



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Conway School District	*	
	*	
Complainant	*	Case No. A-0453-10
v.	*	
	*	
AFSCME Council 93, Local 859, AFL-CIO	*	Decision No. 2007-003
	*	
Respondent	*	
	*	

APPEARANCES

Representing the Conway School District:
John F. Teague, Esq., Upton & Hatfield, LLP

Representing AFSCME Council 93, Local 859:
Daniel Cocuzzo, Esq., AFSCME Council 93

BACKGROUND

The Conway School District (“District”) filed an unfair labor practice charge on September 15, 2006 based upon grievance proceedings initiated by AFSCME Council 93, Local 859 (“AFSCME”). The AFSCME grievance concerns wages for bargaining unit members during the status quo period following expiration of the parties’ collective bargaining agreement. The District claims that AFSCME breached the parties’ Collective Bargaining Agreement (“CBA”) by attempting to arbitrate a grievance that is not arbitrable in violation of RSA 273-A:5, II (f). The District asserts that affected bargaining unit members are currently receiving the wages to which they are entitled during the status quo period.

AFSCME obtained an extension of time to answer and filed its response on October 12, 2006. AFSCME maintains that its grievance is arbitrable and that members of the bargaining unit are entitled to wage increases under the performance pay formula contained in the expired CBA during the status quo period.

The undersigned hearing officer conducted a hearing on the merits on December 4, 2006 at the offices of the PELRB in Concord, New Hampshire. The District submitted Requests for Rulings of Law, Requests for Findings of Fact (neither of which was required or requested) and a Legal Memorandum at the hearing. AFSCME was granted leave to file a legal memorandum within two weeks of the hearing. The deadline for this submission having passed, and AFSCME's legal memorandum having been filed, the record is closed. At hearing the parties stipulated to certain facts which are set forth below as Findings of Fact 1-16.

FINDINGS OF FACT:

1. The Petitioner, Conway School District, employs persons to provide transportation, custodial and food services within the public schools located within the district and, therefore, qualifies as a public employer within the meaning of RSA 273-A:1, X.
2. The Respondent, AFSCME Council 93, Local 859, is the exclusive bargaining representative of a bargaining unit comprised of certain employees of the Petitioner that may be generally classified as bus drivers, custodians and kitchen workers who perform work for the Conway School District.
3. In 2003, the parties agreed that a system of performance pay increases would replace traditional across-the-board percentage pay increases and a so-called performance pool system.
4. For the contract years 2004-2005 and 2005-2006, the parties negotiated the actual percentage figures for the performance pay provisions.
5. In the CBA for 2005-2006, the last agreed-upon CBA, the performance pay paragraph, 27.1, provided 3.5% of base salary for commendable performance; 3% for proficient performance; 2.5% for basic performance; and 0% for unsatisfactory performance.
6. The parties have, from time to time, also negotiated increases in the hourly rate. For the 2004-2005 contract, the parties agreed to a \$.45 increase.
7. Each year, the legislative body, the Conway School District Meeting, has voted on, and approved, the cost items for the AFSCME CBA.
8. The warrant article requesting approval for the 2005-2006 CBA cost items read as follows:

To see if the school district will vote to raise and appropriate thirty-five thousand, five hundred and forty-six dollars (\$35,546) to fund all cost items relating to employee salaries and benefits for the American Federation of State, County and Municipal Employees (AFSCME) for the 2005-06 school year, which resulted from negotiations and represents negotiated increases over the current salaries and benefits. (Recommended by the School Board 5-0-0). (Recommended by the Municipal Budget Committee 10-0-1). This appropriation is in addition to Warrant Article#2, the operating budget.

9. This article passed 903 to 433.
10. The 2005-2006 CBA did not contain an automatic renewal clause, a so-called "evergreen clause."
11. The parties were unable to reach agreement on a CBA for 2006-2007.
12. Despite the lack of a negotiated CBA or consequent voter approval of cost items, the Union requested payment of the performance pay increases contained in the expired CBA, claiming that these increases had become conditions of employment and were, therefore, covered by the status quo doctrine.
13. The request was denied by the Superintendent on July 21,2006, and by the Conway School Board on August 29,2006. (See Attachments Band C to the Unfair Labor Practice Complaint in this case).
14. The Union then filed a Demand for Arbitration, pursuant to paragraph 11.3.E of the expired CBA.
15. The Conway School District responded by filing this Unfair Labor Practice Complaint and Request for a cease and Desist Order on or about September 15,2006.
16. The parties agree that the basic issue before the PELRB is whether performance pay increases are to be extended as a matter of law during the status quo period.
17. The expired CBA does not grant the Arbitrator the authority to determine the issue of arbitrability.

DECISION AND ORDER

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. RSA 273-A:6 I. PELRB jurisdiction is proper in this case as the District has alleged a violation of RSA 273-A:5, II (f).

DISCUSSION

The District argues that the present dispute concerning wages during the status quo period is not arbitrable.

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.

Appeal of the City of Manchester, 153 N.H. 289, 293 (2006)(quotations and citations omitted). See also 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). The CBA in this case provides for final binding arbitration but does not specifically state that the arbitrator is to determine the arbitrability of claims or that the PELRB should not perform this task. Accordingly, the PELRB must decide the arbitrability issue in this case and review and interpret the CBA for this purpose. "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).

The parties' CBA provides that a "grievance shall mean an alleged violation, misinterpretation, or misapplication with respect to one or more employees, of any provision of

this Agreement governing employees.” Because this case must be decided based upon what the law requires with respect to payment of wages during the status quo period following the expiration of the parties’ CBA (and not an interpretation of the parties’ CBA), this dispute is properly before the PELRB, and not an arbitrator.

The analysis of the wage increase issue starts with the law concerning enforceable evergreen clauses.

A CBA may contain an automatic renewal clause, sometimes referred to as an “evergreen clause.” Such a clause purports to continue the terms of the contract indefinitely until the parties negotiate, and the legislative body ratifies, a successor contract. An automatic renewal clause is a cost item, and it therefore does not bind the parties unless it has been ratified by the legislative body. In the absence of a binding automatic renewal clause, a CBA ends on its termination date. Once a CBA expires, while the parties continue to negotiate for a successor agreement, their obligations to one another are governed by the doctrine of maintaining the status quo. The principle of maintaining the status quo demands that all terms and conditions of employment remain the same during collective bargaining after a CBA has expired. This does not mean that the expired CBA continues in effect; rather, it means that the conditions under which the teachers worked endure throughout the collective bargaining process.

Appeal of Alton School District, 140 N.H. 303, 307 (1995). Further, the importance of using some form of an enforceable evergreen clause to address cost items like wage increases during a status quo period was emphasized in some detail by the court.¹

In this case the parties stipulated that the CBA does not have an evergreen clause. Therefore, this case must be decided according to the law of status quo as discussed in Alton and Appeal of Milton School District, 137 N.H. 240 (1993). The “doctrine of status quo does not require payment of salary increases based on additional years of experience (‘step increases’) after a CBA expires” nor does it require the payment of salary increases for additional years of

¹ “These cases are the latest in a series of “status quo” cases. This body of law should provide a fair matrix for the parties to collective bargaining to be able to predict the consequences of allowing their employment relations to drift into the “level playing field” of the “status quo.” The consequences are judicially determined and have been, and will be, unsatisfactory to one party or another. It is important to state that the parties to collective bargaining are in a position to settle, in advance, the consequences of allowing the term of the collective bargaining agreement to end without a new agreement in place. To avoid judicially imposed “status quo” there are three collectively bargained alternatives. The first, as was attempted in Alton, is the “evergreen” provision, where the collective bargaining agreement, at the end of the stated term, renews itself automatically until the successor agreement is ratified. Obviously, as we say above, this agreement must be ratified by the legislative body, said body being fully informed of its terms and aware of its financial impact, or, in bargaining parlance, *Sanbornized*. The second is the limited “evergreen” provision that we see in the Rochester contract. This provides for an extension of the contract during the period of negotiation. This also must have the informed ratification of the legislative body and bears the risk of the specter of judicially imposed “status quo” should bargaining be abandoned. The third is a “status quo” clause where the precise terms of the post-term relationship are spelled out by the parties. This is also a cost item requiring informed legislative ratification, but, being bargained, would avoid further dispute.”

Alton at 315-316. See also Appeal of City of Nashua Board of Education, 141 N.H. 768, 777 (1997). Unfortunately, the parties in this case failed to employ any of the above mentioned mechanisms. See Finding of Fact No. 10.

experience under a CBA's unit system, which are "comparable to step increases." Alton at 307, 310. The court has recognized an education based exception which permits a status quo increase for certain teachers during the status quo period. This so-called educational incentive exception was approved because a "raise based on additional training, however, is not an experience increase and cannot be considered its equivalent for purposes of defining and maintaining the status quo." Alton at 310. "It [a raise based upon additional training] was a condition of the teachers' employment that time and money invested outside the classroom in course work would be rewarded by a salary increase the following year. Experience raises cannot be equated." Id. See also Fall Mountain Regional Educational Support Personnel Association/NEA-NH v. Fall Mountain Regional School District, PELRB Decision No. 2004-198.

AFSCME argues that only "automatic step increases and the like do not fall under the doctrine of status quo and are a cost item subject to voter approval." AFSCME also argues that the performance based pay increase system is "incentive driven" and means employees must in effect "change their position" and therefore are entitled to a wage increase under Alton and Milton. See AFSME Post Hearing Legal Memorandum.

The fact that step or experience based pay increases are "automatic," while performance based pay increases are discretionary in the sense that an employee has to receive at least a "basic" rating to receive a wage increase, is a distinction without a difference in this case. Despite this distinction, both situations nevertheless involve wage increases which are cost items subject to voter approval. Either way, the law requires that the legislative body be *Sanbornized* with respect to any wage increases that might be paid during the status quo period and, having been duly warned, the legislative body ratify the cost. AFSCME fails to offer any reasoned justification for exempting the performance based wage increase formula involved in this case from this process. There is no inherent reason why this can't be done. The District obtained legislative approval of the maximum potential wage increase (assuming all employees received the highest rating) for the 2005-2006 CBA, as discussed at the hearing and reflected in District Exhibit One.

The performance based wage increase formula in this case in fact is similar to the experience or step pay wage formulas and bears little or no resemblance to the educational incentive at issue in Alton. The mechanics of the "performance" pay system reveals that an employee only has to perform his or her job at more than an "unsatisfactory" level to receive at least a 2.5% pay increase (given for the "basic" rating)(there was no evidence that a "basic" rating means anything other than the common understanding of the word, and in the context of this case it simply describes a job performance that is merely better than "unsatisfactory.") There is a fair argument that by performing their jobs at more than an "unsatisfactory" level employees are doing nothing more than what is required given the language contained in Paragraph 1.4 of the CBA (Joint Exhibit 2):

The Union agrees for itself and its members that they will individually and collectively perform loyal and efficient work and service and use their influence

and best efforts to promote and advance the interests of the taxpayers of the Conway School District.

Given the parameters set forth in the Alton and Milton decisions and in particular the legal requirements relating to voter approval of cost items, the District employees in this case do not qualify for the same treatment as the teachers who received the education based pay increases in Alton. Of particular significance is the lack of evidence that District employees either devoted their own time and money pursuing coursework or training or engaged in the effective equivalent of such activity in order to obtain a rating of basic or better. It is unreasonable to conclude on the facts of this case that an employee who has received a “basic” rating or better must have changed his or her position or otherwise was incentive driven to increase his or her job performance in a manner that is comparable to or the equivalent of the conduct of teachers who pursue additional education and training on their own time and at their own expense. The kind of special circumstances which justified the educational incentive exception in Alton are not present in this case.

Accordingly, the District employees involved in these proceedings are not entitled to the performance based pay increase they have demanded during the status quo period.

So ordered.

January 8, 2007.

/s/ Douglas L. Ingersoll

Douglas L. Ingersoll, Esq.
Hearing Officer

Distribution:

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