Affirms PELRB Decision No. 2012-122

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2012-0586, Appeal of New Hampshire Department of Corrections, the court on December 19, 2013, issued the following order:

The appellant, the New Hampshire Department of Corrections (State), appeals an order of the New Hampshire Public Employees Labor Relations Board (PELRB) directing the parties to proceed to arbitration with respect to a grievance arising out of the elimination of pre-shift briefings for certain prison employees. The appellees are State Employees' Association of N.H., SEIU Local 1984 (SEA) and Teamsters of New Hampshire, Local Union 633 (collectively, the unions). The State argues that the PELRB erred by not deciding whether the grievance was "viable," and by construing the parties' collective bargaining agreement (CBA) as requiring the State to submit to arbitration as the last step of the grievance procedure. We affirm.

This matter evolved from unfair labor practice complaints filed with the PELRB in 2008 regarding the elimination of pre-shift briefings. The State moved to dismiss the complaints, arguing that the grievance procedure in the parties' CBA was the proper means of resolving the dispute. In its order dated December 9, 2009, the PELRB characterized the State's position as follows: "At hearing the State requested dismissal of these cases, claiming the PELRB lacks jurisdiction because the SEA's claims, in substance, are covered by the parties' 2007-09 CBA and therefore must be addressed through the parties' contractual grievance process, which includes final and binding arbitration." The PELRB granted the State's motion to dismiss, and specifically ordered: "The parties are directed to utilize their contractual grievance process, including arbitration proceedings, to address the disputes that are the basis for these complaints."

Thereafter, the SEA filed a grievance with the department of corrections, which was denied on the ground that it was untimely filed. Although the unions sought arbitration of the dispute, the State eventually declined to participate. The unions then filed complaints with the PELRB, alleging that the State had committed an unfair labor practice by refusing to participate in arbitration. The State moved to dismiss the complaints, arguing that the grievance had not been timely filed and was not otherwise properly brought. In addition, the State argued that under the CBA, the unions had no right to arbitrate a matter that the State did not agree to arbitrate, and, therefore, the PELRB could not order the State to participate in arbitration. The PELRB disagreed, and directed the parties to proceed with arbitration, at which the

threshold question of arbitrability raised by the State could be submitted to the arbitrator for decision. The State then brought this appeal.

The CBA provides a four-step grievance procedure. Section 14.5 of the CBA is entitled "Grievance Procedure — STEP IV — ARBITRATION." It provides in part:

> 14.5.1. If subsequent to the agency head's decision the Association feels that further review is justified a petition may be submitted to the Labor Management Committee for the appointment of an arbitrator as provided in 14.5.4. or for the Labor Management Committee to schedule a meeting to review the petition. Said petition shall be submitted within fifteen (15) working days from the date the employee or Steward was notified of the decision. A copy of the petition must be sent to the Employer at the same time.

Subsection 14.5.2. further provides, in part, that 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."

Subsection 14.5.4. provides for the creation of an arbitration panel consisting of "not less than six (6) and not more than eighteen (18) arbitrators who are willing to serve pursuant to guidelines set forth in 14.5.5. Arbitrators for each individual arbitration will be assigned from this panel on a rotating basis. Initial assignments shall be determined by lot."

The State contends that pursuant to these CBA provisions, it cannot be compelled to arbitrate. The State relies primarily upon the language in subsection 14.5.1. providing that a "petition" may be submitted to the Labor Management Committee for the appointment of an arbitrator, arguing that the definition of "petition" is "something asked or requested." Thus, according to the State, all that subsection 14.5.1. provides is that the union may ask for or request arbitration. Unless the Labor Management Committee (LMC), which is composed of an equal number of State and union representatives, agrees to grant the union's request, however, no arbitration can be held.

We begin by examining the language of the CBA, as it reflects the parties' intent. Appeal of Silverstein, 163 N.H. 192, 196 (2012). The intent is determined from the agreement as a whole, and by construing terms according to the common meaning of their words and phrases. Id. We interpret a CBA de novo, and we will set aside the decision of the PELRB if it is based upon an erroneous interpretation of the law. Id.

Even accepting the State's assertion that a petition may be a request, we are not persuaded, reading the agreement as a whole, that subsection 14.5.1. empowers the LMC, under step IV of the grievance procedure, to decide whether or not a matter should go to arbitration. Indeed, nothing in subsection 14.5.1. purports to authorize the LMC to consider whether or not a particular grievance should be arbitrated. Rather, subsection 14.5.1. simply authorizes the LMC, upon request, to appoint an arbitrator as provided in subsection 14.5.4. If the parties had intended the LMC to perform the substantive task of determining which grievances should be arbitrated rather than the ministerial task of appointing, pursuant to a procedure laid out in subsection 14.5.4., the arbitrator who will preside over the arbitration, there would be more specific language in the subsection to that effect. As we have stated in another context, 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 Town of Bedford, 142 N.H. 637, 639 (1998). Similarly, where the parties have agreed to the inclusion of a broad arbitration clause as they did in this case, more forceful evidence than has been provided on this record would be necessary to persuade us that the parties did not intend that final step in a four-part grievance process to be mandatory when invoked.

Furthermore, construing subsection 14.5.1. as the State suggests would be inconsistent with the spirit of section 14.5. In its brief, the State asserts that "[i]n the instant matter, the parties have agreed that a grievance may be arbitrated if certain conditions precedent are met. First and foremost is the requirement that a grievance 'shall be filed within fifteen (15) work days of the time the grievant knew or should have known of the alleged violation.' CBA § 14.1.9. . . . [T]here is no 'live,' or 'viable' grievance unless it was timely filed or the parties agreed to waive the time limit. In the instant matter, there was no agreement to extend the time for filing a grievance. Therefore, there was no viable grievance and, hence, no question to send to an arbitrator." Similarly, in an answer filed with the PELRB dated January 9, 2012, the State asserted that the SEA was told that the Attorney General's Office would not be providing any arbitration dates "as SEA's claim was time barred." Furthermore, the reason given for denial of the SEA's grievance by the commissioner of DOC at step III of the grievance procedure was the commissioner's finding that the grievance was untimely. Thus, the record indicates that the State's refusal to arbitrate was based upon a determination that the grievances were procedurally barred.

To construe subsection 14.5.1. as permitting the LMC to deny arbitration based upon its view that a grievance was untimely filed, as it appears to have done in this case, would authorize the LMC to make the final decision (under the CBA's grievance procedure) on questions that are for the arbitrator to decide. "'[P]rocedural' questions which grow out of the dispute and bear on its final disposition are presumptively . . . for an arbitrator . . . to decide."

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002) (quotation omitted); see Southwestern Trans. Co. v. Durham, 102 N.H. 169, 177-78 (1959). Thus, issues such as whether contractual time limits have been met are for the arbitrator. See Howsam, 537 U.S. at 84-85; Durham, 102 N.H. at 177-78. Moreover, here the parties specifically provided in subsection 14.5.2. of the CBA that "questions of arbitrability," which include issues of substantive arbitrability, see Howsam, 537 U.S. at 84-85, are also proper issues for the arbitrator to decide. Given the parties' clearly expressed intent that both procedural and substantive questions of arbitrability be decided by the arbitrator, we are not inclined to construe subsection 14.5.1. as authorizing the LMC to preemptively decide that a grievance should not go to arbitration because half (or more) of the members of the LMC believe that the grievance was untimely filed. To do so would permit the LMC to decide a question that the parties clearly intended be decided by an arbitrator.

We have considered the State's remaining arguments that its interpretation of subsection 14.5.1. is supported by other provisions of the CBA, but find them unpersuasive. Accordingly, we affirm the decision of the PELRB.

Affirmed.

CONBOY, LYNN and BASSETT, JJ., concurred.

Eileen Fox,
Clerk

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