NH Supreme Court affirmed this decision on 12-19-2013.
NH Supreme Court Case No. 2012-0586

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

State Employees' Association of New Hampshire, SEIU Local 1984

and

New England Police Benevolent Association, Local 250

v.

State of New Hampshire, Department of Corrections

Consolidated Cases Nos. G-0108-3 & G-0109-6
Decision No. 2012-122

Order re: Pending Motions

For the reasons set forth below, the SEA's Motion for Summary Disposition and Deferral to Arbitration is granted and the State's Motion to Dismiss is denied as moot.

Background:

In Case G-0109-6 the NEPBA filed an unfair labor practice complaint on October 17, 2011 claiming that the State violated RSA 273-A:5, I (a), (b), and (h) when it refused to participate in an arbitration session on April 19, 2011 scheduled to address several grievances pursuant to the parties' collective bargaining agreement (CBA). The NEPBA requests that the PELRB find the State in violation of RSA 273-A:5, I, (b), and (h), order the State to participate in the arbitration procedure set forth in the parties' CBA and order the State to pay costs, including attorney's fees, it has incurred. The State denies the charge and contends that the grievance scheduled for the April 19, 2011 arbitration session was non-arbitrable because it was

untimely. In Case G-0108-3 the SEA filed an unfair labor practice complaint on December 23, 2011 claiming that the State violated RSA 273-A:5, I (a), (b), (e), (f), (g), and (i), RSA 273-A:3, and RSA 273-A:4 when it refused to participate in arbitration of a grievance involving shift briefing pay. The SEA requests that the PELRB find that the State committed an unfair labor practice in violation of RSA 273-A:5, I (a), (b), (e), (f), (g), and (i), RSA 273-A:3, and RSA 273-A:4, order the State to proceed to arbitration with the previously selected arbitrator, and enjoin the State from any further violations. The State denies the charges and claims that the subject grievance is not arbitrable.

Pursuant to prior orders[1] the above matters were consolidated and a schedule established for the submission of filings relative to the State's Motion to Dismiss (filed April 3, 2012) and the SEA's Motion for Summary Disposition and Deferral to Arbitration (filed April 3, 2012).[2]

The current consolidated cases represent the second time the PELRB has had to address cases involving the same bargaining units, public employer, and underlying pre-shift briefing/overtime pay dispute. The decision in the first proceedings is set forth in PELRB Decision 2009-263 (Consolidated Cases S-0483-3 and G-0108-2, dated December 1, 2009). The New Hampshire Supreme Court declined an appeal of Decision 2009-263 by order dated April 28, 2010. In Decision 2009-263, the PELRB granted the State's motion to dismiss for lack of jurisdiction given provisions of the CBA grievance procedure providing for final and binding arbitration.

Discussion:

Since the conclusion of the earlier proceedings the parties have taken steps to prepare for arbitration proceedings to address the issues and claims raised in the underlying unfair labor

[1] See PELRB Decisions 2012-022 and 2012-073.
[2] The NEPBA submitted a notice on April 3, 2012 advising that it joined in this SEA motion.

practice complaints filed in the earlier proceedings. Such activity has included the selection of arbitrators, communications about the scheduling of a date for arbitration, and an arbitration date was set in the NEPBA matter. The record also reflects that the State's participation in this pre-arbitration activity and its commitment to proceed with arbitration has been somewhat ambivalent. Ultimately the State declined to participate in the scheduled NEPBA arbitration and to proceed with further scheduling activity with respect to the SEA arbitration. In both cases, the State cited the Unions' alleged non-compliance with CBA provisions governing the grievance procedure, and concluded that as a result there was nothing to arbitrate.[3] The NEPBA and the SEA then filed the present unfair labor practice charges and both seek to compel the State to participate in arbitration.

In general, the State's position with respect to the SEA unfair labor practice charge is that "any agreement to arbitrate was premised on the SEA having followed the procedural requirements of the CBA and conditioned upon acquiescence of the Attorney General's Office to arbitrate and its willingness to represent the State concerning this matter. The SEA did not follow the procedural requirements of the CBA and the Attorney General's Office did not agree to arbitrate." *See* State's answer to SEA's complaint, paragraph 7. As to the NEPBA unfair labor practice charge, the State argues that "because the NEPBA's complaint is based on a failure to arbitrate but the NEPBA did not follow the grievance process, the complaint cannot stand." *See* State's Motion to Dismiss, paragraph 37. The State asks the PELRB to dismiss the SEA's complaint because the SEA's underlying grievance was allegedly untimely and the SEA allegedly lacks standing to maintain the grievance. The State likewise contends that the NEPBA's complaint should also be dismissed because the NEPBA allegedly did not follow the

[3] In its objection to the SEA's motion the State also argues that pursuant to the CBA the "unions have no right to arbitrate a matter that the State does not agree to arbitrate."

contractual grievance process. In the State's Reply to Petitioners' Objections to Motion to Dismiss, paragraph 7, the State maintains that "whether the petitioners [Unions] properly filed and followed the grievance procedures is the dispositive issue before this Board." In the State's Objection to SEA Motion for Summary Disposition and Deferral to Arbitration, the State asserts that it can decline to arbitrate because under the CBA the State's participation in arbitration is voluntary. The State also asserts that the Unions have waived their right to have the underlying pre-shift briefing/overtime pay dispute addressed because "[i]n the first instance, they chose to avail themselves of the PELRB forum in lieu of the grievance process, to address the merits of their claims" and because they otherwise did not follow the grievance process.

For their part the Unions disagree with the State's interpretation and application of the CBA and further argue, as set forth in the SEA's motion, that these cases involve a question of "procedural arbitrability" which should be decided by an arbitrator. Therefore, according to the Unions, the PELRB lacks jurisdiction in the current cases just as it lacked jurisdiction in the earlier proceedings, as reflected in Decision 2009-263.

The State's argument that the Union complaints filed in the earlier proceedings (and which resulted in Decision 2009-263) constituted a waiver which now prevents the Unions from utilizing arbitration proceedings is inconsistent with the order in Decision 2009-263, which provides in part that "[t]he parties are directed to utilize their contractual grievance process, including arbitration proceedings, to address the disputes that are the basis for these complaints."

The disposition of these consolidated cases at the PELRB, like the disposition of the two earlier cases, depends upon the jurisdiction of the PELRB. In general, the PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6. However, as reflected in Decision 2009-263, PELRB jurisdiction over disputes subject to a CBA grievance procedure and

PELRB jurisdiction to decide questions of arbitrability varies, depending upon the particular provisions of the CBA under consideration. *See Appeal of Silverstein,* 163 N.H. 192 (2012); *Appeal of Nashua Police Commission,* 149 N.H. 688 (2003); *Appeal of Police Comm'n of City of Rochester*, 149 N.H. 528 (2003); *Appeal of Town of Bedford*, 142 N.H. 637 (1998); and *Appeal of Hooksett School District,* 126 N.H. 202 (1985).

In their CBA, the parties describe an arbitrator's powers as follows:

> 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 or 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.

The phrase "questions of arbitrability" is broad and general enough to include questions concerning "procedural" and "substantive" arbitrability. The power of an arbitrator to decide "questions of arbitrability" means, as reviewed in Decision 2009-263, that the PELRB lacks jurisdiction to determine the threshold question of arbitrability. As summarized earlier in this decision, in the present case the State has raised a number of procedural defenses to its alleged obligation to participate in arbitration which are grounded in various provisions of the CBA and which are also based upon the Unions' alleged non-compliance with different contractual provisions governing the contractual grievance procedure. These are matters which are fairly and properly characterized as "questions of arbitrability." Consistent with applicable authority, the PELRB lacks jurisdiction to decide such questions given the power the parties have contractually granted to the arbitrator, and accordingly the SEA's Motion for Summary

Disposition and Deferral to Arbitration is granted and the State's Motion to Dismiss is denied as moot. The adjudicatory hearing currently scheduled for June 7, 2012 is cancelled. The parties are directed to proceed with the scheduling and conduct of arbitration and to submit the threshold question of arbitrability to the arbitrator for decision.

So ordered.

May 31, 2012

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