In the Matter of the Arbitration Between

THE BUFFALO CITY SCHOOL DISTRICT,

Employer,

-and-

THE BUFFALO TEACHERS FEDERATION,

(Class Action),

Union.

OPINION

AND

AWARD

Grievance

No. 15-149

Before: MICHAEL S. LEWANDOWSKI, Impartial Arbitrator

Appearances:

For the DISTRICT: Nathaniel Kuzma, Esq.
Director of Labor Relations

Edward Betz, Esq.
General Counsel

For the ASSOCIATION: Dennis Licherelli
Labor Relations Speicialist

Deana Fox
Labor Relations Specialist

Phillip Rumore
BTF President

At its meeting of June 8, 2016, the City School District of the City of Buffalo ("District") Board of Education ("Board"), as part of its Budget considerations, resolved that it "Eliminate the 5$ million reserve for the cosmetic rider and advise the BTF that the District will no longer reimburse Teachers for cosmetic procedures and reserve these savings to increase the offer in the same amount to the Buffalo Teachers Federation" (Joint exhibit 2). The union

representing the District's teachers, the Buffalo Teachers Federation ("Union)" ("BTF") filed a timely grievance dated June 10, 2016 (also Joint exhibit 2) asserting that the Board's actions violated the collective bargaining agreement it has with the District. In order to expedite the review of the instant grievance, the parties mutually designated the undersigned to serve as arbitrator in this matter.

In accordance with the above designation, a hearing was conducted at the District's offices in Buffalo City Hall on August 31, 2016. The parties were accorded a full and fair hearing including the right to present witnesses for examination and cross-examination, the right to introduce documentary and physical evidence and the right to make arguments in support of their respective positions in this matter.

The parties closed the hearing by submitted oral arguments at the hearing.

ISSUE

The parties were unable to agree to the issues to be submitted to arbitration. Both proposed issues appear below.

The Union's Proposed Issue:

Did the Board of Education violate the collective bargaining agreement when it passed a resolution on June 8, 2016 that unilaterally eliminated the cosmetic surgery coverage from the collective bargaining agreement and eliminated teacher reimbursement for cosmetic procedures effective July 1, 2016?

If so, what shall the remedy be?

The District's Proposed Issue:

Does the language of §209(f) of the Taylor Law permit the Board of Education to make unilateral contract changes following impasse?

If so, what shall the remedy be?

BACKGROUND AND EVIDENCE

The relevant facts in this matter are not in dispute. The Board passed a resolution eliminating the cosmetic provision of the health insurance coverage it provides to members of this bargaining unit. Subsequent to the passage of the resolution, the BTF petitioned the State of New York Supreme Court for a restraining order to stay the implementation of the Board Resolution (Union exhibit 2). On June 29, 2016 the Honorable Tracey Bannister, J.S.C. granted a temporary restraining order (Joint exhibit 4) "pending disposition of the grievance and arbitration." The implementation of the Board resolution was therefore delayed

pending the instant review of the matter.

The facts also show that at no time during the numerous bargaining sessions between the District and the BTF was there a mutual agreement to eliminate the cosmetic surgery provision. This is true even after mediation and fact finding.

The parties jointly entered into evidence §209(3)(f) of the New York Civil Service Law (Joint exhibit 5) that reads as follows.

"where the public employer is a school district, a board of cooperative educational services, a community college, the state university of New York, or the city university of New York, the provisions of subparagraphs (iii) and (iv) of paragraph (e) of this subdivision shall not apply, and (i) the board may afford the parties an opportunity to explain their positions with respect to the report of the fact-finding board at a meeting at which the legislative body, or a duly authorized committee thereof, may be present; (ii) thereafter, the legislative body may take such action as is necessary as is necessary and appropriate to reach an agreement. The board may provide such assistance as may be appropriate."

The record before me shows that the Public Employment Relations Board ("PERB") has made no overtures to call for a meeting with the Buffalo Board of Education as referenced under this provision of Law.

The facts present show that the cosmetic surgery provision has continued after the expiration date of the collective bargaining agreement that expired in 2004 and that such continuation was mandated under the Triborough doctrine that prohibits New York State public employers from discontinuing provisions of an expired collective bargaining agreement while a replacement collective bargaining agreement is being negotiated. The parties here continue to negotiate. Both sides have offered proposals regarding modifications to the health insurance coverage provision including a Board proposal to eliminate the cosmetic surgery benefit.

POSITION OF THE PARTIES

The Union argues the collective bargaining agreement is violated.

First, the Triborough doctrine applies. That doctrine requires the continuation of all terms of an expired collective bargaining agreement including in this case continuing the cosmetic surgery provision of the health care insurance provided to BTF members.

While the Agreement does contain a provision at Article XXXIX, Miscellaneous, that permits the parties to modify the collective bargaining agreement, the provision bars such modification "except by an instrument in writing duly executed by both parties." No such agreement to modify or writing exists. The District has no right to unilaterally modify the collective bargaining agreement.

The Union further argues that Article XXXIX at §D provides that "this contract shall supersede any rules, regulations or practices of the Board which shall be contrary or inconsistent therein" thus the terms of the Agreement prevail over any Board action that is not in compliance with the collective bargaining agreement.

Further, health insurance is a mandatory subject of contract negotiations thus the Board is not free to act unilaterally to change health insurance provisions.

Also, Article IV, Negotiations and Impasse Procedures, of the collective bargaining agreement requires that any changes to the collective bargaining agreement must be ratified by the Board of Education and the BTF membership.

No such ratification occurred.

In summary, the BTF asserts the Board does not have the contractual right to unilaterally modify the terms of the collective bargaining agreement, which contains clear and unambiguous language providing a cosmetic surgery benefit. The BTF petitions the arbitrator to sustain the grievance.

The District asserts it has the right to eliminate the cosmetic surgery provision.

The parties have been without a contract since 2004. This is perhaps the longest standing impasse in the history of New York State public sector labor history. The parties have exhausted every possible avenue towards reaching a resolution of the impasse without reaching agreement.

Section 209 provides that under such circumstances, where the employer is a public sector school district, PERB may afford the parties an opportunity to explain their positions. PERB has not exercised its option to speak with the parties therefore the next clause in the section of Law applies. That section reads that a legislative body may take such action as appropriate to reach agreement. While there is no case history as to what this language means, the

Law specifically reads the legislative body can take action. That is what the Board of Education did here.

Further, the Board eliminated the cosmetic surgery provision as part of its budget process. The benefit cost the District $5 million dollars last year alone. The District has spent millions on the benefit over the years. The Board found that funding the cosmetic surgery provision diverted valuable resources that could be used better of other purposes. Additionally, the provision gives the District a "black eye" in that it provides a benefit that the public views as excessive and unnecessary in comparison to what most employees receive when employed by other employers.

In essence, the Board diverted the monies used to fund the cosmetic surgery provision to increase its monetary offer to the BTF in collective bargaining as a means to reach agreement. There is no decisional case law or statutory law prohibiting the Board from taking such action. In fact, §209 (f) permits the Board to take this type of action to reach agreement.

Further, the collective bargaining agreement at Article XLI, the Conformity to Law - Savings Clause reads that the collective bargaining agreement may not be in conflict with the Law. Here, the Board's action is consistent with the Taylor Law. The clause permits modifying the collective bargaining agreement to come into compliance with the Law. Section 209 (f) allows the Board to take this action. There is very little guidance as to what type of action a legislative body may take but it is clear that subsection (f) permits unilateral action.

In the past, the Board has taken unilateral action to bring the collective bargaining agreement into compliance with the law and those actions were not grieved by the BTF.

For the reasons stated above, the District petitions the arbitrator to dismiss the grievance.

DISCUSSION AND ANALYSIS

This is a most unusual situation. Here, the Union petitions me to render a determination as to whether or not the collective bargaining agreement is violated. Here, the District petitions me to render a determination whether its

actions violate the Taylor Law.

The more appropriate issue for any arbitrator is whether or not the actions of a party violate the collective bargaining agreement it has with another party.

Claims that the Taylor law is properly applied, in my opinion, are properly brought to PERB.

Claims that the collective bargaining agreement is violated are properly before an arbitrator.

Here, the collective bargaining agreement at Article V, Grievance Procedure, provides at subsection B Definitions (1) that "A "grievance" is a complaint by one or more teachers, of a violation, a misapplication, or a misinterpretation of this Contract, or of Board personnel policies."

In my opinion, the unilateral elimination of a provision of the collective bargaining agreement is a misapplication of a provision of the collective bargaining agreement.

bargaining agreement.

With respect to the Board's claim that the issue properly before me is whether or not the Board's action is permissible under the Taylor Law, I find the following.

First, in my opinion, such a claim is more appropriately before PERB.

Notwithstanding the above, I here address the Board's arguments. First, the Board asserts that pursuant to Article XLI Conformity to Law – Savings Clause permits the Board to modify the collective bargaining agreement to bring it in conformance with Law. That argument here fails since the cosmetic surgery benefit is not inconsistent with any "constitutional, statutory, or other legal provision." This provision *per se* does not provide a legitimate basis to unilaterally eliminate or modify the cosmetic surgery benefit.

Second, the Board's assertion that it has the right to eliminate the benefit under Section 209(f) fails after review. As referenced above, that provision permits a legislative body to take action to reach agreement after the

"board" (therein referring to as PERB's board) has "afforded the parties an opportunity to explain their positions with respect to the report of the fact-finding board at a meeting at which the legislative body, or a duly authorized committee thereof, may be present."

The record before me not only shows that PERB has not exercised its action but also that PERB was never petitioned to convene such a meeting. Therefore even by the provision of Law the District points to, it is not free to take unilateral action. I therefore have no basis to conclude that the Board's unilateral action is in keeping with the Taylor Law. As it stands, the Board's action is outside of the provision of the Taylor Law on which the District rests its argument.

Additionally, the Union's position that the Taylor Law favors the Union's position is here found to have merit. The Taylor Law's Triborough amendment is in place to prevent the precise action grieved here. The Triborough amendment calls for the terms of an expired collective bargaining agreement to remain in place until such a time as the parties have reached a successor agreement. Here, the Board's actions fly directly in the face of the

Triborough amendment.

While it is understandable that the parties may be frustrated by their long-standing failed attempts to reach agreement on a successor collective bargaining agreement, I find that the facts before me, the collective bargaining agreement and the Taylor Law do not permit one of the parties to unilaterally change the terms of a collective bargaining agreement.

Based on the above, I find that the collective bargaining agreement would be violated should the Board be permitted to unilaterally eliminate the cosmetic surgery provision. Since the implementation of the Board's resolution has been to date stayed by the Court, there is no remedy available here but for an order to cease and desist the future implementation of the resolution at issue here.

AWARD

I find the Board's June 8, 2016 resolution to unilaterally eliminate the cosmetic surgery benefit violates the collective bargaining agreement. The language of 209(f) of the Taylor Law, in the instant set of circumstance, does not permit the Board of Education to make unilateral changes following impasse.

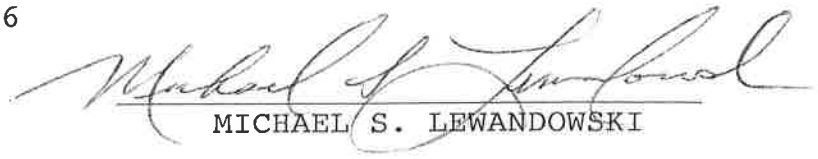
The remedy for the above finding that the resolution violates the collective bargaining agreement is to order the District not to implement the resolution at issue here.

AFFIRMATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

I, MICHAEL S. LEWANDOWSKI, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Date: September 17, 2016



MICHAEL S. LEWANDOWSKI