STATE OF RHODE ISLAND LABOR RELATIONS BOARD

In the matter of	)	
	)	
RHODE ISLAND STATE LABOR RELATIONS BOARD	)	CASE NO. ULP-4647
	)	
-and-	)	
	)	
WARWICK SCHOOL COMMITTEE	)	
	)	

DECISION AND ORDER

I. INTRODUCTION

This matter is before the Rhode Island State Labor Relations Board ("Board") on an unfair labor practice complaint ("Complaint") issued by the Board against the City of Warwick, Rhode Island School Committee ("Employer" or "School Committee"). The Complaint is predicated upon an unfair labor practice charge ("Charge") filed October 9, 1992, by Robert E. Casey, Field Representative, on behalf of the Warwick Teachers Union ("Charging Party" or "Union"). The Complaint alleges, in pertinent part, that Respondent violated G.L. §§ 28-7-13(5), (6) and (10) by refusing to comply with the terms of the parties' 1988-1991 collective bargaining agreement (1988 CBA), Union Exhibit (UX) 1. The School Committee denies this allegation. Upon receipt of the Charge, the Board on October 13, 1992, conducted an informal conference, following which the Complaint issued. A formal hearing on the Complaint was conducted

on October 21, 1992. Both parties appeared and presented evidence.[1] Briefs were received on October 30, 1992.

II. FINDINGS OF FACT

1. The School Committee is an agency or instrumentality of the City of Warwick with its headquarters at the Warwick School Department, 34 Warwick Lake Avenue, Warwick, Rhode Island.

2. The Union is a labor organization which represents certain employees engaged in teaching in the City of Warwick.

3. The School Committee and Union executed a collective bargaining agreement, UX1, governing terms and conditions of employment for the period September 1, 1988 to August 31, 1991.

4. During the period March 1991, up to and including September 10, 1991, the parties negotiated concerning terms and conditions of a successor agreement.

5. Following these negotiations, on or about September 10, 1991, the parties reached what they believed to be a binding, comprehensive agreement.

6. On September 10, 1991, the Warwick teachers reported to work.

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[1] On October 9, shortly after the Charge was filed, the Rhode Island Superior Court, Famiglietti, J. sitting at Kent, issued an Order directing the Board to conduct an expedited hearing provided a Complaint issued. Later that day, the Order was stayed by a duty justice of the Rhode Island Supreme Court. Justice Weissberger held that the Order was inconsistent with the time constraints established by G.L. §8-7-21, and therefore stayed the Order while permitting the Board to implement its normal unfair labor practice charge procedures. Justice Weissberger's temporary stay was continued indefinitely by Order of the Supreme Court on October 14, 1992. Warwick School Committee v. Warwick Teachers Union Local 915, et al., No. 92-501-A.

7. In mid-September 1991, a dispute arose concerning what the parties had agreed with respect to certain terms of employment. By communication dated September 17, Union Negotiator Edward J. McElroy, Jr., faxed to School Committee Negotiator Robert Watt, Esq., the Union's assessment of the agreement, in summary fashion. SC9 at 3-12.

8. Upon review of the McElroy communication, School Superintendent Henry S. Tarlian determined that, in his opinion, the McElroy draft had not been agreed to by the School Committee. On September 30, School Committee Chairman Harold Knickle wrote McElroy to describe the areas in dispute. The significant areas of dispute were (a) payments to teachers for classes in excess of 25 students, (b) leaves of absence, (c) personal days and (d) layoff procedures. Tarlian believed that teachers were entitled to extra payment for the 27th student when class size reached that level, while the Union believed that payment began for the 26th student. Tarlian believed there were limitations on personal days, while the Union's draft stated that three personal days were unrestricted. The terms of the grievance procedure were not in dispute.

9. On or about October 4, 1991, Richard A. Skolnik, Esq., on behalf of the Union, filed an unfair labor practice charge alleging, inter alia, that the School Committee violated G.L. §§ 28-7-13(6) and (10) and 28-93 (sic) by refusing to execute the successor agreement. Case No. ULP-4518. A Complaint issued on the Charge, and on May 19, 1992, the Board issued a Decision and Order sustaining the pertinent allegations of the Complaint. The School

Committee was directed to execute an agreement based on the 1991 negotiations, and make whole Union members for any losses associated with the violation.

10. The School Committee appealed the Board's decision in ULP-4518, and in a bench decision issued August 18, 1992, the Superior Court, Famiglietti, J., sustained the appeal. Warwick School Committee v. Rhode Island State Labor Relations Board, et al., KC92-0622 (August 18, 1992). The Superior Court held that the negotiations committee for the School Committee lacked actual authority to bind the School Committee. The Court did not reach the issue whether "its view of the evidence differs from the Board's view of the evidence." Slip op. at 11.

11. Review of the foregoing decision is pending before the Rhode Island Supreme Court.

12. During the period October 1991 until at least January 21, 1992, the Union filed grievances in connection with the disagreement. After January 21, grievances continued to be filed, but the School Committee refused to process them.

13. The School Committee's refusal to process grievances came to a head in late January and early February 1992 in correspondence between the parties and to the American Arbitration Association ("AAA"). SC12-14. School Committee Attorney William R. Powers, III, advised the AAA that there were "substantial" differences between the Union and School Committee versions, leaving it to the Labor Board to determine whether the Union's version was accurate, the School Committee's version was accurate, or whether there was

no meeting of the minds sufficient to produce an agreement, thereby requiring resumption of negotiations. In the meantime, Powers indicated that the School Committee would refuse to process grievances to arbitration. SC15.

14. During the period February 1992, until at least May 18, 1992, there was evident confusion by all concerning what agreements, if any, were binding on the parties. In testimony, Tarlian described this as "entirely confusing." For example, while Robert H. Quinlan, School Committee Chairman on January 31 wrote McElroy that the School Committee had "no current contractual relations" with the Union SC16, Tarlian, on February 18 wrote Mary Pendergast, Union President, that "the contract in force at the present time does not address this issue; there is no contract." SC19. Yet on May 6, 1992, when Pendergast wrote Tarlian about whether the "contract" agreed between the parties was the basis for implementation of managed care for health insurance, SC21, Tarlian replied that this provision was among the "issues" which might be implemented in accordance with the agreement.

15. In June 1992, a dispute arose concerning how teacher evaluations should be conducted. The Union, on June 23, indicated that the School Committee's proposal should not be implemented. SC29.

16. In July 1992, Tarlian wrote Pendergast that pending decision by Judge Famiglietti on ULP-4518, the School Committee would not implement involuntary transfers incident to a reduction in force. Pendergast replied that this issue was not disputed

during 1991 negotiations. While the transfer rights had not been disputed, the layoff rights were.

17. During July and August, 1992, the School Committee solicited the Union to return to the bargaining table "in an effort to reach agreement on all issues." UX 7.

18. Those negotiations did not result in an agreement.

19. Warwick teachers did not initially report to work at the commencement of the 1992-93 school year.

20. The School Committee on or about September 2, 1992, filed a Complaint for injunctive relief directing the teachers back to work. UX4. The Superior Court, Pederzani, J., issued the injunction.

21. On September 15, 1992, the Superior Court, Pederzani, J., again directed the teachers to return to work, explaining that the 1988 CBA, UX1, "continues to be operative, effective, and control the relationships and obligations" between the parties "until a subsequent agreement is agreed to by the parties."

22. On October 2, 1992, the Supreme Court overruled Judge Pederzani. Warwick School Committee v. Warwick Teachers Union Local 15, et al., 92-455-A (October 2, 1992) (per curiam).

23. The Supreme Court held that the Superior Court was without authority to direct the parties to enter into any particular agreement or set out the terms and conditions of employment, as a condition to directing the teachers to return to work. Any dispute concerning the effect of the failure to enter into a new agreement and whether the 1988 CBA should be controlling

pending negotiation and execution of the new agreement, was within the exclusive jurisdiction of the Board.

III. CONCLUSIONS OF LAW

1. The Warwick School Committee is a duly constituted Committee within the City of Warwick, a municipal corporation, duly organized under the Constitution and the General Laws of Rhode Island, with its headquarters at the Warwick School Department, 34 Warwick Lake Avenue, Warwick, Rhode Island.

2. The Warwick Teachers Union, Local 915, AFT, is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers and grievances in other mutual aid or protection.

3. The Warwick School Committee illegally refused to recognize the terms and conditions of the 1988 CBA, in derogation of G.L. §28-7-13(5), (6) and (10).

4. The aforesaid unfair labor practices engaged in by the School Committee have resulted in the denial of rights of the employees as guaranteed them by law and has tended to lead to strife and unrest inimical to the public safety health and welfare, in derogation of Title 28, Chapter 7, Section 13 of the General Laws, as amended.

IV. OPINION

The Complaint presents a question of first impression in this jurisdiction: May an employer unilaterally implement terms and conditions of employment, with or without impasse, pending execution of a new agreement? We conclude that it may not.

A. DEPARTURE FROM TERMS AND CONDITIONS OF THE 1991 CBA

The Charge alleges, and the parties agree, that the School Committee has "altered" the terms and conditions of employment embodied in the 1988 CBA. There are not less than four such alterations.

First, beginning in September 1991, the School Committee altered existing contractual provisions with regard to class size, payment in excess of 26 students, and weighting. Article 6 of the 1988 CBA establishes a goal of 25 pupils per class, and a ceiling of 28 students on a weighted basis. Tarlian testified that students had been weighted, according to "special needs". Beginning in September 1991, payments in excess of maximum class size were eliminated. While Tarlian testified that he was implementing the 1991 tentative agreement concerning this article, he later conceded that the School Committee had not made the payments for additional pupils required by that agreement. There is no evidence that either party proposed elimination of payment for oversized classes. Hence, with regard to elimination of payment for oversized classes, it is evident that the School Committee has implemented a procedure that was neither agreed to nor proposed at any time in negotiations.

The second change concerned teacher personal days. Article 9-6.4 of the 1988 agreement authorizes one personal use day per contract year. Prior to September 10, 1991, the parties reached a tentative agreement increasing personal leave to three days. However, when the 1991 agreement broke down, Tarlian reinstituted

the leave provisions of the 1988 CBA. It appears that from September to December 1991, the increased leave period was in effect.

Third, in February 1992, the School Committee ceased processing teacher grievances as it had done until that time. Article 3 of the 1988 CBA describes a comprehensive procedure for adjustment and settlement of grievances. Article 3-2.3 imposes on the School Committee an obligation to conduct a grievance hearing and render a written decision to the aggrieved party and union. There is no evidence that either party proposed elimination of the grievance procedure or modification of the School Committee's role in that process.

Fourth, the School Committee abrogated the 1988 CBA memorandum of agreement concerning reductions in force. This memorandum imposed a cap of 20 lay offs per year. Although it is unclear what number of lay off notices were sent during 1992, Mr. Tarlian estimates that some 30 teachers were laid off.

The School Committee did not document any dire circumstance or compelling need required implementation of the foregoing alterations to the terms and conditions of the 1988 CBA, and we discern none. Nor is there a neutral principal by which the School Committee implemented these changes. To the contrary, the School Committee utilized the terms of the 1988 CBA, 1991 tentative agreement, or something else completely, depending entirely on which provision appeared to be most beneficial to it. For example, with regard to personal days, the School Committee implemented the

one day provision of the 1988 CBA, rather than the three day provision of the 1991 tentative agreement. With regard to class size requirements, the School Committee eliminated the "weighting" aspect of the 1988 agreement, but adopted the increased class size of the 1991 tentative agreement, while eliminating completely the increased pay for extra students. With regard to the grievance procedure, the School Committee has ignored both agreements. Thus, when it suits the School Committee's purposes, unilateral change was rationalized by whatever contract or tentative agreement is most convenient.

There is no conclusive evidence that the School Committee implemented managed care of medical benefits or job fairs.

B. THE OBLIGATION TO MAINTAIN CONTRACT TERMS REGARDLESS OF IMPASSE

Having concluded that the School Committee altered terms and conditions of employment, we next address whether that alteration was unlawful. We conclude that unilateral departure from the terms of an expired contract, prior to exhaustion of all available statutory dispute resolution procedures, violates the obligation under G.L. §28-7-13 to bargain collectively.

At the threshold, we observe that the terms of a collective bargaining agreement survive expiration under certain circumstances. Those circumstances differ depending whether federal or state law is applied. In the private sector, the terms of a collective bargaining agreement between a union and employer continue beyond the expiration of the agreement, until a new agreement is reached or the parties bargain in good faith to

impasse. NLRB v. Katz, 369 U.S. 736 (1962). Conversely, Katz has generally been rejected in the public sector. Triborough Bridge & Tunnel Authority, 5 PERB, ¶4505, Aff'd, 5 PERB, ¶3037 (1972); Maureen O'Valley Unified School District v. Perb, 142 Cal. App. 3rd., 1991 Cal. Rptr. 60 (1983); Wasco County v. Afscme Local No. 2752, 30 Ore. App. 863, 569 P.2d 15 (1977), opinion following remand, 46 Ore. App. 859, 613 P.2d 1067 (1980). The School Committee urges that we adopt the federal sector line of cases without regard to the distinct character of public sector labor relations. We decline.

In the private sector, we observe two distinct differences in collective bargaining. First, private sector labor relations adopts an "economic warfare" model of labor relations, and second, federal law requires government neutrality in labor relations, while our statute requires a bargaining result consistent with public policy.

Private sector collective bargaining is a function of economic power:

> The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that [federal laws] have recognized. Abstract logical analysis might find inconsistency between the command of the [NLRA] to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other, but the truth of the matter is that. . .two factors - necessity for good faith bargaining between parties, and the availability of economic pressure devices to

> make the other party incline to agree to one's terms - exist side by side.

NLRB v. Insurance Agents International Union, 361 U.S. 477, 488-489 (1960).

Thus, the federal law contemplates and authorizes the use of economic power to force an agreement, and, by its terms, condones long strikes, business shutdowns, and subjectively unfair agreements as a function of the private sector collective bargaining model. "[T]he use of economic pressure by the parties to a labor dispute is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." 361 U.S. at 495.

In the private sector, unlike the public sector, it is anticipated - in fact, customary - that a union will exercise its right to strike for the purpose of obtaining leverage at the bargaining table. The threat of a strike, and the strike itself, are legitimate economic weapons. Section 13 of the National Labor Relations Act, 29 U.S.C. §163 provides, in relevant part, that the NLRA shall not "be construed so as to either interfere with or impede or diminish in any way the right to strike." Private sector theory embraces the position that the strike weapon "supports the principles of the collective bargaining system" by balancing the power of labor and management. NLRB v. Erie Resistor Corp., 373 U.S. 221, 235 (1963).

Rhode Island, to the contrary, adopts a different model for public sector collective bargaining. See G.L. §28-9.3-1, et. seq. The policy of our teacher arbitration statute is to achieve "good

relations" between teachers and school committees. Specific time constraints govern the response to a request for bargaining and the reference of issues to mediation or arbitration. G.L. §§28-9.3-4, 9 and 10. The duration of teacher contracts is limited to three years. G.L. §28-9.3-4. A similar thesis drives our State Labor Relations Act, G.L. §28-7-1 et. seq. Our statute is designed to "encourage the practice and procedure of collective bargaining" and promote "equality of bargaining power," and requires that the Act be interpreted "liberally. . .for the accomplishment of this purpose."

Rhode Island's prohibition on teacher strikes is generally consistent with the collective bargaining system created by statute. Unlike private sector parties, teachers and school committees are obliged to meet and confer on a regular schedule, provide notice to funding sources, demand mediation and conciliation, or ultimately submit to binding arbitration concerning certain issues. See, G.L. §28-9.3-1 - 10, 12. This dichotomy of tactic is justified by Rhode Island's statute. Unlike the private sector, Rhode Island declares that "it is in the public interest that equality of bargaining power be established and maintained." G.L. §28-7-2.

This sensible statement of legislative intent recognizes that where the public interest in safety or education is concerned, the public simply cannot tolerate an objectively bad agreement or absolute control of employment conditions by one party.

Neither can the public tolerate a bankrupt or broken down school system. While the private sector tolerates the extremes of collective bargaining, the public sector could not sustain them. Indeed, the legislature that wrote the Labor Relations Act specifically stated that "strikes, lock-outs, and other forms of industrial strife and unrest. . .are inimicable to the public safety and welfare, and frequently endanger the public health." G.L. 28-7-2. In the private sector, they are grist for the mill.

Among commentators, there is unanimity of opinion that the private sector collective bargaining model is not transferable to the public sector. Edwards, The Emerging Duty to Bargain in the Public Sector, 71 Mich.L.Rev. 885, 923-927 (1973); Vause, Impasse Resolution in the Public Sector - Observations on the First Decade of Law and Practice under the Florida PERA, 37 U.Fla.L.Rev. 105, 133-137 (1985); Note, Developments - Public Employment, 97 Harv.L. Rev. 1611, 1712 (1984).

While we are cognizant that our Supreme Court finds federal law persuasive, Barrington School Committee v. RILRB, 388 A.2d 1369, 1374 (R.I. 1978), it is clearly not binding. McDonald v. Local 1033, 505 A.2d 1176 (R.I. 1986).

The disparity between the private and public sector conditions has been recognized by numerous courts. "It would be impractical to require that collective bargaining procedures. . .be identical in the public and private sectors. Myriad distinctions, not just those of procedures, exist between public and private collective bargaining, and have been noted by the highest courts of several

sister states. United Teachers of Dade v. Dade County School Board, 500 So.2d. 508 (Fla. 1986) (and cases cited therein). As the Pennsylvania Supreme Court recognized,

> Although [NLRB] decisions may provide some guidance, we are mindful of the distinctions that necessarily must exist between legislation primarily directed to the private sector and that for public sector employees. The distinction between the public and private sector cannot be minimized. Employers in the private sector are motivated by the profit to be returned from the enterprise, whereas public employers are custodians of public funds and mandated to perform governmental functions as economically and effectively as possible. The employer in the private sector is constrained only by investors who are most concerned with the return for their investment, whereas the public employer must adhere to the statutory enactments which control the operation of the enterprise. We emphasize that we are not suggesting that the experience gained in the private sector is of no value here, rather, we are stressing that analogies have limited application and the experiences gained in the private employment sector will not necessarily provide an infallible basis for a monolithic model for public employment.

Pennsylvania Labor Relations Board v. State College Area School District, 337 A.2d 262 (Pa. 1975). We concur with the analysis of the Florida Second District Court of Appeal:

> We do not believe that the constitutional and legislative prohibitions against strikes by public employees were ever intended to give public employers a power advantage over their employees in contract negotiations. Strikes are prohibited to protect the public, not to circumvent the rights of public employees to meaningful collective bargaining with their employer.

School Board of Escambia County v. PERC, 350 F.S. 2nd 819 (Fl. 1977). Legislative denial of the right to strike should not be allowed to reduce collective bargaining to collective begging.

State courts have therefore approved various distinctions based on the unique character of public sector bargaining statutes. See e.g., City of Miami v. F.O.P. Miami Lodge 20, 571 So. 2d 1309 (Fla. 1989); School Committee of Boston v. Boston Teachers Union, Local 66, 389 N.E. 2d 970 (Mass. 1979); See generally, Wellington & Winter, The Unions and the Cities, (1971).

With these principles in mind, we now address whether the departure from existing terms and conditions of employment was unlawful. Put another way, were the unilateral changes discussed above implemented illegally? The School Committee concedes that an employer "must continue to observe the terms of [an expired] agreement" based on a "statutory rather than contractual" obligation. This statutory obligation, it urges, is the "duty to offer the union the opportunity to discuss, counter-propose, argue and dissuade" the employer until good faith bargaining is exhausted or abandoned. At that point, the employer may implement what it has proposed, but not more. Discussing federal law, the School Committee argues that the parties were at impasse from September 10, 1991 until at least August 18, 1992, reasoning that because the union believed it had an agreement, an impasse was created.

With regard to all implemented terms other than personal days, the School Committee's position would be incorrect even under federal law. This is because the School Committee, by its own

admission, did not bargain to impasse on proposals it implemented. The decision to eliminate the School Committee from the grievance procedure was never proposed at negotiations, or discussed with the Union. The decision to increase class size and eliminate weighting without payment for extra students was never proposed to the Union. Thus, the School Committee's conduct would not even satisfy the minimum requirements of federal law.

We do not, however, rest our decision on federal law. We join those jurisdictions which hold that an employer's implementation of bargaining proposals is per se an unfair labor practice. In Wasco County, 569 P.2d 15, aff'd, 613 P.2d 1067, the Court of Appeals of Oregon approved a SLRB decision squarely on point. There, the employer implemented the Union's wage proposal prior to exhaustion of dispute resolution procedures. Citing the SLRB decision, the Court acknowledged the dichotomy between federal and state impasse resolution procedures, even though Oregon public employees have a limited right to strike. It seems to us the case is even more compelling when public employees have no right to strike whatsoever. See also, Gresham Grade Teachers v. Gresham Grade School, 630 P.2d 1304 (Ore. 1981).

We observe that this rule will likely have a stabilizing impact on labor relations. Neither party will be subject to a term or condition of employment that it had not previously agreed to. We believe that this will contribute to the maintenance of "good relations. . .between teaching personnel and school committees." G.L. §28-9.3-1.

V. ORDER

1. The 1988 CBA, as agreed to and executed by the parties, is binding upon the parties.

2. The Union and Employer shall abide by and comply with the terms of the 1988 CBA for the 1991-1992 school year.

3. The Union and Employer shall abide by and comply with the terms of the 1988 CBA for the 1992-1993 school year.

4. The Union and Employer shall abide by and comply with the terms of the 1988 CBA for the period following the commencement of the 1992-1993 school year until such time as the parties enter into a successor collective bargaining agreement.

5. The employer shall make whole any affected employees for any losses sustained as a result of its departure from the terms of the 1988 CBA.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Joseph V. Mulvey

JOSEPH V. MULVEY, CHAIRMAN

Raymond Petrarca

RAYMOND PETRARCA, MEMBER

Frank J. Montanaro

FRANK J. MONTANARO, MEMBER

Glenn W. Edgecomb

GLENN EDGECOMB, MEMBER

Daniel L. Beardsley, Jr. Dissent

DANIEL L. BEARDSLEY, JR., MEMBER

Entered as Order of the
Rhode Island State Labor
Relations Board

Dated: November 10, 1992

By: Donna M. Geoffroy
DONNA M. GEOFFROY
AGENT