State of New Hampshire
Public Employee Labor Relations Board

Nashua Fire Fighters Association, IAFF Local 789

v.

City of Nashua

Case No. G-0122-7
Decision No. 2019-250

Order

I. Background:

In this unfair labor practice case the Association complains about how the City calculated military duty pay in early 2019. Military duty pay is a contract benefit provided under Article 28 of the parties' July 1, 2015 to June 30, 2019 collective bargaining agreement (CBA) and is paid to bargaining unit employees fulfilling National Guard or Armed Forces Reserves obligations. The Association's complaint includes the following allegations:

(1) Under Article 28 of the CBA, the City is required to pay an employee who is called to serve with the National Guard or Armed Forces Reserves the difference between the employee's pay for such service and the amount of straight time earnings lost by reason of such service "based on the employee's regular straight time rate and schedule;"

(2) For more than ten years, employees have provided their schedule for military leave to the City as well as the amount of anticipated pay, and the City would then subtract military earnings from their regular weekly paycheck;

(3) In prior years no employee lost pay for service in the military and City pay was never delayed;

(4) The City unilaterally changed its method of calculating military duty pay in January of 2019;

(5) The new method is based upon a 7-day work week, while the actual schedule worked by bargaining unit members is a 24 hour schedule averaged out over 8 weeks; and

(6) Employees now experience delay in payment of wages and are not compensated for the amount of straight time earnings lost due to military service. Instead, the City deducts wages for days they were on military leave but were not regularly scheduled to work.

According to the Association, the City's actions constitute a violation of RSA 273-A:5, I (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations) and (h)(to breach a collective bargaining agreement).

The City denies the charges and maintains that the disputed changes to the processing of military pay are supported by clear language in the CBA. The City acknowledges that in the past it has made payment under CBA Article 28 based on anticipated military pay but that under Article 28 it is not obligated to make military duty payments until after "the showing of satisfactory evidence of the amount of pay received for such service." The City also raises a number of other points based on the language of the CBA that are not detailed here.

The City has also moved to dismiss, arguing the board lacks jurisdiction under *Appeal of Silverstein*, 163 N.H. 192 (2012); *Appeal of the City of Manchester*, 153 N.H. 289 (2006); and *Appeal of the State of New Hampshire*, 147 N.H. 106 (2001). These authorities address the board's lack of jurisdiction in cases involving a collective bargaining agreement dispute which is subject to a final and binding step under the collective bargaining agreement's grievance procedure.

In its objection to the motion to dismiss the Association states it did not pursue CBA Article 19 arbitration because the City's change in interpretation and implementation of CBA Article 28 is a violation of RSA 273-A:5, I (h) and (e). The Association also cites *Board of Trustees of the University System of New Hampshire v. Keene State College Education*

Association et al., 126 N.H. 1121 (1985) and *Appeal of New Hampshire Department of Corrections,* 164 N.H. 307 (2012) for the proposition that the Association's complaint sets forth a valid past practice claim over which the board has jurisdiction pursuant to RSA 273-A :5, I (h).

The parties appeared for hearing on October 17, 2019 at which time the board heard argument on the pending motion to dismiss. After a brief recess the board voted 2-1 in favor of granting the motion to dismiss and advised the parties that a written decision would follow.

II. Discussion:

"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 City of Manchester,* 153 N.H. 289, 293 (2006)(quotations and citations omitted). The board "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 (board) is empowered to determine as a threshold matter whether a specific dispute falls within the scope of the CBA." *Id.*[1] Additionally, "under the 'positive assurance' standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists, and in the absence of any express provision excluding a particular grievance from arbitration,... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail ..." *Appeal of the City of Manchester*, 144 N.H. 386, 388 (1999)(citations omitted). A grievance is arbitrable "unless we can say with positive assurance that the CBA's arbitration clause is not susceptible of a reading that will cover the dispute." *Appeal of City of Concord,* 168 N.H. 533 (2016)(citations omitted). "However, the principle that doubt should be resolved in favor of arbitration does not relieve us of the responsibility of applying traditional principles of contract interpretation in an

[1] There is no CBA language to the contrary in this case.

effort to ascertain the intention of the contracting parties." *Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998).

The record reflects that the Association filed a grievance dated February 18, 2019 about the City's administration of the military duty pay benefit. The grievance was denied at steps 1-3 but was not advanced to step 4. See City Exhibits A, B, C and D. The grievance identifies the aggrieved employees as those eligible to receive military leave, it charges violations of CBA Articles 1, 2, 28 and all other articles pertaining to the grievance, and it requests that all employees "who use Military Duty Leave under Article 28 do not lose any pay and that the city follow the procedure that has been used prior to the change that took effect January 2019." In the "[f]acts pertaining to the grievance" section the grievance states that "[t]he intent of Article 28 of the CBA agreed upon by the members of Local 789 as well as the City of Nashua is clear that a member will not lose any compensation when they are required to take time off for military business."

CBA Article 28, titled "Military Duty Pay," provides as follows:

> An employee called to serve not more than a seventeen (17) day annual training tour of duty with the National Guard or Armed Forces Reserves will be paid the difference between his pay for such government service and the amount of straight time earnings lost by him by reason of such service, based on the employee's regular straight time rate and schedule. Such payments are to be made following the showing of satisfactory evidence of the amount of pay received for such service.

Relevant portions of CBA Article 19, titled "Grievance Procedure," provide as follows:

> A. It shall be the purpose of this grievance procedure to settle grievances between the City and the Union as expeditiously and fairly as possible. Any difference as to the interpretation of this Agreement in its application to a particular situation, or as to whether it has been observed and performed, shall be a grievance under this Agreement and the parties shall observe the following procedure for the adjustment and settlement of such grievance.
> .....

Step IV: Within thirty (30) days of the documented receipt of the Commissioners ruling by the Union, either the Union or the City will have the option of submitting any remaining disagreement over the interpretation or application of a specific provision of this Agreement, settled by arbitration. The parties agree to submit such grievances to the Public Employee Labor Relations Board and to abide by the rules and procedures set forth by said Board, or may submit them to a different arbitrator agreed by the parties. Determinations and decisions set forth by said arbitrator shall be final and binding upon the parties.

The Association's complaint is, in substance, a grievance within the meaning of CBA Article 19 ("any difference as to the interpretation of this Agreement in its application to a particular situation, or as to whether it has been observed and performed, shall be a grievance under this Agreement"). The complaint stems from the City's administration of the CBA Article 28 military duty pay benefit, and it requires the consideration and interpretation of CBA Article 28 (and any relevant and established past practice) to properly and fully evaluate the claim.

Additionally, we cannot say with positive assurance that CBA Article 19, Step IV is not susceptible of a reading that it is a final and binding arbitration clause applicable to the dispute in this case. Even though this contract provision was poorly drafted and is, as a result, somewhat disjointed, it can be read to reference and describe two options for appointing an arbitrator. One is appointment of an arbitrator following board procedures,[2] and the other is appointment directly by the parties because they have agreed to a "different arbitrator" on their own.

In summary, the Article 28 military duty pay benefit dispute falls within the scope of the CBA and is subject to final and binding arbitration. Accordingly, we do not have jurisdiction to interpret the CBA and decide this case on the merits. Therefore, by a 2-1 vote of the board, the City's motion to dismiss is granted.

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[2] Parties to grievance arbitration regularly ask the board to appoint a grievance arbitrator, and such requests are made and processed pursuant to N.H. Admin. Rules, Pub 305.02. In such cases, the board relies on its RSA 273-A:2, V "list of neutrals" to generate a random list of candidates, and the board makes an appointment after the parties complete a ranking process to indicate their preferences.

So Ordered.

October 23, 2019

Andrew B. Eills, Esq., Chair

Chair Andrew B. Eills, Esq. and Board Member James M. O'Mara, Jr. voted to grant the motion to dismiss. Alternate Board Member Glenn Brackett voted to deny the motion, as explained in his dissenting decision below.

Dissenting Opinion:

I disagree with the majority's conclusion that the board does not have jurisdiction. In my opinion, the CBA Article 19 arbitration clause allows the Association to choose between a final and binding grievance arbitration or an unfair labor practice proceeding before the board. The Association elected a proceeding before the board, and therefore the board should deny the City's motion to dismiss and hear this case on the merits.

October 23, 2019

Glenn Brackett

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