State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, LOCAL 1984	:	
Complainant	:	
v.	:	CASE NO. S-0398:2
STATE OF NEW HAMPSHIRE, DIVISION OF PERSONNEL	:	DECISION NO. 1999-039
Respondent	:	

APPEARANCES

Representing State Employees Association of New Hampshire:

Linda Chadbourne, Field Representative

Representing State of New Hampshire, Division of Personnel:

Thomas Manning, Manager of Employee Relations

Also appearing:

Bette Jane Riordan, State Employee Association
Tom Hardiman, State Employee Association
Kate McGovern, State Employee Association
Mike Reynolds, Esq., State Employee Association

BACKGROUND

The State Employees Association of New Hampshire, SEIU Local 1984 (Union) filed unfair labor practice (ULP) charges on March 11, 1999 against the State of New Hampshire, Division of Personnel (State) alleging violations of RSA 273-A:5 I (a), (e), (h) and (i) resulting from the State's refusing to schedule some twelve (12) grievance arbitration hearings for Department of Health and Human Services (DHHS) personnel after the issue of arbitrability had been arbitrated under final and binding contract language, found to be arbitrable and not appealed. The State filed its answer on March 25, 1999 after which this matter was heard by the PELRB on April 1, 1999.

FINDINGS OF FACT

1. The State of New Hampshire is a "public employer" of classified personnel who operate and are employed in its various departments, including the Department of Health and Human Services, as defined by RSA 273-A:1 X.

2. The State Employees Association of New Hampshire, SEIU, Local 1984, is the duly certified bargaining agent for classified personnel employed by the State at DHHS.

3. The State and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 1997 through June 30, 1999. That agreement contains provisions providing for management rights, grievance processing, final and binding grievance arbitration and lay-off rules in Articles 2, 14 and 16, respectively. Pertinent parts of those three articles provide as follows:

Article II
MANAGEMENT PREROGATIVES and RIGHTS

2.1 Rights Retained. The Employer retains all rights to manage, direct and control its operations in all particulars, subject to the provisions of law, personnel regulations and the provisions of this Agreement, to the extent that they are applicable. These rights shall include but not be limited to:

2.1.1. Directing and supervising employees;

2.1.2. Appointing, promoting, transferring, assigning, demoting, suspending, and discharging employees;

2.1.3. Laying off unnecessary employees due to lack of work, for budgetary reasons or for other like considerations;

* * * * *

ARTICLE XIV - GRIEVANCE PROCEDURE

Purpose: The purpose of this Article is to provide a mutually acceptable procedure for adjusting grievances and disputes arising with respect to interpretation or application of any provisions of this Agreement.

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14.5.2 Arbitrator's Powers: The arbitrator shall have

no power to render a decision that will add to, subtract from or alter, change or modify the terms of this Agreement, and his/her power shall be limited to interpretation or application of the express terms of this Agreement, and all other matters shall be excluded from arbitration. To the extent that a matter is properly before an arbitrator in accordance with this provision, the arbitrator's decision thereon shall be final and binding providing it is not contrary to existing law of regulation nor requires an appropriation of additional funds, in either of which case it will be advisory in nature.

The parties further agree that questions of arbitrability are proper issues for the arbitrator to decide.

ARTICLE XVI -- EMPLOYEE RECORDS AND RIGHTS

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16.3 Reasons for Non-Selection: An employee who is not selected after applying for a posted position shall be informed in writing of his/her non-selection and the reasons therefore within a reasonable period of time as required by Per 602. 02d. of the Administrative Rules of the Division of Personnel.

* * * * *

16.8 Loss of Bumping Rights: Any employee who is laid off between July 1, 1997 and December 31, 1998 and whose bumping privileges have been suspended by statute shall be entitled to state-paid health and dental coverage for a period of nine (9) months from the time that coverage ceases due to the layoff.

16.9 Layoff Rules: The Employer agrees that, except where currently prohibited by law, the Administrative Rules of the Division of Personnel pertaining to layoff in effect on May 16, 1997 shall remain in effect for the term of this Agreement. This provision shall expire on June 30, 1999.

4. Prior to the parties coming to agreement on and signing their 1997-99 CBA, the New Hampshire General Court ("Legislature") passed H.B. 32 on or about November 1, 1995, also known as the Department of Health and Human Services Reorganization Act, now memorialized at RSA 99:9, an event which produced litigation before and a decision by this board in March of 1996 (Decision No. 1996-004). RSA 99:9 IV eliminated certain bumping rights of employees of DHHS. Those rights were subsequently restored to DHHS employees, as well main-

tained for all employees covered by the CBA between the State and the Union, by the inclusion of Articles 16.8 and 16.9 in the 1997-99 contract, as shown in Finding No. 3.

5. On or about October 5, 1997, fifty-eight DHHS employees were laid off effective November 30, 1997. This caused the Union to file grievances on behalf of twelve (12) of these employees, in accordance with the grievance process outlined in the 1997-99 CBA, and to file appeals in accordance with the administrative rules of the Division of Personnel. An issue then developed between the State and the Union as to which methodology should be used to pursue these grievances/appeals, with the State asserting that the personnel rules and the procedures thereunder should be controlling.

6. Between November 30, 1997 and May 5, 1998, the parties agreed to arbitrate the issue of the arbitrability of the 12 grievances in question and selected Nancy Peace as the arbitrator. Arbitrator Peace conducted an arbitration hearing in Concord, New Hampshire, on May 5, 1998. In her opinion and award, dated June 30, 1998 and appended as an exhibit to the Union's ULP, she noted that the *stipulated* issue (emphasis added) was, "Is the question of whether the Department of Health and Human Services violated the Rules of the Division of Personnel in laying off twelve individuals on November 30, 1997 arbitrable?" Her award, final and binding under Article 14,5,2 of the CBA, found that the layoffs were arbitrable.

7. During the summer and until the Union filed this ULP, the Union made various overtures and attempts schedule the 12 grievances for hearing on the merits. According to testimony from Union counsel, Michael Reynolds, Manning called him "around election time" in the fall to put off scheduling a yet-to-be-scheduled hearing on the 12 grievances. Reynolds agreed, understanding "putting off" to be the equivalent of a continuance and because, to that date, Manning had not made any claims that the arbitrator's award was flawed or advisory only.

8. The Union's ULP asserts that after the elections and the January inauguration, Manning had a conversation with Union representative Chadbourne in which he allegedly told her he was unwilling to go forward with the 12 grievance arbitrations "at any time." See also the letter from Thomas Manning to Linda Chadbourne dated March 10, 1999 appended as an exhibit to the Union's ULP. The State's answer addresses this issue, in pertinent part, by admitting a refusal to schedule the 12 arbitration hearings and by claiming that the

decision of the arbitrator "exceeds the clear language of the Collective Bargaining Agreement."

9. Between the date of the Arbitrator's award on arbitrability on June 30, 1998 and the expiration of six (6) months thereafter, the State did not seek a review by PELRB or any other authority, as to the validity or invalidity of the arbitrator's award.

DECISION AND ORDER

The cause and effect relationship in this case is clear. The Health and Human Services Reorganization Act was passed in 1995. It contained provisions which were troublesome, if not unacceptable, to the Union relative to bumping rights. When the parties came to negotiate what was to become their 1997-99 CBA, they addressed concerns with the loss of bumping rights by adding Article 16:8 and concerns with layoff rules by extending rules pertaining thereto until June 30, 1999, as evidenced by Article 16.9. Neither of these two articles had been included in the 1995-97 CBA. They are clearly the product of concerns with and negotiations about certain provisions in the DHHS Reorganization Act.

Likewise, the parties maintained their grievance and arbitration procedures from the 1995-97 agreement to the 1997-99 contract. Article 14.5.2 (Finding No. 3, above) was unchanged. It contains two provisions which are compelling to the outcome of this case: (1) "To the extent that a matter is properly before an arbitrator in accordance with this provision, the arbitrator's decision thereon shall be final and binding providing it is not contrary to existing law or regulation" and (2) "The Parties further agree that questions of arbitrability are proper issues for the arbitrator to decide."

Following the filing of certain grievances, the parties agreed to go to arbitration, on the issue of arbitrability and selected an arbitrator to decide that issue, an issue on which the Union prevailed. Under the provisions of the contract, the decision of the arbitrator is final and binding, unless it is "contrary to law or regulation." After the award was issued, the State did not challenge it. Without there having been a challenge to the award within six (6) months, the award was no longer subject to challenge at the PELRB as a violation of contract, if it could be established that the arbitrator exceeded her authority. RSA 273-A:6 VII.

In this case, we need not act under the exclusive original jurisdiction mandate of School District #42 of the City of Nashua v. Murray, 128 N.H. 419 (1986) to determine the matter of arbitrability in the absence of a contractual provision granting the arbitrator the authority to make that decision. To the contrary, here the parties have agreed, both in the CBA and by their stipulated issue, that the arbitrator may decide matters of arbitrability. It was not until the Union prevailed on June 30, 1998 and until after the expiration of more than six months thereafter that the State refused to proceed to arbitration on the merits and raised the issue of the arbitrator exceeding her authority. While this is an argument the State could have timely raised (and did not), it is not a decision it can appropriately

make unilaterally, for, if it were permitted to do so, it would make the "final and binding" language of the grievance procedure meaningless.

We find this case to come from the mold of Appeal of Westmoreland School Board, 132 NH 103, 109 (1989), namely, "the real issue here, however, is whether the contracting parties have agreed to arbitrate a particular dispute." That agreement was unequivocal, as evidenced by the contract; specific, as evidenced by the contract and the stipulated issue; purposeful as evidenced by the history which led to the adoption of the contract language and intentional as evidenced by the conduct of the parties until such time as the State announced its intention to process none of the twelve grievances to arbitration. An arbitrator's jurisdiction, and hence authority, "depends on the extent of the parties' agreement to arbitrate." Westmoreland, *supra*. The facts establish that the arbitrator was fully and unequivocally vested with the authority to arbitrate this case. One party in interest cannot, at this late date, reject the arbitrator's final and binding report in order to repudiate the claims raised in the pending grievances.

We find the State's conduct to have been violative of RSA 273-A:5 I (e) and (h) and direct that it shall CEASE and DESIST forthwith from refusing to process the twelve (12) grievances in question to arbitration and from refusing to participate in the arbitration process.

So ordered.

Signed this 4th day of May, 1999.

Jack Buckley

JACK BUCKLEY
CHAIRMAN

By unanimous decision. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.