

STATE OF CONNECTICUT
DEPARTMENT OF LABOR

STATE BOARD OF MEDIATION AND ARBITRATION

ARBITRATION RULING

<u>In The Matter Of:</u>) CASE NO.:
) 2021-A-0257
HARTFORD BOARD OF ED.) AWARD DATE: January 26, 2023
) HEARING DATE: July 19, 2022
-and-)
)
AFSCME, Co. 4, Local 566,)
AFL-CIO) HELD: Via Zoom Platform
)
)
<u>GRIEVANT: Class Action</u>)

PANEL: Attorney Susan E. Halperin, Chair and Alt. Public Member
Kenneth Baldyga, Alternate Management Member
John B. Toomey, Jr., Alternate Labor Member

APPEARANCES:

For the City: Attorney Lori Mizerak

For the Union: Attorney Anthony J. Bento, Staff Representative

STIPULATED ISSUE

1. Is case number 2021-A-0257 arbitrable?
2. If so, what shall the remedy be?

¹ The Ruling was delayed due to COVID.

RELEVANT CONTRACT LANGUAGE

ARTICLE IX - WAGES

9.11F Employees called in for work outside their regularly scheduled work hours shall be paid straight time if work is contiguous to their regularly scheduled hours unless the employee has worked more than 40 hours in one week. When employees are called in on a non-contiguous basis, they shall be paid for a minimum of three hours or hours worked, whichever is greater, at the rate of time and one half their regular hourly rate.

ARTICLE XVI - GRIEVANCE PROCEDURE

16.0 (A) Definitions

The term "grievance" is defined as an alleged violation, misapplication or misinterpretation of the specific provisions of this Agreement.

"Workdays," for purposes of this Article, shall mean any day that the district (Central Office) is open.

16.0 (B) Procedure

Grievances shall be processed in the following manner:

Step 1: A bargaining unit member must submit his/her grievance in writing and such grievance must be received by the immediate supervisor within ten (10) work days of the date when the events giving rise to the grievance occurred. Such submission shall be made to the immediate supervisor for a satisfactory adjustment. The written grievance must indicate the specific nature of the grievance and the contract provision(s) alleged to be violated. Such immediate supervisor may request a meeting with the bargaining unit member prior to making his/her decision, but in any event must render his/her decision within five (5) work days of the submission. The bargaining unit member may be accompanied by a Union representative if he/she so desires at any such meeting.

Nothing in this provision shall prohibit a bargaining unit member from informally discussing his/her problem with the involved supervisor, prior to filing a grievance. However, the time limits for filing the initial grievance may only be waived or extended by written agreement between the Chief Labor and Legal Officer (or specified designee) and the Union President (or designee).

1. Step 2: If no satisfactory settlement is reached after presentation of the grievance at Step 1, the grievance may be pursued by the bargaining unit member to the Chief Labor and Legal Officer by providing the Chief Labor and Legal Officer with a copy of such grievance and requesting a meeting in writing, within ten (10) work days of the decision of the Supervisor at Step 1. The Chief Labor and Legal Officer or his/her designee will schedule a meeting with the Grievant to attempt to resolve the issues related to the grievance within twenty (20) work days following the bargaining unit member's filing the grievance with the Chief Labor and Legal Officer. The Chief Labor and Legal Officer shall have ten (10) work days after holding the meeting to issue a written decision. A copy of the decision shall be provided to both the Grievant, if a Grievant was present at the meeting, and the Union.

Step 3: In the event that the grievance is not settled at Step 1 or Step 2, then the Union may seek arbitration of the grievance. No bargaining unit member may file for arbitration as an individual, but only the Union may file an appeal to arbitration hereunder. The Union's request for arbitration shall be in writing and must be filed with the applicable arbitration agency with a copy to the Chief Labor and Legal Officer within ten (10) work days after the receipt of the Chief Labor and Legal Officer's (or his/her designee's) decision at Step 2 or not later than ten (10) work days following the expiration of the time limits for making such a decision, whichever shall occur first. The first six (6) grievances filed by the Union for arbitration during each fiscal year (July 1 - June 30) shall be submitted to the State Board of Mediation and Arbitration. All subsequent grievances filed for arbitration during the fiscal year (July 1 - June 30) shall be submitted to the American Arbitration Association. For purposes of determining the year in which a grievance was filed, the date of the filing of the first step to the supervisor shall control.

The decision of the arbitrator(s) shall be final and binding upon both parties, except as otherwise provided by law. The arbitrator shall have no power to add to, delete from, or modify in any way the provisions of this Agreement.

16.0 (C) General Provisions

1. The provision(s) of the Agreement which are alleged to have been violated in the matter must be identified in the submission.

2. The parties shall share equally in the general cost of the arbitration, including the arbitrator's fee, but shall be responsible for bearing their own respective costs associated with the arbitration process. If a postponement is necessary for one party, that party must pay the postponement fee. If the parties mutually agree to a postponement, they shall share equally the costs of any such fee.
3. In the event that the Board's representative does not provide the Union with a timely response to the grievance following the meeting of the parties or if the meeting is not scheduled within the timelines described above, the bargaining unit member or, if appropriate, the Union may proceed with the next step of the grievance procedure provided that the Union or the bargaining unit member, if appropriate, does so within the specific time limits set forth above.
4. Any grievance, as defined above, not presented for disposition through the grievance procedure described under "Procedure" above within ten (10) work days of the time when either the Grievant or the Union knew or reasonably should have known of the conditions giving rise thereto, shall not be considered a grievance arising out of this Agreement. Failure at any step to appeal within the specified time limits shall permit the aggrieved to proceed immediately to the next step. Failure at any step to appeal within the specified time limits shall be considered acceptance by the aggrieved of the decision rendered or an acceptance of a denial, if no decision was rendered, and such decision/denial shall thereafter be binding upon the aggrieved and the Union. The time limits specified at any step after Step 1 may be extended in any particular instance by written agreement signed by both the Chief Labor and Legal Officer and an officer of the Union.
5. Grievances arising from the action of an official other than the immediate supervisor shall be filed with the involved administrator.
6. The Union shall have the right to initiate a grievance or appeal from the disposition of a grievance of any bargaining unit member or group of members at any step of the grievance procedure.

STATEMENT OF THE CASE

This bifurcated matter is before the State Board of Mediation and Arbitration (hereinafter the "SBMA") because of a grievance filed with the Hartford Board of Education (hereinafter the "Board") by AFSCME, Co.4, Local 566, AFL-CIO (hereinafter the "Union") concerning whether the Board's payment to the bargaining unit members violated certain terms of the Agreement.

The Union filed the grievance on February 11, 2021, alleging a specific violation of Article IX, Section 9.11 (F).² That Section provides that when employees are called in on a non-contiguous basis, they shall be paid for a minimum of three hours at the rate of time and one half their regular hourly rate. On February 1, 2021, the Board's Custodial Manager changed the Second Shift Custodians' schedules to first shift for February 2, 2021, to deal with an impending snowstorm.

A second step grievance meeting was scheduled by the Board, after several scheduling and communication issues, but the Union filed for arbitration with the SBMA on April 15, 2021 and did not attend the second step.

The arbitration hearing was noticed by the SBMA and held on July 19, 2022.

One witness, the Senior Executive Director of Human Resources, testified and was cross-examined under oath and each Party presented documentary and testimonial evidence in support of its position.

The Panel represents that it has reviewed the entirety of the record and fully reviewed and analyzed the evidence and arguments presented by each Party although not discussed herein.

We believe that each Party was fully represented and given the opportunity for a fair hearing.

² See Joint Exhibit 2

BOARD POSITION

The Board claims that the matter is not procedurally arbitrable in a letter dated September 23, 2021 to the SBMA.³

It asserted the grievance was not arbitrable on two bases:

First, it relies on Article 16.0 of the Agreement. It maintains that since the grievance was denied by the immediate supervisor, it must proceed to a step 2 Superintendent level hearing. If denied at that level, then it can proceed to arbitration. Since no step 2 was held and the Union filed directly to arbitration, it claims that the matter cannot be heard.

Secondly, it claims that the information contained in the grievance was insufficient for the Board to prepare an adequate defense since no date of the alleged violation was mentioned and inadequate information was presented concerning the specifics of the grievance. It believes that the specific nature of the grievance was lacking as required by article 16.0 (B) of the Agreement.

In response to the Union's arguments and because of a prior SBMA Award issued allegedly concerning the same violation of the grievance procedure, the Board introduced other arguments at the hearing.⁴

These positions were fully explained to the Panel.

UNION POSITION

The Union relies on the specific provisions of the Agreement⁵ to persuade the Panel to find the matter arbitrable.

³ See Union Exhibit 8.

⁴ See Union Exhibit 14.

⁵ See Joint Exhibit 1

It argues that the language clearly identifies those certain situations that allow the contractual grievance procedure at certain steps to be bypassed.

More specifically, Article 16.0 (C) (3) and two other provisions address the Union's right to move directly to arbitration:

1. In the event the Board's representative fails to provide to the Union a timely response to a grievance following the meeting, or if the meeting is not scheduled timely, the Union may proceed to the next step;
2. Failure at any step to communicate a decision in a timely manner; and,
3. Time limits prescribed may only be extended by mutual agreement.

The Union emphasizes that the record shows that the Union contacted the Senior Executive Director of Human Resources after she was on notice of the grievance being filing on March 16, 2021 and informed her on that same date it wanted to set up the meeting during the twenty (20) day contractual limit in Article 16.

The Parties did not agree to a contractual mutual extension. In fact, the Board witness testified⁶ that issues related to scheduling and communication affected the step 2 date due to unusual activity related to a "Return To Learn Plan" that involved increased commitment by each and all of the school district administration and staff.⁷

In addition, the Union asks the Panel to apply the findings and Ruling of the Majority of the Arbitration Panel in Case No. 201-A-0223⁸ as determinative of the arbitrability question.

⁶ See Transcript, page 63.

⁷ See Transcript, page 15, Banks testimony.

⁸ Chairman Sullivan and Labor Member Kuehnel concur in the Ruling. Management Arbitrator Culhane dissents.

ANALYSIS, DISCUSSION AND DECISION

The Panel fully analyzed the documentary and testimonial evidence considering the record and the arguments of the Parties.⁹

The Panel Chair and the Labor Panel Member find that the matter is arbitrable and should proceed to be heard on the merits.

Arbitrators' are expected to recognize the fundamental principles of contract law.

The Panel's responsibility is to interpret the contract language and our authority is established in the contract in Step No. 3 of Article 16:

...The arbitrator shall have no power to add to, delete from, or modify in any way the provisions of this Agreement.

That language is significant as the specific language regarding the scheduling of grievances is clear and must be given its true meaning and cannot be changed or modified.

We respect that limitation especially regarding matters of arbitrability when we determine and make a finding that the matter is arbitrable because the Parties presented certain evidence that can only be addressed when the merits are properly heard.

Other findings:

The Board's arguments with reference to scheduling of and language of other bargaining unit contracts—a new argument in this proceeding-- is not persuasive.

⁹ Although both Parties provided numerous court citations supporting each of its arguments, the Panel no weight to the arguments as full case test was not provided, although the argument was considered.

We find that the prior arbitration Ruling in SBMA Case No.2021-A- is not determinative of our decision. Note that both decisions were based on the Agreement of a majority of the Panel

We do find that the Majority's discussion and findings regarding the contract language and the grievance process is compelling. We concur with their analysis in our Ruling.

The Union gave specific notice to the Board that it expected the Board to adhere to the twenty (20) day period for scheduling. Without mutual agreement, the matter should have been heard in a timely manner. Otherwise, we find that the Union had the right to move the matter to arbitration.

This finding is based on dates established in the record by joint exhibits.

As to the argument that the Union failed to provide the information required in the grievance filing, the evidence is clear that the Board and the Union communicated about the substance of the grievance.¹⁰ The Board had actual notice of the alleged contract violation. This finding is fully supported by the individuals notified in emails on March 16, 2021.

Most particularly, the Panel has a responsibility to fully hear the matter since we find that the questions involving arbitrability are inextricably entwined with a fair outcome on the merits.

Based on the foregoing findings analysis and discussion, the Majority find the matter arbitrable.

¹⁰ See Board Exhibit 4.

RULING

A Majority of the Panel, the Public and Labor Members, find the matter **arbitrable**.

The SBMA shall schedule Case no. 2021-A-0257 to be heard on the merits.

BY THE:

CONNECTICUT STATE BOARD
OF MEDIATION AND ARBITRATION

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Panel Chair & Alternate Public Member

K. Baldyga
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