STATE OF NEW HAMPSHIRE

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Hudson Federation of Teachers, Local 2263, American Federation of Teachers, AFL-CIO	:	CASE NO. T-0236:1
v.	:	DECISION NO. 79013
Hudson School Board, Hudson, New Hampshire	:	

APPEARANCES

Representing the Hudson Federation of Teachers:

Theodore Wells, Jr.

Representing the Hudson School Board:

Lewis Soule, Esquire, Counsel

BACKGROUND

This is an unfair labor practice charge brought by the Hudson Federation of Teachers, Local 2263, American Federation of Teachers, AFL-CIO against the Hudson, New Hampshire School Board. The unfair labor practice complaint alleges that the School Board has refused to abide by an arbitrator's decision reached after arbitration proceedings held in accordance with the contract between the parties and that this constitutes an unfair labor practice under the provisions of RSA 273-A:5 I (h) & (i) being the breach of a collective bargaining agreement and the adoption of a rule or regulation invalidating an agreement reached in collective bargaining. The School Board responds by stating that the relief granted by the arbitrator in the particular matter was beyond the scope of arbitration, unlawful and violated the management rights provisions of the contract and of RSA 273-A as interpreted by this Board and the Courts.

A hearing was held pursuant to notice at the offices of the Board on June 4, 1979.

The facts of this matter are somewhat complex and will be stated in detail. The Hudson Federation of Teachers is the exclusive bargaining representative of teachers in Hudson including those in the elementary schools. The union

and school board executed a collective bargaining agreement which is in effect and which continues in full force and effect until August 31, 1981.

Portions of the contract between the union and management which are relevant are as follows:

> "Article II - Management Rights Clause. Subject only to the limit stated in this agreement, the Federation recognizes that the Hudson School District retains the exclusive right to manage its affairs including (but not limited to) the right to determine the means and methods of operation to be carried on, to direct its employees, and to conduct District operation in a safe and most efficient manner."
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> "Article IX - Arbitration.
> 1. Any grievance which remains unsettled after having been fully processed pursuant to the provisions of the grievance procedure as stated herein, relating to the interpretation or application of a provision of this agreement, may be submitted to arbitration...
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> 2. A request for arbitration shall state in reasonable detail the specific nature of the dispute and the remedy requested. The dispute as stated in the request for arbitration shall constitute the sole and entire subject matter to be heard by the arbitrator...
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> 3. In any arbitration case, a fundamental principle shall be that the Board retains the exclusive right to manage its affairs, including (but not limited to) the right to determine the means and methods of operation to be carried on, to direct its employees, and to conduct District operations in a safe and most efficient manner, subject only to the limits stated in this agreement. The parties agree that only grievances with specific reference to the agreement shall be processed to arbitration...
>
> 6. ...the decision of the arbitrator shall be final and binding."
>
> "Article XI Section H.
>
> 2. All policies shall be applied and enforced fairly and equitably."

A dispute arose between the parties and a grievance was filed concerning the fairness and propriety of the inclement weather scheduled for certain elementary school teachers. After processing the grievance through the internal channels and failing to reach agreement, the Federation requested arbitration and Marsha L. Greenbaum was appointed by the American Arbitration Association as arbitrator. The arbitrator then proceeded to hear the case, holding hearings in Hudson, New Hampshire on September 15, 1978 and October 27, 1978. At these hearings both parties were represented, the school board by legal counsel. The sole issue at the hearing was changing the inclement weather bus duty schedule at the first grade level so that it would be "fairly and equitably" applied.

On April 9, 1979 the arbitrator issued her 27 page decision in which there was a detailed review of the facts of the case, the contract between the parties and the background of the dispute. The decision provided a four-part remedy, the first two portions of which were the awarding of back pay and computation of pay for teacher work in covering inclement weather duty. There is no dispute as to these two awards and the parties have agreed to abide by those remedies.

The third and fourth parts of the remedy which are the subject matter of this dispute read as follows:

> "3. That the Federation and the Board, or their designees, meet, discuss and attempt to agree upon either the prior procedure, the procedure spelled out above or any other procedure they deem fair and equitable, and that such procedure be implemented on an agreed upon date."
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> "4. And that in the event they are unable to so agree by May 14, 1979, either party shall so notify the American Arbitration Association by Friday, May 18, 1979, in which event the arbitrator will retain jurisdiction and order a procedure with possible additional pay from April 9 until the day of implementation."

By letter dated May 9, 1979 to the arbitrator, Peter G. Doloff, Superintendent of Schools acknowledged the award, agreed to measures 1 and 2 and stated, in respect to items 3 and 4 that "the approach set forth in items 3 and 4 on page 27 contradicts, in our judgment, the 'managerial discretion' discussed above. To 'meet, discuss and attempt to agree' clearly implies an obligation to bargain. We assume this was not your intent but, in order to disabuse any such notion, we must respectfully reject this approach." Following receipt of this letter, the union filed its unfair labor practice complaint stating that the school district had violated the provisions of RSA 273-A as stated above.

FINDINGS OF FACT AND RULINGS OF LAW

The questions presented to the Board in this case surround the entire matter of dispute resolution under contracts between public employers and public employees reached under the scheme of RSA 273-A. Specifically, the questions presented are as follows:

1. Are arbitration provisions properly included within contracts under RSA 273-A?

2. Are there subjects which cannot be the subject of arbitration despite arbitration agreements since they are against public policy?

3. Does the agreement in question in this case breach public policy?

4. Does the arbitrators award in this case as applied breach public policy or go beyond the arbitration provision?

The answer to the first question posed above must be made with reference to RSA 273-A:4 "Grievance Procedures", which simply states "every agreement negotiated under the terms of this chapter shall be reduced to writing and shall contain workable grievance procedures." (Emphasis added). The Board notes that arbitration provisions are common in labor agreements as a means by which grievances arising under those agreements can be resolved. The Board also notes that there is a great difference between arbitration as a means to reach agreements and contracts and arbitration as a means to resolve differences under those contracts. There is certainly within the scheme of RSA 273-A no requirement that parties agree to any provisions nor arbitration available in contracts negotiating. (RSA 273-A:3 I). Nevertheless, there is nothing in the statute to prohibit binding arbitration as a means to accomplish the establishment of workable grievance procedures. When an employer agrees to binding arbitration, that employer gives up certain rights and establishes the "law of the contract" for the interpretation of the contract terms and the resolution of disputes under the contract. Indeed, the establishment of such a procedure is an agreement to resolve all issues related to the contract through the use of an arbitrator under the rules of arbitration. Such an agreement may subject more issues to arbitration than would be mandatory subjects of bargaining under RSA 273-A. When these provisions are included in contracts and the parties have agreed to submit all issues relating to the contracts to the decision making authority of an arbitrator, this Board will uphold the arbitrator subject to the factors listed below. The answer to question one above, therefore, is yes.

There is a doctrine in Federal Labor Law in the private sector which favors arbitrability and adopts a "presumption of arbitrability." Under this doctrine, it is up to the arbitrator to decide whether an issue is arbitrable or not in the first instance and every attempt is made to find disputes are subject to arbitration. In the public sector, there are certain items which are non-negotiable as a matter of law. The employer in this case refers to State Employees' Association of New Hampshire, Inc. v. New Hampshire Public Employee Labor Relations Board 118 N. H. ___ (1978) which excluded from bargaining for an initial contract items within managerial discretion as defined in RSA 273-A:1 XI. The Board agrees that under certain circumstances there are items which cannot legally be negotiated under RSA 273-A. For example, negotiating the non-applicability of the Personnel Commission Rules on advancement under conditions of political neutrality for state employees would clearly violate RSA 273-A. This is a non-negotiable item by statute and cannot be the subject of arbitration. The answer to question two stated above also, is yes.

Because of the existence of items which cannot be negotiated or arbitrated, the Board finds that there is no presumption of arbitrability for public employee agreements under RSA 273-A. That being the case, the Board finds that agreements to arbitrate must be express, direct and unequivo al as to the issues or disputes subject to arbitration. Therefore, when reviewing whether items are arbitrable and arbitrators' awards are proper, the Board adopts a two-step test as stated by the New York Court of Appeals in Matter of Acting Superintendent of Schools of Liverpool Central School District, 42 N. Y. 2nd 509 (1977). First, it must be determined whether the claim sought to be arbitrated falls within those matters which are allowed by statute. Second, it must be determined whether the parties have agreed in an arbitration clause to arbitrate the dispute raised. Further, the Board finds that this two-step test should be considered first by the arbitrator to conserve the time of the parties and minimize expenses. This should be the first question addressed by the arbitrator. Only after the matter has been addressed by the arbitrator should the parties seek review by this Board and/or the Courts.

Applying the above principles to the case before the Board, the Board finds that the parties agreed on arbitration of all matters contained in the contract. While there is a management rights clause within the contract, the parties negotiated regarding the administrations of programs, and they were agreed to be "applied and enforced fairly and equitably." This introduction, negotiation and agreement by the employer on administration gave up management discretion rights on these items during the life of this contract. The arbitrator found a violation of this provision. Her award was an attempt to remedy the breach which she found. While the subject matter

of the award might not have been a mandatory subject of bargaining prior to an agreement for a contract, the arbitrator found and the Board cannot reverse the finding that the parties agreed on the terms of administration of the program and there was a violation of the agreement. Since there was an agreement that matters in the contract were arbitrable, the arbitrator was properly summoned and fashioned her award.

The Board will not review findings of fact made by the arbitrator. The Board will look only at whether the matter decided was outside the realm of permissable arbitration. Nothing in RSA 273-A prohibits the parties from negotiating over the administration of policies. What the statute says is that the employee organization may not insist on bargaining by management over subjects which are "managerial policy." If the employer negotiates over certain of these matters, as was done in this case, and those negotiations are reduced to an agreement, the employer will not be able to hide behind the management rights section of the law in denying the arbitrator review of these matters. Therefore, even if the arbitrator had ordered a change in procedures which might be under the "managerial policy" provisions, management would have no right to object since it agreed to a broad, all-inclusive arbitration provision and will be required to abide by its agreement. The answer to questions three and four above is no.

The Board's reading of the arbitrator's award is not consistent with the contentions of the employer in this case. Items 1 and 2 of the award remedy past inequities by awarding back pay. Item 3, which the employer indicates is improper, is merely an order that the parties meet and attempt to resolve the dispute their own way rather than have a procedure imposed upon them. No procedure has been imposed on the parties. It may be that a procedure suggested in the award will be acceptable to them.. The arbitrator has recognized that it is better for the parties to have the opportunity to reach an agreement than to have one imposed upon them. The fourth provision of the award provides for the contingency of a failure to reach an agreement on future procedures. This is consistent with the responsibility of the arbitrator to resolve the dispute finally. The employer has no justification for its failure to abide by the provisions of the award since it requires nothing illegal.

In summary, in relation to this case, the Board finds that the parties knowingly entered into a contract and adopted a dispute resolution mechanism which was clear, unambiguous and comprehensive. The arbitrator made a legally proper decision, the provisions of which were consistent with the agreement and negotiating practices of the parties. Management, by its own admission, refused to follow two portions of the award, thus committing an unfair labor practice.

ORDER

The Board issues the following order:

1. The Board finds an unfair labor practice as charged under the provisions of RSA 273-A:5 I (h) & (i). The Board orders the Hudson School Board to cease and desist its refusal to comply with the provisions numbered 3 and 4 in the award of arbitrator Greenbaum and to proceed forthwith to comply with said provisions and to report compliance with those provisions to this Board within 30 days of this order.

2. The Board orders the parties to provide the arbitrator with a copy of this decision.

Richard H. Cummings

Richard H. Cummings, Acting Chairman
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed this 19th day of June, 1979

Board members Joseph Moriarty and James Anderson also present. All concurred. Board Clerk Evelyn LeBrun and Board Counsel Bradford Cook also present.