

STATE OF CONNECTICUT
DEPARTMENT OF LABOR
STATE BOARD OF MEDIATION AND ARBITRATION

IN THE MATTER OF :
Cheshire Board of Education : **Case 2023-A-0016**
and :
UPSEU Local 424 Unit 19 :

Hearing Date(s): November 28, 2022
Hearing Location: Zoom videoconference
Date of Award: February 27, 2023

APPEARANCES:

Attorney Elizabeth Ditman
United Public Service Employees Union
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Meriden, CT 06450
For Union

Attorney Floyd J. Dugas
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Milford, CT 06460
For Employer

ARBITRATION AWARD

This arbitration arises from a dispute between United Public Service Employees Union Local 424 Unit 19 (“Union”) and Cheshire Board of Education (“Employer”) regarding notice of a Step 4 grievance hearing decision. Union and Employer agreed to hold the underlying grievance in abeyance pending a decision on the subsequent grievance challenging the Step 4 notice. The parties also agreed to waive the grievance steps for this grievance and proceed directly to arbitration. Employer contested arbitrability of the grievance.

A duly noticed hearing was held on November 28, 2022¹ via Zoom. On behalf of the Union, Attorney Ditman made an opening statement and offered documentary and video exhibits. On behalf of Employer, Attorney Dugas made an opening statement, offered documentary exhibits, and presented one witness who was questioned and cross-examined under oath: Vincent Masciana, Employer’s Chief Operating Officer (“COO”).

The following were marked as full exhibits without objection:²

- Joint 1: Collective Bargaining Agreement for the period July 1, 2019 through June 30, 2023 (34 pages)
- Joint 2: Letter dated July 7, 2022 (1 page)
- Joint 3: Official Grievance Form dated July 8, 2022 (1 page)
- Joint 4: Minutes of June 9, 2022 Board Meeting (14 pages)
- Union 1: Video of June 9, 2022 Board Meeting
<https://www.youtube.com/watch?v=WItMO2TeIc0>
- Employer 1: Newspaper coverage (9 pages)
- Employer 2: Official Grievance Form dated March 11, 2022 (1 page)

¹ All dates are 2022 unless otherwise indicated.

² Joint exhibits are identified as J-#, Union exhibits as U-#, and Employer exhibits as E-#.

The parties waived oral closing arguments in favor of written briefs which were submitted simultaneously on December 20.

ISSUES

At the November 28 hearing, the parties stipulated to the following issues to be decided by this panel:

1. Did Cheshire Board of Education violate the Collective Bargaining Agreement by not providing the Union written notification of denial of Jonathan Padua's grievance within fourteen business days of the Step 4 meeting?
2. If the answer to Issue One is in the affirmative, what shall be the remedy consistent with the Collective Bargaining Agreement?

RELEVANT CONTRACT LANGUAGE

ARTICLE X – GRIEVANCE PROCEDURE AND ARBITRATION

Section 10.1

A grievance is defined as a reasonable allegation that there has been a violation of the express terms of this Agreement. Grievances shall be submitted within five (5) working days after occurrence of the event giving rise to it and shall be processed in the following manner:

Step 1: The aggrieved employee(s), with a Union representative if he/she so desires, and the Facilities Manager and/or his/her designee shall meet within ten (10) working days after the filing of the grievance in an effort to adjust the grievance and answer the grievance in writing within five (5) working days of this meeting.

Step 2: If the aggrieved employee(s) is not satisfied with the disposition of the grievance at Step 1, the employee(s) may, within five (5) working days of the Step 1 response, file the written grievance with the Chief Operating Officer will meet with the Union representative and the employee(s) within ten (10) working days of such filing and answer the grievance in writing within ten (10) days after the date of filing at Step 2.

Step 3: If the employee(s) is not satisfied with the disposition of the grievance at Step 2, the employee(s) may, within ten (10) working days after the issuance of Step 2 answer, file the written grievance with the Superintendent of Schools, who will meet within fifteen (15) working days after receipt of the grievance with the employee(s), the Union representative and UPSEU staff representative to further discuss the grievance. The Superintendent shall answer the grievance in writing within seven (7) working days after the above meeting.

Step 4: If the employee(s) is not satisfied with the disposition of this grievance at Step 3, the written grievance may, within ten (10) working days after receipt of the Step 3 answer, be filed with the Board. The Board, or a committee of the Board, shall meet with the employee(s), the Union representative and the UPSEU staff representative at its next regularly scheduled meeting to discuss the grievance. The Board shall answer the grievance in writing within fourteen (14) working days after its meeting.

Section 10.2

If a grievance is not settled by the above steps, it may be submitted to arbitration. Arbitration of discharge decisions will be before the American Arbitration Association. Other arbitrations will be before the Connecticut State Board of Mediation and Arbitration. The request for arbitration shall be in writing and must be filed with the applicable body no later than twenty (20) days after receipt of the decision of the Board per Step 4 above. In the case of discharge grievances, the Board shall pay the cost of the American Arbitration Association should the Board's decision not be upheld. In the event the Board's discharge decision is upheld by the arbitrator, the parties will equally share the cost of arbitration.

Section 10.3

The Arbitrator's decision shall be final and binding on both parties.

Section 10.4

The Arbitrator shall have no authority or power to alter this Agreement in any way.

Section 10.5

Any time limits specified within this article, except for the initial filing of a grievance, may be extended by mutual consent. If a grievance is not submitted to a higher step in the above procedure, it shall be deemed settled on the basis of the Board's answer in the last step considered.

Section 10.6

If the Board fails to answer the grievance within the specified time limits the grievance will be considered resolved to the Union's satisfaction. All remedies sought will be incumbent upon the Board.

RELEVANT FACTS

1. The Employer and Union entered into a Collective Bargaining Agreement ("CBA") for the period July 1, 2019 through June 30, 2023. Article X of the CBA governs grievance procedure and arbitration. (Exh. J-1)
2. On March 11, the Union filed a grievance ("March Grievance") with the Employer on behalf of Jonathan Padua ("Grievant") whose application for the position of District-wide Outside Maintainer was denied in favor of an external candidate, allegedly in violation of CBA Article 4.4. (Exh. E-2, J-4)
3. The March Grievance was denied at Steps 1, 2, and 3. It was heard by Employer's Board at Step 4 on June 9. Union's Attorney and Grievant were present at the meeting at which Employer and Union each presented their respective positions to the Board. Following those presentations, Employer's Attorney stated that the Board could grant or deny the grievance that evening or could defer the decision and that the Board has to issue a written decision within fourteen business days of the meeting, saying "that does matter." At the conclusion of the Step 4 meeting, the Board unanimously voted to deny the March Grievance. Union's Attorney and Grievant were present for the vote. (Exh. J-4, U-1; Testimony of COO)

4. Fourteen business days after the June 9 meeting is June 29. (Exh. U-1)
5. Via letter dated July 7, Employer's Superintendent provided Union's Attorney written notice that the Board "voted unanimously to deny the grievance filed by [Grievant] on March 11..." and attached a copy of the minutes of the Board's June 9 hearing. (Exh. J-2)
6. On July 8, the Union filed a grievance ("the July Grievance") alleging that Employer violated the CBA when it failed to provide the Union with written notice of the denial of the March Grievance within fourteen business days of the Step 4 meeting. (Exh. J-3)
7. Employer did not provide Union written notice of its decision within fourteen business days because they notified Union's Attorney and Grievant of the decision verbally at the Board meeting. (Testimony of COO)

UNION POSITION

Union argues that this is a straight-forward matter: Grievant, a Union member, applied for a posted position; an external candidate was hired instead of Grievant; Union filed the March Grievance on behalf of Grievant; the March Grievance has been through all four steps of the CBA grievance procedure; the March Grievance is being held in abeyance until this matter is decided; this matter involves the July Grievance following Employer's failure to provide written notice of the Step 4 decision within fourteen business days pursuant to CBA language; Employer knew they needed to respond in writing within fourteen business days; Employer's claimed reliance on the verbal notice being sufficient is contradicted by the subsequent untimely written notice; CBA article 10.6 provides that the March Grievance must be resolved in the Union's favor as a result of Employer's failure to provide timely written notice of the Step 4 decision; Employer has not granted a remedy in Union's favor as required by the grievance procedure language, which was collectively bargained; and Grievant should be awarded the position as a remedy to the Employer's failure.

Union further argues that articles 10.5 and 10.6, respectively, are clear in indicating what happens if Union fails to timely submit a grievance and if Employer fails to timely respond to a grievance step.

Union also argues that it fully intended to pursue the March grievance to arbitration and was waiting for the written notice to do so to have a complete record of the grievance steps and responses, to ensure that the claim for arbitration was ripe, and in hopes that the Board might reconsider their decision over the following days and decide to uphold the March Grievance.

EMPLOYER POSITION

Employer agrees that there are no facts in dispute in this case and that it is a legal argument. Employer argues that this is a grievance over the applicability of language and not discipline and therefore Union has the burden of proving clear and unequivocal violation of the CBA language; that Union is bound by the grievance which cites CBA Articles 10.4 and 10.6, with no reference to Article 10.1, and that they cannot now be allowed to amend the grievance to include additional articles; that Union and Grievant had better than written notice in that they had actual notice of the Board's decision so are not prejudiced; that the purpose of notice under the CBA is notice so that the Union can timely file a grievance and have it arbitrated; that the term "resolved" in Article 10.6 does not mean "sustained" and that the ultimate remedy under that article is solely within Employer's jurisdiction. Employer argues that because the original grievance has to do with qualifications of a candidate, Union is using this grievance to side-step the underlying grievance.

DISCUSSION

The Employer's argument that any claim of violation of Article 10.1 is not arbitrable due to the Union's failure to expressly cite Article 10.1 in the July Grievance is not persuasive. The July Grievance states that it "includes but is not limited to... violation of Article 10, section 10.4 and 10.6." (Exh. J-3). The additional language stating the facts that form the basis of the July Grievance relate to Article 10.1 Step 4 and Article 10.6, are consistent with the stipulated issues, do not raise new issues, and are sufficient to put the Employer on notice of the issues in dispute.

CBA Article 10.1 defines a grievance as "a reasonable allegation that there has been a violation of the *express terms* of this Agreement" [emphasis added]. Step 4 of Article 10.1 expressly states that the Employer "shall answer the grievance *in writing* within fourteen working days..." [emphasis added]. Per CBA Article 10.4, the Arbitrators "have no authority or power to alter [the CBA] in any way."

The parties agree that the March Grievance filed by the Union was processed through Steps 1, 2, 3, and 4 of the grievance procedure set out in CBA Article 10, that the Employer verbally answered the grievance at Step 4 on June 9, that Union and Grievant had actual notice of the verbal answer on June 9, and that the Employer did not answer the grievance at Step 4 in writing within fourteen business days as expressly required by CBA Article 10.1.

The Union met its burden of proving that the Employer violated the express terms of the CBA by not answering the grievance in writing within fourteen business days of the Step 4 meeting.

CBA Article 10.6 states that "[i]f the Board fails to answer the grievance within the specified time limits the grievance will be considered resolved to the Union's satisfaction." No evidence of past practice under, or the intent of, the bargained for language in Article 10.6 was presented in this hearing. Just as the Arbitrators have no authority to eliminate or ignore the term "in writing" in Article 10.1 Step 4, they have no authority to insert the term "in writing" in Article 10.6.

The Employer timely heard and answered the March Grievance on June 9, which was "within the specified time limit." By their own admission, which is supported by their evidentiary submissions, the Union had actual notice of that answer on June 9. The Union has not claimed, and the evidence does not support a finding, that the Employer failed to timely answer the March Grievance. The Union argues only that the Employer did not reduce that answer to writing in a timely manner.

The Union has not met its burden of proving that Article 10.6 was triggered for the Employer's failure to reduce its June 9 answer to writing within fourteen business days of the Step 4 meeting.³ The Union's available remedy under CBA Article 10.2 is to submit the March Grievance to arbitration to be heard on the merits.

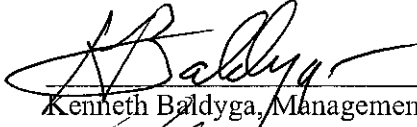
AWARD

Cheshire Board of Education violated Article 10.1 Step 4 of the Collective Bargaining Agreement by not providing the Union written notification of denial of Jonathan Padua's grievance within fourteen business days of the Step 4 meeting. As remedy, the Union may submit the March Grievance to arbitration to be heard on the merits.

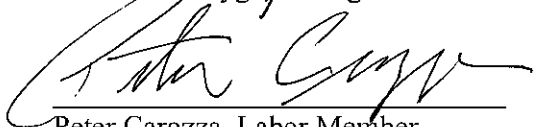
³ Under the Union's argument, if Article 10.6 was triggered, Grievant would be awarded the position, making the March grievance moot.



Janis C. Jerman, Chair and Neutral



Kenneth Baldyga, Management Member



Peter Carozza, Labor Member