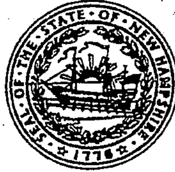
NH Supreme Court affirmed this decision on 1-26-2016, Slip Op. No. 2014-0801
(NH Supreme Court Case No. 2014-0801)



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

City of Concord

v.

Concord Police Supervisors Association

Case No. G-0205-3
Decision No. 2014-232

Appearances: James Kennedy, Esq., City Solicitor
Concord, New Hampshire for the Complainant

John Krupski, Esq.,
Concord, New Hampshire for the Respondent

Background:

On April 4, 2014 the City filed an unfair labor practice complaint, charging that the Concord Police Supervisory Association (CPSA) made a wrongful demand to arbitrate the Lt. Paul Leger grievance (Leger grievance) in violation of RSA 273-A:5, II (f) and (g). The City argues the Leger grievance is not arbitrable because the current collective bargaining agreement does not apply to Lt. Leger since he retired from the City Police Department on July 31, 2013, because Lt. Leger is no longer a City employee or "public employee" under the Public Employee Labor Relations Act, and because he is no longer a member of the CPSA bargaining unit. The City asks that the PELRB find that the CPSA has committed an unfair labor practice and issue a cease and desist order against the CPSA's arbitration of the Leger grievance.

The CPSA denies the charge. It maintains that the arbitration demand is valid because it is based upon a benefit Lt. Leger earned during the last month of his employment in accordance

with certain retroactive provisions of the current collective bargaining agreement. The CPSA asks that the PELRB find that its demand for arbitration was proper, dismiss the complaint, and award attorney fees and costs.

The PELRB scheduled this case for a May 29, 2014 hearing which was continued on the CPSA's assented to motion. Further scheduling activity ultimately resulted in the parties' agreement to submit this case for decision on stipulated facts and briefs on or before August 19, 2014. The undersigned board has reviewed the parties' submissions and the decision in this case is as follows.

Findings of Fact

1. The City of Concord ("City") is a public employer as that term is defined by RSA 273-A:1, X.

2. The CPSA is the certified exclusive representative for all non-probationary Police Sergeants, non-probationary Police Lieutenants, non-probationary Parking Supervisors and non-probationary Dispatch Supervisors.

3. Lt. Paul Leger retired from the police department on January 31, 2013.

4. The parties' current collective bargaining agreement covers the January 1, 2013 to December 31, 2015 time period (2013-15 CBA). Joint Exhibit 1.

5. Negotiations on the 2013-15 CBA were completed at the end of 2013, approximately eleven months after Mr. Leger's retirement. The parties signed the 2013-15 CBA on December 19, 2013 and it became effective on that date.

6. The 2013-15 CBA contains the following grievance definition:

> A grievance is defined as a claim or dispute by an Employee arising out of the application or interpretation of this Agreement, under express, written provisions of this Agreement, and shall be processed in the following manner...

7. The 2013-15 CBA grievance procedure concludes with final and binding arbitration. There is no language in the grievance procedure or elsewhere in the 2013-15 CBA granting the arbitrator the power to determine arbitrability.

8. Article VII of the 2013-15 is titled "Wages," and provides under Section 1 (A) as follows:

> Effective retroactive to January 1, 2013, employees assigned to the 10 step wage scale shall receive a cost of living adjustment of 2.25%. Effective January 1, 2014, employees assigned to the 10 step wage scale shall receive a cost of living adjustment of 2.5%. Effective January 1, 2015, employees assigned to the 10 step wage scale shall receive a cost of living adjustment of 2.5%. Such adjustments are included as Appendix B, Wage Schedule.

9. Lt. Leger did not receive a retroactive cost of living adjustment (COLA) for January of 2013 (his last month of employment) under the 2013-15 CBA.

10. In March of 2014 the CPSA and Lt. Leger filed a grievance with the City concerning the City's refusal to provide Lt. Leger with the retroactive COLA. The City denied the grievance, and in April of 2014 the CPSA filed a demand for arbitration with the American Arbitration Association describing the grievance as a failure to provide a retroactive pay increase.

Decision and Order

Decision Summary:

The Leger grievance is arbitrable. It is based upon Lt. Leger's status during the month of January, 2013, when he was still a city employee, and alleges a violation of a provision of the 2013-15 CBA that is retroactive to January 1, 2013. The City's complaint is dismissed and the CPSA request for the award of attorney fees and costs is denied. The parties shall proceed to arbitration as demanded by the CPSA.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6 and in this case has jurisdiction to determine the arbitrability of the Leger grievance.

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). Both a wrongful refusal to arbitrate and a wrongful demand can be litigated as a possible breach of a collective bargaining agreement in violation of RSA 273-A:5, I (h) and II (f). *See School District #42 v. Murray,* 128 N.H. 417, 422 (1986). The PELRB "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." *Appeal of the City of Manchester*, 153 N.H. at 293 (citations omitted). The analysis of arbitrability disputes is governed by four general principles:

> (1) arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit ...; (2) unless the parties clearly state otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator; (3) a court should not rule on the merits of the parties['] underlying claims when deciding whether they agreed to arbitrate; and (4) 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)(emphasis added).

> 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. 637, 640 (1998).

The CPSA filed the underlying grievance and the demand for arbitration based upon Lt. Leger's status in January of 2013, when he was still an employee of the City, a public employee under the PELRA, and a member of the CPSA bargaining unit. The basis for the claim is relatively straightforward, namely that given the retroactive language in Article VII, Section 1 (A), Lt. Leger is entitled to receive a wage increase for the last month of his employment.

Disputes involving the application of Article VII, Section 1 (A) are subject to the grievance procedure and grievance arbitration. Further, when their public employment ends public employees do not automatically lose the right to maintain or pursue grievances which are based upon events that transpired during their employment. In such cases, disputes over benefits, like the retroactive COLA at issue here, are still appropriate subject matter for the contractual grievance procedure and grievance arbitration. See *Rochester School Board v. Public Employee Relations Board,* 119 N.H. 45 (1979)(PELRB has jurisdiction to address back-pay claims of former employees). See also *New Hampshire Troopers Association/Trooper Karen Therrien v. New Hampshire Department of Safety, Division of State Police,* PELRB Decision No. 2010-165 (September 15, 2010)(PELRB had jurisdiction over breach of collective bargaining agreement claim even though involved trooper had retired).[1]

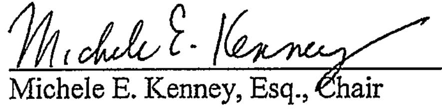
Based upon the applicable law and the circumstances of this case we cannot say, with positive assurance, that the 2013-15 CBA is not susceptible of an interpretation which covers the Leger grievance. Accordingly the City's complaint is dismissed. The CPSA request for attorney fees and costs is denied. Whether Lt. Leger is entitled to the benefit of Article VII, Section 1

[1] In this case, the dispute is subject to arbitration, and not a proceeding at the PELRB for breach of contract under RSA 273-A:5, I (h). See, e.g., *In re Silverstein,* 163 N.H. 192, 197 (2012).

(A) is for an arbitrator to decide, and the parties shall proceed to arbitration per the CPSA demand.

So ordered.

Date: 10/14/14



Michele E. Kenney, Esq., Chair

By unanimous vote of Chair Michele E. Kenney, Esq., Board Member Carol M. Granfield, and Board Member Richard J. Laughton, Jr.

Distribution: John Krupski, Esq.
James Kennedy, Esq.