

IN THE MATTER OF ARBITRATION BETWEEN

EDUCATION MINNESOTA- CARLTON)	
)	
)	
)	ARBITRATION
and)	AWARD
)	
)	ARBITRABILITY OF
)	STEP AND LANE INCREASES
)	GRIEVANCE
INDEPENDENT SCHOOL DISTRICT NO. 93, CARLTON)	
)	BMS CASE No. 10-PA-0817

Arbitrator: Stephen F. Befort

Hearing Date: N/A

Briefs Received: June 5, 2010

Date of decision: June 16, 2010

APPEARANCES

For the Union: Debra M. Corhouse

For the School District: Kevin J. Rupp
Christian R. Shafer

INTRODUCTION

Education Minnesota-Carlton (“Union”) is the exclusive representative of a unit of teachers employed by Independent School District No. 93, Carlton (“School District”). The Union contends that the School District violated the parties’ collective bargaining agreement (“CBA”) by failing to pay step increases, longevity payments, and lane increments for the 2009-10 school year. The School District maintains that such payments are not owing due to the

expiration of the parties' 2007-09 CBA. The parties agreed to bifurcate this arbitration proceeding with the issue of arbitrability first submitted for resolution on the written briefs of the parties. Depending on the outcome of that issue, a hearing on the merits then may be scheduled.

ISSUE

Is the Union's grievance challenging the School Districts failure to pay step increases, longevity payments, and lane increments for the 2009-10 school year arbitrable?

RELEVANT CONTRACT LANGUAGE

ARTICLE VI BASIC SCHEDULE AND RATE OF PAY

Section 1. Basic Compensation:

Subd. 1. 2007-2008 Rates of Pay: The wages and salaries reflected in Schedule A, attached hereto, shall be effective only for the 2007-2008 school year, and Teachers shall advance one increment on the salary schedule.

Subd. 2. 2008-2009 Rates of Pay: The wages and salaries reflected in Schedule B, attached hereto, shall be effective only for the 2008-2009 school year, and Teachers shall advance one increment on the salary schedule.

ARTICLE XVI DURATION

Section 1. Terms and Reopening Negotiations: This Agreement shall remain in full force and effect for a period commencing upon the date of its execution through June 30, 2009, and thereafter until modifications are made pursuant to the P.E.L.R.A. In the event a successor agreement is not entered into prior to the commencement of school in 2009, a teacher shall be compensated according to the last individual contract negotiated between the Teacher and the School District until such time that a successor agreement is executed. If the exclusive representative desires to modify or amend this Agreement commencing on July 1, 2009, it shall give written notice of such intent no later than May 1, 2009. If such notice is not served, the School District shall not be required to negotiate any terms of employment for the following school year. Unless otherwise mutually agreed, the parties shall not commence negotiations more than ninety (90) days prior to the expiration of this Agreement.

FACTUAL BACKGROUND

The Union and the School District are parties to a CBA governing the District's teachers for the 2007-09 school years. That agreement sets out a basic salary schedule applicable to each year covered by the agreement. The CBA also provides for additional compensation based upon years of service (steps) and the completion of post-graduate education (lanes). Step and lane increments are credited beginning in September of each school year.

Article XVI of the CBA addresses the duration of the 2007-09 agreement. In this regard, Section 1 of that article contains the following language: "This Agreement shall remain in full force and effect for a period commencing upon the date of its execution through June 30, 2009, and thereafter until modifications are made pursuant to the P.E.L.R.A."

The parties have engaged in negotiations over the past several months in an attempt to reach agreement on a successor CBA. Despite several negotiation and mediation sessions, the parties thus far have been unsuccessful in that endeavor.

On September 15, 2009, the School District issued paychecks to the teachers without providing any new step and lane increments. On September 18, 2009, the Union filed a grievance with Superintendent Scott Hoch contending that "ISD # 93 has instituted a 'freeze' of expected advancements for steps, lanes, and longevity" which is "a violation of the past practices of ISD # 93 and counter to the intent of PELRA." The School District denied the grievance, stating that the CBA only obligates the School District to compensate teachers "according to the last individual contract executed by the Teacher and the School District." On October 29, 2009, Superintendent Hoch wrote a letter to the Union's Teacher's Rights Chair claiming that the Union had forfeited its grievance by failing to file the initial grievance with the appropriate Step 1 recipients, namely the high school and elementary principals.

The Union filed a new grievance with the appropriate Step 1 recipients on November 19, 2009, and the two principals responded on the same day with a letter stating that they lacked any authority to resolve the grievance. On December 8, the Union sent a letter to Superintendent Hoch claiming that the School District's failure to schedule timely meetings to address the grievance required "mandatory alleviation" of the grievance under the terms of the parties' CBA. Meanwhile, in a letter to the Union dated December 7, Superintendent Hoch wrote: "The Carlton School District would propose that both sides go to arbitration in order to settle the grievance filed for Steps, Lanes and Longevity."

After selecting an arbitrator, the parties agreed to bifurcate the arbitration hearing with the issue of arbitrability to be initially submitted to the arbitrator on written briefs. Those briefs have been submitted, and the arbitrability issue is now ripe for determination.

POSITIONS OF THE PARTIES

School District:

The School District principally contends that the Union's grievance is not arbitrable because the parties' CBA expired on June 30, 2009, several months prior to the time that the Union's grievance was filed. Although Minn. Stat. § 179A.20, subd. 6 provides that the terms of an expired contract continue in effect until the date upon which the right to strike matures, this provision conflicts with the more specific terms of Minn. Stat. § 179A.20, subd. 3 which mandates that CBAs involving teachers "shall be for a term of two years, beginning on July 1 of each odd-numbered year." Based upon the analysis utilized by the Minnesota Supreme Court in Independent School District No. 88, New Ulm v. School Service Employees Union, Local 284, 503 N.W.2d 104 (Minn. 1993), the School District argues that the parties' CBA expired by "force of law" on June 30, 2009 such that any subsequently arising grievance is not arbitrable.

Using this same logic, the School District maintains that the language of Article XVI providing that the parties' contract remains in "full force" through June 30, 2009 "and thereafter" until modified also cannot trump the two year limit on teachers' contracts mandated by § 179A.20, subd. 3.

The School District further argues that the Union's grievance does not assert any right to step and lane increases for the 2009-10 school year that vested prior to the June 30, 2009 expiration date. Finally, the School District asserts that even if the parties' CBA remained in effect following expiration, that status ceased as of December 30, 2009 when the Union's right to file a notice of intent to strike matured.

Union:

The Union initially claims that the Employer waived its right to contest arbitrability by agreeing to submit this matter to arbitration and that the Union's grievance should be awarded automatically due to the School District's failure to respond in a timely fashion to two steps of the grievance procedure. Turning to the Public Employment Labor Relations Act (PELRA), the Union contends that § 179A.20, subd. 6 provides that collective agreements in Minnesota continue in effect beyond expiration until such time as the right to strike matures. The Union argues that this provision does not conflict with subdivision 3 of that same section since the latter only specifies contract length while subdivision 6 provides for continuing effect following expiration regardless of contract duration. In addition, the Union points out that the parties' CBA expressly states that it shall remain in full force through June 30, 2009, "and thereafter until modifications are made pursuant to the P.E.L.R.A." According to decisions cited by the Union, nine out of ten Minnesota arbitrators who have interpreted similar contract language have ruled that the denial of post-expiration step increments violated the master contract in question.

Citing to the resolution of a similar grievance by Arbitrator Sharon Imes, the Union argues that the events leading to this grievance occurred during the life of the 2007-09 contract and may be vested in nature. As a final matter, the Union contends that the School District's argument that PELRA limits the contract in effect doctrine to the maturation of the right to strike only goes to the issue of remedy and not arbitrability.

DISCUSSION AND OPINION

A. The Arbitrability Issue

The issue of arbitrability concerns whether an arbitrator has jurisdiction to determine the dispute in question. Normally, that is a matter governed by the scope of the parties' contractual agreement. Here, the parties' CBA contains a broad arbitration provision that applies to all grievances that involve "a dispute or disagreement regarding the application or interpretation of any term of [this] contract." Article XIII, Section 1. The arbitrability issue is complicated in this instance, however, by the fact that the grievance was filed after the expiration date of the CBA. A further complication arises from the fact that PELRA affirmatively addresses the temporal duration of the parties' agreement. Thus, the arbitrability determination in this case requires an inquiry into the terms of both PELRA and the parties' CBA.

As a general matter, a presumption in favor of a finding of arbitrability exists under both federal and state law. As the U.S. Supreme Court has counseled:

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83

(1960). The Minnesota Supreme Court has quoted this same language with approval in

Independent School District No. 88, New Ulm v. School Service Employees Union Local No.

284, 503 N.W.2d 104, 107 (Minn. 1993). The U.S. Supreme Court has explained the rationale for this presumption in the following terms:

This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, “furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties’ presumed objectives in pursuing collective bargaining.”

AT & T Technologies, Inc. v. Communication Workers of America, 475 U.S. 643, 650 (1986)

(citations omitted).

In this case, the Union alleges three possible sources of arbitral jurisdiction: 1) The PELRA provision providing for the continuing effect of expired contracts; 2) the parties’ CBA which provides for the contract to continue in effect post-expiration until modified pursuant to PELRA; and 3) by virtue of the fact that the grievance involves facts and occurrences that arose prior to contract expiration. Each of these theories is examined below.

The parties’ briefs in this matter have raised a number of additional assertions that are not appropriate for resolution in this initial jurisdictional phase of the proceedings. Among those sub-issues that will not be addressed in this opinion are the following: 1) whether the School District has waived the right to object to arbitrability; 2) whether the School District’s actions during the grievance steps require mandatory alleviation of the grievance; and 3) whether the maturation of the Union’s right to strike following the filing of the grievance limits the scope of arbitral authority. These matters are not yet ripe for determination because they either relate to the merits of the grievance (sub-issue # 2), relate only to the availability of remedies (sub-issue # 3), or depend on questions of fact that have yet to be determined (sub-issue # 1).

B. The PELRA Issue

Minnesota’s PELRA contains a “contract in effect” provision that statutorily extends the life of a public sector contract following expiration. This provision states:

During the period after contract expiration and prior to the date when the right to strike matures, and for additional time if the parties agree, the terms of an existing contract shall continue in effect and shall be enforceable on both parties.

Minn. Stat. § 179A.20, subd. 6 (hereinafter “contract in effect provision”). Thus, according to this provision, a covered CBA remains in effect, even without any explicit agreement between the parties, until such time as the right to strike matures. Pursuant to Minn. Stat. § 179A.18, subd. 2(1), a Union representing teachers can file a notice of intent to strike following expiration of the CBA and participation in mediation over a period of at least 30 days. According to the School District’s calculation, the 30-day mediation period ended on December 30, 2009, meaning that the Union potentially could have engaged in strike activity as of January 9, 2010, approximately seven weeks after the Union filed the operative grievance in this matter.

The purpose of the contract in effect provision appears evident. The provision serves to stabilize labor relations by preserving the respective rights and obligations of the parties while they attempt to negotiate a successor agreement. In the private sector, this goal is fostered by the rule that a party may not unilaterally change terms of conditions of employment following contract expiration until such time as the parties have negotiated to impasse. NLRB v. Katz, 369 U.S. 736 (1962). While this rule also is followed in Minnesota’s public sector, Education Minnesota-Greenway, Local 1330 v. Independent Sch. District No. 316, 673 N.W.2d 843 (Minn. Ct. App. 2004), the notion of when an impasse occurs is less certain in the public sector where mediation and other alternative dispute devices frequently are used in an attempt to forestall a deadlock in bargaining. The contract in effect provision, accordingly, establishes a bright line period during which labor agreements are insulated against destabilizing unilateral change and concerted activity.

The School District argues that the contract in effect provision should not apply in this particular context because of a conflict with Minn. Stat. § 179A.20, subd. 3. The latter subdivision states:

The duration of the contract is negotiable but shall not exceed three years. Any contract between a school board and an exclusive representative of teachers shall be for a term of two years, beginning on July 1 of each odd-numbered year.

The School District contends that subdivision 3 precludes the operation of subdivision 6 with respect to teacher contracts because the term of a teacher CBA contract is limited to two years. As the School District summarizes in its brief, “because Subdivision 3 is limited to a specific category of contracts (i.e. teacher units), whereas Subdivision 6 applies to all “contracts,” Subdivision 3 is the more specific statute” and should control.

The School District argues that the Minnesota Supreme Court’s decision in Independent School District No. 88, New Ulm v. School Service Employees Union, Local 284, 503 N.W.2d 104 (Minn. 1993) supports its position. In that case, an arbitrator ruled that a school district violated the parties’ contract by unilaterally subcontracting work performed by the district’s food service workers. Among other arguments, the school district sought to vacate the award on the grounds that the arbitrator lacked jurisdiction due to the fact that the parties’ one-year agreement had expired prior to the district’s subcontracting decision. Interpreting PELRA’s contract in effect provision, the New Ulm court found that the contract had not expired by “force of law,” referencing Minn. Stat. § 179A.20, subd. 3 and noting that the contract being given effect did not exceed the maximum duration specified in that subdivision. 503 N.W.2d at 109. The School District, by analogy, contends that the contract in this case has expired by force of law because a teacher’s contract is limited by subdivision 3 to a maximum term of two years.

The School District's interpretation of the pertinent PELRA provisions misses the mark in several respects. First, there is no inherent conflict between subdivisions 3 and 6 of section 179A.20. Subdivision 3 sets the maximum term of a CBA while subdivision 6 provides for the continuing effect of a contract for a period following contract expiration. Thus, subdivision 6 freezes the status quo for a brief negotiation period, but does not alter the term of the contract itself.

In addition, the School District's construction would undermine the purposes served by the contract in effect provision. If the contract in effect provision is wholly inapplicable to teacher contracts as the School District argues, the grievance procedure established in these contracts would simply disappear following contract expiration. This would lead to the destabilization of labor relations in the period during which the parties are attempting to negotiate a new agreement. The parties, for example, could not enforce discipline and benefit terms through arbitration, thereby tempting alternative resort to litigation and concerted activity. In fact, it is not clear from the parties' briefs whether they envision that unilateral changes would continue to be policed by unfair labor practice claims asserted in district court. *See* Minn. Stat. § 179A.13. Even if that is the case, district court litigation lacks the expertise, speed, and efficiency of the arbitration process.

Thus, both the plain statutory language and public policy support the conclusion that the contract in effect provision applies to all public sector contracts, including teacher contracts. In this matter, such a conclusion means that the parties' contract was still in effect at the time that the Union filed the grievance at issue. The fact that the Union's right to strike subsequently matured may effect the question of remedy, but not the question of jurisdiction. As such, the grievance is arbitrable.

C. The Contract Issue

A CBA also may continue in effect following expiration by the terms of the parties' contract. Indeed, the essence of an arbitrability decision is to ascertain the jurisdictional intent of the parties. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). PELRA's contract in effect provision explicitly recognizes the ability of the parties to determine contractually the post-expiration effect of a CBA by stating:

During the period after contract expiration and prior to the date when the right to strike matures, *and for additional time if the parties agree*, the terms of an existing contract shall continue in effect and shall be enforceable on both parties.

Minn. Stat. § 179A.20, subd. 6 (emphasis added). Thus, the parties by contract may agree (or not agree) that a contract continues to have force and effect post-expiration even beyond the point in time when the right to strike matures.

In this instance, the parties' CBA contains the following language with respect to duration:

This Agreement shall remain in full force and effect for a period commencing upon the date of its execution through June 30, 2009, *and thereafter until modifications are made pursuant to the P.E.L.R.A.*

Article XVI, Section 1 (emphasis added). The clear import of this language is that the parties have agreed that the terms of their CBA shall continue after June 30, 2009 until such time that the CBA has been modified pursuant to PELRA, such as by the negotiation of a successor agreement. Such a modification has not yet occurred.

A long line of arbitration decisions in Minnesota have interpreted this language as continuing the effect of an expired CBA providing for teacher step and lane increments.

Arbitrator Sara Jay offered the following summation of this line of cases in a 2002 decision:

During the late 1970s, a number of school districts arbitrated the question of increment increases during negotiations. The language at issue in those cases was similar to the

language of this Agreement, providing dates of the agreement and for continuation “thereafter until modifications are made pursuant to the P.E.L.R.A. of 1971 as amended.” With near unanimity, arbitrators held that the continuation of the agreements continued the salary schedules, including the right to increment increases for succeeding school years. *Virginia I.S.D. No. 706* (1978); *Clarissa I.S.D. No. 789* (12/77); *South Washington County I.S.D. No. 833* (2/77); *Winona I.S.D. No. 861* (4/76); *Alexandria I.S.D. No. 206* (Grabb 9/76); *Wayzata I.S.D. No. 284*, AAA Case 56-39-0041-75 (Whitlock 3/76); *Duluth I.S.D. No. 709*, PERB 76-PP-573-A (Gallagher 2/76); *Chaska I.S.D. No. 112*, 76-PP-443-A (Fogelberg 12/75); *Golden Valley I.S.D. No. 275*, PERB Case 76-PP-598-A (Boyer 12/75); *Thief River Falls I.S.D. No. 564*, PERB Case 76-PP-70-B (Karlins 11/75); *Little Falls I.S.D. No. 482*, PERB Case 75-PP-15-B (1/75); *Bloomington I.S.D. No. 271*, PERB Case 74-PP-17-B (Lloyd 10/74); *but see, Glencoe I.S.D. No. 422* (G. Jacobs 2/75). All but one arbitrator held that “in the absence of a successor agreement, all terms of the Collective Bargaining Agreement continue in full force and effect; and that as a consequence of this, a year of service earns a step increment and the completion of the appropriate credits earns a lane change, with the right of denial for just cause.” *Chaska I.S.D., supra*, at 5.

In re ISD No. 2184 and Luverne Educ. Ass’n, BMS Case No. 02-PA-751 (Jay, 2002).

This line of reasoning also was endorsed and followed in a decision issued on May 22, 2010 by Arbitrator Sharon Imes. *See In re Special Sch. Dist. No 1, Minneapolis and Minneapolis Federation of Teachers*, BMS Case no. 10-PA-0859 (Imes 2010). Similar to the instant matter, the Minneapolis Schools case involved a grievance challenging the school district’s failure to continue step and lane increments following the expiration of the parties’ 2007-09 CBA. There too, the school district argued that the grievance was not arbitrable in spite of the fact that the parties’ CBA provided that the contract remained in full force and effect until expiration “and thereafter until a new agreement is reached.” After reviewing the CBA language, the PELRA provisions, and the New Ulm decision, Arbitrator Imes made the following conclusion:

It is concluded that the Arbitrator has jurisdiction to decide the dispute under the collective bargaining agreement since the terms and conditions continued in effect after the expiration date of the collective bargaining agreement.

Minneapolis Schools at 19.

I find this virtually unbroken line of arbitral precedent to be persuasive. Taken together, these decisions establish and reflect a longstanding understanding in Minnesota's education field. Without some sign of legislative or judicial rejection, I am hesitant to overturn this customary understanding.

The School District claims that the Minnesota Supreme Court's decision in the New Ulm case provides such a sign. According to the School District's reading of that decision, the two-year term limit on teacher contracts imposed by Minn. Stat. § 179A.20, subd. 3 precludes either a statutory or contractual extension of the effect of such a contract following expiration by "force of law." *See generally* New Ulm, 503 N.W.2d at 109.

I find the School district's construction of the New Ulm decision no more persuasive in the contractual context than in the statutory context. Once again, there is no inherent conflict between a mandatory two-year term for teacher contracts and a voluntary agreement by the parties to preserve the status quo pending the negotiation of a new agreement. And, as also stated previously, the bar on contractual extensions would jettison the arbitral enforcement of terms and conditions of employment and destabilize labor relations. The only distinction in this context is that the parties would be forbidden from negotiating over the contract extension issue altogether. That construction hardly seems consistent with PELRA's overall endorsement of collective bargaining. *See generally* Minn. Stat. § 179A.01.

D. The Litton Issue

Irrespective of statute or contract, a grievance filed after the expiration of a contract nonetheless may be arbitrable if the dispute "arises under" the contract. Litton Financial Printing Div. v. NLRB, 501 U.S. 190 (1991). According to the Litton Court, a post-expiration grievance "arises under" the contract if it 1) involves facts or occurrences that arose prior to expiration, and

2) a post-expiration action infringes upon a right that accrued or vested prior to expiration. 501 U.S. at 205-06.

The Union argues that both prongs of this test are satisfied in this case. Here, unit teachers earn step increments through years of service and lane increments by earning post-graduate education credits. All of the service credits and most of the education credits were earned through efforts expended by teachers prior to the contract's expiration on June 30, 2009. Thus, when the School district decided not to provide incremental compensation in September 2009, this decision infringed upon rights that had been earned and accrued prior to expiration. Arbitrator Imes agreed with this analysis in the Minneapolis Schools decision, stating:

It is also concluded that even if the terms and conditions of the agreement had not continued in effect after the expiration date of the collective bargaining agreement, the Arbitrator has jurisdiction to decide the dispute since the events giving rise to the grievance occurred under the collective bargaining agreement while it was in effect.

Minneapolis Schools at 19.

Here again, the School District's arguments contesting arbitrability are unpersuasive. The School District first argues that the grievance involves no facts occurring prior to June 30, 2009 because the School District's decision not to provide the step, lane and longevity increases did not occur until September 2009. This argument, however, ignores the fact that most of the efforts undertaken by the teachers to earn these increases constitute relevant facts and occurrences that took place prior to June 30, 2009.

The School District further maintains that it did not infringe upon any accrued rights to the increments since the expired CBA did not set out any salary schedule for the 2009-10 school year. In this regard, the School District particularly relies on the following provision in Article XVI of the CBA:

In the event a successor agreement is not entered into prior to the commencement of school in 2009, a teacher shall be compensated according to the last individual contract negotiated between the Teacher and the School District until such time that a successor agreement is executed.

Based on this language, the School District's brief asserts that "the plain language of Article XVI can only mean that, after the CBA's expiration, and until such time as a new collective bargaining agreement is finalized, teachers are to be compensated at the same rate that they had been paid for the 2008-2009 school year."

The School District's non-accrual argument relates more to the merits of this dispute than it does to arbitrability, and the Supreme Court has counseled that those two considerations should be kept separate at this jurisdictional phase of the proceedings. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). In any event, most jurisdictions view the required status quo that must be maintained following contract expiration as a dynamic concept that encompasses a past agreement or practice calling for non-discretionary wage adjustments. As a leading authority on this issue with respect to public sector collective bargaining has noted, the dominant "dynamic status quo rule requires and permits a public employer to pay wages according to the wage plan of the expired agreement, including any scheduled step increases." Steven J. Scott, *The Status Quo Doctrine: An Application to Salary Step Increases for Teachers*, 83 CORNELL L. REV. 194, 216 (1997).

Ultimately, I agree with Arbitrator Imes that sufficient facts and occurrences took place during the term of the CBA to render this dispute arbitrable under the expired contract. This result applies above and beyond any jurisdictional finding grounded in statute or contract.

AWARD

The Union's grievance in this matter is arbitrable.

Dated: June 16, 2010

Stephen F. Befort
Arbitrator