

Representing Merrimack County:

George A. Stewart, Asst. Merrimack County Attorney

Representing State Employees Association:

Robert DeSchuiteneer, Negotiator

Also appearing:

Barry Cox, Merrimack County
Pamela Chase, State Employees Association
David Perez, State Employees Association
Tom Hardiman, State Employees Association
Daniel P. Ward, State Employees Association
Stuart D. Trachy, Merrimack County
Richard Doucet, Merrimack County

BACKGROUND

On May 22, 1995, the Merrimack County Board of Commissioners (County) filed an unfair labor practice charge alleging that the State Employees Association, S.E.I.U. Local 1984 (Association)

breached the collective bargaining agreement (CBA) between the parties when it improperly attempted to arbitrate an non-arbitrable. RSA 273-A:5 II (f). On June 6, 1995, the Association filed its answer. The matter was heard before the undersigned hearing officer on August 15, 1995, at which time, the County submitted a Motion for Summary Judgment which was accepted without ruling. At the conclusion of the hearing, the record was held open for the Association's response which was received on August 29, 1995.

FINDINGS OF FACT

1. The Merrimack County Board of Commissioners is a public employer of personnel including those who operate the County correctional facility at Gerrish. RSA 273-A:1 X.

2. The State Employees Association, S.E.I.U. Local 1984, is the exclusive representative of employees at the Merrimack County Department of Corrections facility. RSA 273-A:8.

3. The County and the Association are parties to a three year collective bargaining agreement, April 1, 1994 through April 1, 1997, which includes, for the first time, an eight step wage schedule. The implementation date of this contract is in question.

4. The prior contract contained a five step wage schedule. Seventeen employees had reached the maximum fifth step during 1994. Among those seventeen were five employees who were receiving promotions to the rank of corporal effective July 1, 1994 with the pay increase effective the same date, as apparently has been the practice with promotions.

5. Article X, Section 10.5.1 of the CBA reads: Date of Increase: The effective date of an annual increase shall be the anniversary date of entrance or reentrance into county service for employees hired after April 1, 1977. For all other employees the anniversary date shall be July 1.

6. Pamela Chase has been a correctional officer since 1991. She was the Association chapter president and on the negotiating team for the most recent contract. She testified that there was no separate provision

altering anniversary dates for "maxed out" employees but that she believed that the parties had agreed to the date printed on the wage schedule, July 1, 1994, as the effective date and the date on which all of the employees who had been on step five, some of whom had been waiting for years, would get the first increment of the raise to step six. Correctional Officer Chase testified that she had used the immediate benefit to long term employees as a selling point at the ratification meeting at which the membership accepted a 0% increase for the first year of the contract followed by two 2.5% increases in successive years. It was when the first check after July 1, 1994, failed to include the increase for some of the "maxed out" employees (non-corporals and those hired after April 1, 1977) that the grievance was filed.

7. Thomas Hardiman, Chief Negotiator for the Association, admitted that he may have told Barry Cox, Human Resources Director and chief negotiator for the County that he did not remember discussing anniversary dates changing, but he also stated that the purpose of the this grievance was not to add a term to the CBA but to clarify an existing part of the CBA. (Joint Exhibit No. 1). He indicated that the basis for the grievance was the effective date on the 1994 wage schedule, July 1, 1994, which he believed was to be applied for all seventeen employees moving to the new step six.

8. Barry Cox, negotiator for the County, testified that step increases are merit increases. He stated that his notes taken at bargaining sessions do not reflect that changes in anniversary dates were proposed.

9. Article XVIII of the CBA enumerates the steps of the grievance procedure agreed to by the parties and declares that "[t]he purpose of this Article is to provide a mutually acceptable procedure for adjusting grievances arising from an alleged violation, misinterpretation or misapplication with respect to one of more unit employees, of any provision of this Agreement except those excluded expressly." The final step of the grievance procedure is final and binding arbitration.

DECISION AND ORDER

The jurisdiction of the arbitrator depends on the agreement of the parties as stated in the CBA. Appeal of Westmoreland School Board, 132 N.H. 103, 104-106 (1989). In the instant case, the parties have agreed to final and binding arbitration over a broad field of subjects including misinterpretations of provisions of the contract. Notwithstanding the misleading wording of No. 10 of the Association's Answer to the County's charge which undoubtedly prompted the Motion for Summary Judgment submitted by the County, what is requested by the Association is a clarification of what the Association believes to be a misinterpretation of the new wage schedule. The new wage schedule is unquestionably a part of a provision of the contract since it is incorporated by reference into Article X, Wage and Salary Administration. The Motion for Summary Judgment is denied.

While determinations of arbitrability are within the jurisdiction of the PELRB, determinations of the merits of the case are to be left to the arbitrator. However, if the party opposing arbitration has shown with "positive assurance" that an interpretation of the facts in favor of the grievant is not plausible, the matter is not arbitrable. Appeal of Westmoreland School Board, 132 N.H. at 105. Applying this standard, the wage term of the contract is susceptible to an interpretation for the Association and the dispute is arbitrable. The County's unfair labor practice charge is not founded and is DISMISSED. Therefore, the parties are to proceed to arbitration in accordance with Article XVIII of the CBA.

So ordered.

Signed this 4th day of October, 1995.

Gail C. Morrison
Hearing Officer