State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, LOCAL 298 (Highway Department) Petitioner		
v.		CASE NO. A-0408:4 A-0408:5
CITY OF MANCHESTER Respondent		DECISION NO. 95-90
CITY OF MANCHESTER Petitioner		
v.		
AFSCME, LOCAL 298 Petitioner		

APPEARANCES

Representing AFSCME, Local 298:

James C. Anderson, Staff Rep.

Representing City of Manchester:

David Hodgen, Chief Negotiator

Also appearing:

Bob Lynch, Highway Department
Donald Dunn, Highway Department
Victor G. Hyman, Highway Department

Kevin Sheppard, Highway Department
Brian Mitchell, AFSCME, Local 298
Phil Doyan, Highway Department

BACKGROUND

The American Federation of State, County and Municipal Employees, Local 298 (AFSCME) filed unfair labor practice (ULP) charges against the City of Manchester on May 18, 1995 alleging violations of RSA 273-A:5 I (h) and (i) concerning the enforcement of a binding arbitration award. The City filed its answer on June 2, 1995. This matter was designated Case No. A-0408:4. The City of Manchester filed ULP charges against AFSCME on July 27, 1995 alleging violations of RSA 273-A:5 II (f) claiming that the arbitrator had exceeded her authority in the same case. AFSCME then filed its answer on August 10, 1995. This matter was designated Case No. A-0408:5. These matters were then consolidated for hearing by Decision No. 95-70 issued on August 15, 1995. The consolidated cases were heard by the PELRB on September 21, 1995.

FINDINGS OF FACT

1. The City of Manchester is a "public employer" of persons employed in its Public Works Department within the meaning of RSA 273-A:1 X.

2. The American Federation of State, County and Municipal Employees (AFSCME), Local 298 is the duly certified bargaining agent for employees of the City's Public Works Department.

3. The City and AFSCME are parties to a collective bargaining agreement, continuing by virtue of the status quo doctrine at all times pertinent to these proceedings, which contains a final and binding grievance procedure at Article 31.9 thereof.

4. On May 17, 1994, Phillip Doyon (referred to elsewhere as "grievant"), an employee of the Recycling Section of Street Operations Division of the Public Works Department, filed a grievance against the City as the result of his not being selected as the Compost Lead Person, a position vacancy posted on or about April 20, 1994.

5. The parties were unable to resolve the foregoing

grievance prior to the final and binding, arbitration step of Article 31.6 of the CBA. Thereafter, the Union requested a list of arbitrators from the PELRB on August 24, 1994. By October 18, 1994, the parties had been unable to agree upon an arbitrator. This resulted in the appointment of arbitrator Marsha Saylor on October 20, 1994.

6. Arbitrator Saylor heard the grievance on December 15, 1994 and rendered her decision on February 16, 1995. The City lost and was ordered to award the Compost Lead Person position to the grievant. For reasons stated in the award, Arbitrator Saylor found that the City violated 6.1 of the CBA which provided that management has "the right to make promotions and transfers primarily on the basis of qualifications, ability and performance of duty, but shall be governed by departmental seniority where equal qualifications, ability and performance of duty, as determined by the Department have been demonstrated."

7. By letter of April 5, 1995 the City asked Arbitrator Saylor to reconsider. By letter of April 10, 1995, the Union objected to such reconsideration. By letter of April 18, 1995, Arbitrator Saylor denied the request for reconsideration.

8. From April 18, 1995 to the date of the hearing in this case the City has refused to implement the arbitrator's award.

9. In addition to the Article 6.1 contract language cited in Finding No. 6, above, pertinent contract provisions include:

> Article 6.7: "When a question as to the proper person having been chosen to fill any job arises and it cannot be resolved[,] it will be settled by using the grievance procedure in Article 30 [sic]."
>
> Article 31.1: "A grievance is defined as a claim or dispute arising out of the application or interpretation of this agreement, under express provisions of this agreement..."

> Article 31.6(2): "If no settlement is reached as the result of the [Board or Commission] meeting as stated in 31.6 (1) above, the Union may submit in writing a request to a mutually agreed upon neutral arbitration agency...to appoint an arbitrator to resolve said grievance..."
>
> Article 31.8: "The arbitrator shall not have the power to add to, ignore or modify any of the terms and conditions of this agreement."
>
> Article 31.9: "The decision of the arbitrator shall be final and binding upon the parties as to the matter in dispute."

10. The parties stipulated at hearing that they had a full and ample opportunity to present their respective cases to the arbitrator.

DECISION AND ORDER

Our examination of the two complaints of ULP in this matter goes not to the merits of the grievance but rather to the sufficiency of the arbitration process and its administration under the contract. The standard to be applied is the "positive assurance" test that the "arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Appeal of Westmoreland School Board, 132 NH 103 at 105 (1989) citing to Steelworkers v. Warrior & Gulf Co. 363 U.S. 574 at 582 (1960). The circumstances of this case do not convince us that such "positive assurance" has been shown by the City.

As noted in our findings, the parties had a grievance procedure in their CBA. That grievance procedure broadly defined what would constitute a grievance, i.e., an issue "arising out of the application or interpretation" of the CBA. The promotion grievance at hand satisfies that definition as the non-selection of the grievant raises the departmental seniority issue of Article 6.1 found to have been violated by the arbitrator. Finally, Article 31.9 contemplates that the arbitration process is final and binding on the parties.

We have reviewed the arbitration award and, conversely to the position advanced by the City, do not conclude that it showed an impermissible expansion of the arbitrator's authority under Article 31.8 of the contract. To the contrary, the arbitrator was careful to explain the rationale that the City's conduct was

"unfair, arbitrary and capricious" and constituted a "year of preferential treatment [which] effectively disqualified all other candidates from competing." Award, p. 12. The arbitrator's remedy was not inconsistent with this conclusion or the applicable departmental seniority provisions of the contract.

The arbitrator's award in this case is not "significantly flawed" nor is it "repugnant to the [Public Employee Labor Relations] act or [to] clear public policy." AFSCME Local 3438 v. Sullivan County, Decision No. 92-156 (October 7, 1992). The circumstances of the case as well as the rationale offered by the arbitrator do not cause us to conclude that Article 31.8 is an "express provision excluding [this] particular grievance from arbitration." There is no "forceful evidence of a purpose to exclude [this particular] claim from arbitration." Westmoreland, *supra* at page 106 citing to Warrior and Gulf 363 US at 584-85 and AT & T Technologies, 475 US 643 at 647-650 (1986).

Accordingly, we find the City's conduct in not implementing the arbitrator's award to have been a breach of the CBA and in violation of RSA 273-A:5 I (h). The City is directed to implement the arbitrator's award forthwith. All other complaints of ULP, whether by claim or counter-claim, are DISMISSED.

So ordered.

Signed this 4th day of October, 1995.

EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members E. Vincent Hall and William Kidder present and voting.