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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,

Plaintiff/Counterclaim Defendant,

vs.

ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO,

Defendant/Counterclaimant.

ALASKA STATE EMPLOYEES ASSOCIATION/AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 52, AFL-CIO,

Third-Party Plaintiff,

vs.

MICHAEL J. DUNLEAVY, in his official capacity as Governor of Alaska; KEVIN G. CLARKSON, in his official capacity as Attorney General of Alaska; KELLY TSHIBAKA, in her official capacity as Commissioner of the Alaska Department of Administration; and STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION,

Third-Party Defendants.

Case No. 3AN-19-09971 CI

DECLARATION OF MOLLY C. BROWN IN SUPPORT OF ASEA'S OPPOSITION TO STATE'S MOTION FOR DECLARATORY JUDGMENT OR, IN THE ALTERNATIVE, TO STAY ARBITRATION

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STATE OF ALASKA)
) ss.
THIRD JUDICIAL DISTRICT)

I, Molly C. Brown, hereby declare:

1. I am a partner at Dillon & Findley, P..C, admitted to practice by the Bar of the State of Alaska, and one of the counsel to defendant/counterclaimant/third-party plaintiff ASEA in this action. I am over the age of 18 and competent to testify, and make this declaration based on personal knowledge of the facts stated herein.

2. A true and correct copy of the following arbitration decision is attached as **Exhibit 1**: *Chicago Teachers' Union*, 1999 BNA Lab. Arb. Supp. 107830 (Cohen, Arb. 1999).

I declare under penalty of perjury under the laws of the State of Alaska that the foregoing is true and correct.

Molly C. Brown

SUBSCRIBED AND SWORN to before me this 19th day of November 2019, at Anchorage, Alaska.

LISA M. KUSMIDER
My Commission Expires
NOTARY PUBLIC
Mar 9, 2023
STATE OF ALASKA

Notary Public for the State of Alaska
My Commission Expires: 3/9/23

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 19, 2019, a true and correct copy of the foregoing document was served by:

[ ] hand delivery
[✓] first class mail
[✓] email

on the following attorneys of record:

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Labor Arbitration Decision, IN THE MATTER OF ARBITRATION Between CHICAGO BOARD OF EDUCATION, 51 390 00569 98, 1999 BNA LA Supp. 107830

Arbitration Decision

IN THE MATTER OF ARBITRATION Between CHICAGO BOARD OF EDUCATION and CHICAGO TEACHERS' UNION

AAA No. 51 390 00569 98

December 9, 1999

APPEARANCES:

For the Board of Education: David A. Iammartino, Assistant Attorney

For the Union: James P. Popp, Attorney

Lawrence M. Cohen

Grievance of Rosalind Samson

ISSUES:

The issues, as agreed to by the parties, are:

1. Is the grievance substantively arbitrable in light of Section 4.5 of the Illinois Educational Labor Relations Act, 115 ILCS 5/4.5?

2. If the grievance is arbitrable, did the Chicago Board of Education and the principal of Arthur A. Libby Elementary School violate Article 40-1 and/or 40-2 of the parties' 1995-1999 Collective Bargaining Agreement ("CBA") when they failed to program Grievant Rosalind Samson to a second grade classroom for the 1998-1999 school year? If so, what is the appropriate remedy?

FACTS:

A. Prehearing Procedural Background

Pursuant to CBA Article 3-1, by letter dated September 15, 1998, the Chicago Teachers Union filed a grievance on behalf of Rosalind Samson. The grievance alleged that the Board and Beverley Blake, the principal of Arthur A. Libby Elementary School, violated CBA Article 40-1 when they failed to program Grievant to a second grade classroom for the 1998-99 school year. The grievance requested "that Ms. Samson be assigned to teach second grade...." The grievance was denied by the Board on the merits. The Board also "reserve [d] its substantive arbitrability defenses under Section 4.5(a)(4) of the IELRA." When no resolution was reached, on December 10, 1998, the Union filed a timely demand for arbitration. An arbitration hearing was held at the American Arbitration Association on September 8, 1999. On approximately October 25, 1999, the parties submitted briefs.

B. Background Facts

Samson has been employed by the Board since 1988. She is a tenured teacher who holds a Type 3 certification. That certification enables her to teach grades kindergarten through ninth grade. From 1990 until the start of the 1998-1999 school year, Blake programmed Samson to teach a second grade classroom at Libby Elementary School.

At the end of the 1997-1998 school year Samson completed a form which indicated that she desired to continue teaching second grade the following school year. Samson was nevertheless programmed by Principal Blake to teach a fourth grade classroom for the 1998-99 school year. Samson had never taught the fourth grade. The four second grade classrooms were taught that year by full-time basis substitute teachers. The alleged reason for placing Samson at the fourth grade position, a change which admittedly resulted in no monetary loss to the Grievant, was, according to a October 6, 1998 letter by Blake, "school needs, teacher evaluation (ratings) and professional growth."

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 3 - GRIEVANCE PROCEDURE

Definition: A grievance is a complaint involving a work situation or a complaint that there has been a deviation from, misinterpretation of, or misapplication of a practice or policy; or a complaint that there has been a violation, misinterpretation, or misapplication of any provisions of this Agreement.

* * *

ARTICLE 40 - TEACHER PROGRAMMING

40-1 The principal, in programming a teacher, shall (1) keep the number of preparations to a minimum; (2) ability and qualifications being equal, follow the policy of rotation amomng qualified personnel in the matters os sessions, teaching, building assignments, special classes, honors and other modified classes, and division rooms; (3) consider the teacher's professional background and preparation; (4) in the elementary schools, ability and qualifications being equal, program teachers for the grade level at which they have the most experience, except that any teacher may request a change in grade level assignment.

40-2 No later than May 1 of each year, preference sheets shall be distributed to all teachers. A teacher's preference will be honored, to the extent possible, consistent with paragraph 40-1 above.

* * *

RELEVANT ILLINOIS STATUTES:

ILLINOIS EDUCATIONAL LABOR RELATIONS ACT

115 ILCS 5.45

§ 5/4.5 Prohibited subjects of collective bargaining

(Eff. May 30, 1995)

(a) Notwithstanding the existence of any other provision in this Act or other law, collective bargaining between an educational employer whose territorial boundaries are coterminous with those of a city having a population in excess of 500,000 and an exclusive representative of its employees shall not include any of the following subjects:

* * *

(4) Decision to determine class size, class staffing and assignment, class schedules, academic calendar, hours and places of instruction, or pupil assessment policies, and the impact of these decisions on individual employees or the bargaining unit.

* * *

(b) The subject or matters described in subsection (a) are prohibited subjects of bargaining between an educational employer and an exclusive representative of its employees and, for the purpose of this Act, are within the sole authority of the education employer to decide.

(c) This Section shall apply to collective bargaining agreements that become effective after the effective date of this amendatory Act of 1995 and shall render a provision involving a prohibited subject in such agreement null and void.

§ 5/10 Duty to bargain

(Eff. Sept. 23, 1985)

* * *

(b) The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of Illinois....

POSITION OF THE UNION:

The Union maintains that the grievance is substantively arbitrable. First, the Union argues that, contrary to the position that I have previously taken, [1] the Illinois Educational School Board ("IELRB") has "exclusive primary jurisdiction to decide disputes concerning substantive arbitrability." This question of deferral, which has heretofore divided arbitrators, has now been resolved, the Union contends, by the IELRB's decision in CTU and Chicago Bd. of Ed. (Petersen Award), 98-CA-0021-C (April 23, 1999). Second, the Union asserts that, even if the Arbitrator does not defer to the IELRB, the Arbitrator should still find the grievance arbitrable. The Union claims that, while it is true that "class staffing and assignment" are prohibited subjects of bargaining under Section 4.5(a)(4) of the Illinois Educational Labor Relations Act ("IELRA"), this prohibition does not apply to the instant case. Rather, the Union asserts, the issue raised in this case is one of "programming," not "staffing" or "assignment." Programming, the Union argues, is a "distinct concept," covered by Article 40 of the CBA, that is not encompassed by Section 4.5(a)(4).

With respect to the merits, the Union asserts that the Board violated Article 40 of the CBA when it failed to program the Grievant to a second grade classroom for the 1998-99 school year. CBA Article 40, the Union submits, requires that "once a teacher expresses a preference to be programmed in a particular position" the Board must honor that preference "unless other more able or qualified teachers have expressed the same preference." Since that was not the situation here, the Union concludes that the Board violated Article 40 when it failed to honor Samson's expressed preference.

POSITION OF THE BOARD:

The Board maintains that the grievance is substantively inarbitrable. "This grievance," the Board argues, "falls squarely within the class staffing and assignment prohibited subject of bargaining category enumerated in Section 4.5(a)(4) of the Act.... Since Article 40 specifically addresses class staffing and assignment decisions it is null and void pursuant to Section 4(b)(5) of the Act." The Board also submits that Petersen Award is not dispositive because here the CBA expressly incorporates the IELRA and directs an arbitrator to consider the effects of that Act. The Board does not contest the Union's position on the merits of the case. It "maintains exclusively" its substantive arbitrability contention and has not asserted any other defense.

DISCUSSION:

A. Arbitrability

1. In my recent Blackwell and Pruitt decisions, I affirmed the position I had previously taken in Bush and Rodriguez that where, a collective bargaining agreement provides that the determination of substantive arbitrability is vested in the arbitrator, or where the parties agree to submit a challenge to arbitrability to the arbitrator, the arbitrator has initial jurisdiction to resolve that arbitrability issue. Both of these considerations were applicable in my prior decisions as they are in the present case. CBA Article 47-3 specifically permits the Board to contest before an arbitrator the substantive arbitrability of any provisions which the Board deems prohibited subjects of bargaining. See CTU and Chicago Bd. of Ed., AAA Case No. 51390004597 (Cooper, 1997). And, while the Union notes the IELRB's footnote in the Petersen Award case (p. 6, n. 5) questioning whether an arbitrator should consider external law, it does not claim that the substantive arbitrability issue here is only for the IELRB or the courts to decide.

The IELRB's footnote in Petersen Award states that "[u]nless the collective bargaining agreement at issue expressly incorporates external law, an arbitrator simply has no reason to decide whether an employer has violated a statute in addition to the collective bargaining agreement." Here, however, as already noted, the CBA does expressly incorporate the Act. There is also no claim in the case that the Board violated any statute - only a defense by the Board that the Act precludes the Union's claim. This distinction is critical. See, e.g., Franchise Tax Bd. v. Laborers Vac. Trust, 463 U.S. 1, 10 (1983). An arbitrator, for example, may arguably not have authority, absent contractual or consensual authorization, to decide whether an employee has been properly paid under federal or state wage laws; conversely, the arbitrator could certainly consider a defense that, if the grievance was granted, the award would be clearly prohibited by those laws and, hence, would not be enforceable. See generally Elkouri and Elkouri, HOW ARBITRATION WORKS (5 superthed.), at 485-88 and 519.

In neither Petersen Award nor any other case that I am aware of did the IELRB refuse to enforce the arbitrator's decisions on the ground that he had exceeded his jurisdiction in deciding substantive arbitrability. Indeed, in CTU and Chicago Bd. of Ed. (Sandra Gordon), at p. 12, where the decision contained the same footnote (p. 8, n. 3) as Petersen Award, the arbitration award was still found to be "final and binding" and, by refusing to honor it, the Board was held to have violated Section 14(a)(8) and, derivatively, Section 14(a)(1) of the Act. In Petersen Award (p. 17), the award, not the arbitrator's exercise of jurisdiction, was deemed defective and resulted in a dismissal of the action.

For all of the above reasons, I do not believe that the IELRB has mandated that an arbitrator must decline to consider whether a grievance is substantively arbitrable. My view, I recognize, is not shared by all arbitrators. See Chicago Ref. Bd. of Trustees and CTU, AAA Case No. 513900057098 (Kenris, July 26, 1999). Nevertheless, in my opinion, arbitrability is a threshold matter which must be considered and resolved first. If the Arbitrator has no jurisdiction, then he or she may not resolve the merits of the grievance.

2. In the Blackwell decision, I concluded that, under Gordon and Petersen Award, regardless of whether the Union's claim is predicated on a policy or a contractual violation, if the substance of the grievance involves class staffing and assignment, the grievance is barred by IELRA Section 4.5. The critical question, as articulated in Gordon and Petersen Award, is the "identification of the subject matter of the grievance and the interpretation of certain prohibited subjects contained in Section 4.5 of the Act." Gordon, p. 10. In Pruitt, for example, where the dispute involved an assignment decision (the appointment of a summer school clerk), but not a class assignment issue, I concluded that it did not involve a prohibited subject of bargaining. The arbitrator must determine whether the subject matter of the case involves a prohibited subject of bargaining - class staffing and assignment - under IELRB Section 4.5(a)(4).

In this case, the Union argues the dispute does not involve a prohibited subject. It involves a CBA Article 40 "programming" question concerning "how teachers are to move within a particular school," rather than a CBA Article 38 "assignment" issue (which addresses "the way in which the Board is to fill vacancies that arise within the Chicago Public School System" - for example, "non-tenured teachers challenging the Board's decision to assign another

teacher to a particular school within the school system") or an Article 28 "staffing" dispute (which involves "the number of children that each class is to contain and the number of teachers that are to be staffed into each school based on that school's enrollment"). The Union recognizes that, in at least one prior case, Chicago Bd. of Ed. and CTU, AAA Case No. 513900054198 (Meyers, 1998), the Arbitrator rejected this contention and concluded that IELRA Section 4.5(a)(4) "clearly and unambiguously means precisely the sort of assignment at issue here, whether the assignment is called 'programming' or 'staffing' according to the parties' lingo. The decision to have a particular teacher teach a particular class falls within the category of class staffing and assignment, as that phrase is used in Section 4.5(a)(4) of the IELRA."

Arbitrator Meyers' opinion, the Union contends, was "inherently shortsighted." In trying to understand what the General Assembly meant by "class staffing and assignment," the Union argues that the CBA provides guidance - since the CBA differentiates between "staffing," "assignment" and "programming," the Assembly should be presumed to have intended, contrary to Arbitrator Meyer's conclusion, that those terms are not "interchangeable."

3. The Union's argument proposes too narrow an interpretation of the terms "staffing" and "assignment" in Section 4.5(a)(4). "Staff" is defined by Webster's Collegiate Dictionary [2] (9 superthed.), as "to supply with staff or with workers." Similarly Webster's defines the term assignment as "the act of assigning." The term "assign" is defined as "to appoint to a post or duty." No definition of programming exists that falls within the context used in the CBA. Both the terms "staffing" and "assignment," if they are given their usual and ordinary definitions, thus encompass the instant dispute. Moreover, the broad language of the exclusionary phrases used in IELRA Section 4.5, as well as its apparent intent, also militate against the technical definition advocated by the Union. The grievance in this case requests "that Ms. Samson be assigned to teach second grade" (emphasis added). And, the language of CBA Article 40, while termed "teacher programming," also utilizes the term "assignment": in 40-4, it provides that "no teacher shall have more than three consecutive teacher assignments" and, in 40-5, it provides that "the number of different rooms to which a teacher is assigned shall be held to the absolute minimum." It is not clear, therefore, even from the CBA, that "assignment" and "programming" were intended to have distinct, exclusive meanings. For all of these reasons, I agree with the Arbitrator Meyers', opinion and find that the present controversy involves a class staffing or assignment decision that falls within Section 4.5(a)(4). It is, therefore, not substantively arbitrable.

B. Merits

Because the grievance is not substantively arbitrable, the Arbitrator lacks jurisdiction to enter a decision on the merits.

AWARD:

For the reasons set forth herein, the grievance is not substantively arbitrable.

fn 1

See Chicago Bd. of Ed. and CTU, AAA No. 513900027398 (Pruitt) (Cohen, Nov. 11, 1999); Chicago Ref. Bd. of Trustees and CTU, AAA 513900056798 (Blackwell) (Cohen, Oct. 8, 1999); Chicago Bd. of Ed. and CTU (Bush) (Cohen, 1998); and Chicago Bd. of Ed. and CTU (Rodriguez) (Cohen, 1998).

fn 2

Absent a showing of a different intent, "the usual and ordinary definition of terms as defined by a reliable dictionary" is a tool that is frequently used by arbitrators to define contract terms. Elkouri and Elkouri, supra, pp. 490-92. That same tool is similarly applicable to assist in determining legislative intent where, as here, no legislative history has been brought to the Arbitrator's attention to show a technical or extraordinary usage of the statutory terms.