

97-013

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of
Cleveland Teachers' Union,
Employee Organization,
and
Cleveland City School District Board of Education,
Employer.

CASE NUMBER: 97-MED-03-0265

OPINION

POHLER, Chairman:

This mediation case comes before the State Employment Relations Board ("SERB") on stipulations and briefs filed by the parties. After reviewing the record, the filings, stipulations, and briefs, we find, for the reasons below, that the parties' contractual mutually agreed-upon dispute resolution procedure ("MAD") is not valid as it applies to the parties' reopener negotiations; hence, the reopener negotiations are governed by the statutory dispute resolution procedure. As a result, the motion for stay of the statutory dispute resolution procedure, filed by the Cleveland City School District Board of Education, is denied.

I. FINDINGS OF FACT¹

¹The parties submitted 27 joint stipulations of fact. Two stipulations dealing with exhibits proffered by the District, one stipulation identifying the contents of an exhibit, and one stipulation concerning the briefing procedure are not included herein;

1. The Cleveland City School District Board of Education ("District") is an employer as defined by Ohio Revised Code ("O.R.C.") §4117.01(B). (Stipulation ["Stip."] No. 1).

2. The Cleveland Teachers Union AFT Local 279 ("Union") is an employee organization as defined by O.R.C. § 4117.01(D). (Stip. No. 2).

3. In August 1996 U.S. District Court Judge George W. White ordered that a 13.5 mil. operating levy be placed on the ballot for the benefit of the District on November 5, 1996. Both the District and the Union negotiators were aware of this action. (Stip. No. 3).

4. The 1996-1999 collective bargaining agreement, effective September 1, 1996 through August 31, 1999, was ratified by both sides. (Stip. No. 4; Joint Exhibit ["Jt. Exh."] 7).

5. The parties reached a tentative settlement on the terms of the 1996-99 Agreement on September 15, 1996. Shortly thereafter, one of the Union's Officers and one of the District's attorneys jointly prepared a document entitled "Proposed New Language for the 1996-99 Collective Bargaining Agreement between the CTU and the Cleveland City School District." Union President Richard DeColibus added his commentary to the document in italics. The document was then distributed to the Union membership during the ratification process. (Stip. No. 5; Jt. Exh. 9).

6. On September 24, 1996, the Union membership ratified the tentative agreement by a vote of more than 90% of the voting members of the bargaining unit. (Stip. No. 6).

even if these exhibits had been admitted into the record, the result herein would be the same.

7. On October 10, 1996, Union Officer/Secretary Linda Koeth sent a draft of the 1996-99 Agreement to the District's attorneys. (Stip. No. 7; Jt. Exh. 12).

8. On November 5, 1996, a 13.5 mil. operating levy for the Cleveland City Schools was passed by the voters. (Stip. No. 8).

9. One of the District's attorneys, Bradley Sherman, revised a draft of the 1996-99 Agreement and delivered it to the Union on December 16, 1996. (Stip. No. 9; Jt. Exh. 13).

10. On December 20, 1996, the Union sent a letter to the District's chief negotiator, pursuant to Article 31 of the 1996-99 Agreement requesting that a meeting be scheduled to enable the parties to renegotiate the salary and fringe benefit provisions in the contract. This letter was received by the District's chief negotiator on December 24, 1996. (Stip. No. 10; Jt. Exh. 14).

11. The District's chief negotiator communicated to the Union at a meeting held on January 13, 1997, that the District would not reopen negotiations. (Stip. No. 11).

12. On January 21, 1997, the Union filed grievance #97-SA-34. (Stip. No. 12; Jt. Exh. 12).

13. On January 24, 1997, Union Officer/Secretary Koeth sent a letter to Attorney Sherman. (Stip. No. 13; Jt. Exh. 16).

14. On February 18, 1997, District Superintendent Richard Boyd sent a letter

to Union President DeColibus, informing him "of the intent of the Cleveland Public Schools to reopen negotiations with the Cleveland Teachers Union pursuant to Article 31 of the Collective Bargaining Agreement between the two parties." (Stip. No. 14; Jt. Exh. 1).

15. On February 18, 1997, the District sustained grievance #97-SA-34. A copy of Superintendent Boyd's February 18, 1997 letter was attached to the grievance response. (Stip. No. 15; Jt. Exh. 2).

16. On February 28, 1997, Attorney Sherman sent a letter to the Union. Enclosed with that letter was the 1996-99 Agreement. (Stip. No. 16; Jt. Exhs. 7 and 17).

17. On March 12, 1997, the Union filed a Notice to Negotiate with SERB indicating that the parties did not have an alternate dispute settlement procedure for reopener negotiations. (Stip. No. 17; Jt. Exh. 18).

18. On March 14, 1997, the parties held the first negotiation session of the reopener negotiations; the second negotiation session was held on May 19, 1997. (Stip. No. 18).

19. On March 17, 1997, G. Thomas Worley, Administrator of SERB's Bureau of Mediation, sent a letter to both sides regarding negotiations. (Stip. No. 19; Jt. Exh. 3).

20. On March 21, 1997, the District's chief negotiator Martin Wymer sent a letter to Administrator Worley indicating that the parties did have an alternate dispute settlement procedure for reopener negotiations. (Stip. No. 20; Jt. Exh. 4).

21. On March 27, 1997, a mediator was appointed; this was followed, according

to the statutory time lines, by the appointment of a fact finder on April 11, 1997.

22. During the 1993-96 negotiations, the Union proposed that an alternate dispute resolution procedure be added to the collective bargaining agreement. The District accepted that proposal. Thereafter, the parties ratified the 1993-96 Agreement. (Stip. No. 21; Jt. Exh. 1).

23. Article 31, Section 1(E) of the 1996-99 Agreement is a valid MAD. (Stip. No. 23).

24. The District maintains a Summer School program each summer that commences after the school year ends and lasts approximately six weeks in duration. This program is staffed by bargaining-unit members represented by the Union. (Stip. No. 24).

25. On April 7, 1997, the District filed a motion to stay the statutory dispute resolution procedure for a wage reopener asserting that the parties' contract includes a mutually agreed-upon dispute resolution procedure ("MAD") that applies to reopener negotiations. The District also requested a hearing pursuant to O.R.C. Rule 4117-9-03(H).

26. On April 24, 1997, the case was directed to an expedited hearing to determine whether a valid MAD exists that supersedes the statutory procedure. The parties agreed to stipulate the facts and to file briefs simultaneously; the parties also waived a hearing. The case was transferred from the Hearings Section to the Board for a decision on the merits.

II. DISCUSSION

O.R.C. § 4117.14(C) states in pertinent part:

In the event the parties are unable to reach an agreement, they may submit * * * the issues in dispute to any mutually agreed upon dispute settlement procedure which supersedes the procedures contained in this section.

Ohio Administrative Code ("O.A.C.") Rule 4117-9-03 provides:

(F) Except as provided in paragraphs (G) and (L) of rule 4117-9-05 of the Administrative Code, any mutually agreed-upon deviation from the timelines or procedures of the statutory dispute settlement procedure set forth in divisions (C)(2) to (C)(6), (D), and (G) of section 4117.14 of the Revised Code must be in writing and shall constitute a mutually agreed-upon dispute settlement procedure and shall be subject to the provisions of this rule. * * *

* * *

(H) If the parties are in dispute as to the existence of a mutually agreed-upon settlement procedure, the board shall implement the statutory procedure set forth in divisions (C)(2) to (C)(6), (D), and (G) of section 4117.14 of the Revised Code. Upon motion, the board in its discretion may stay the statutory procedure pending resolution of the dispute and direct a hearing to resolve the dispute and to determine whether a mutually agreed-upon settlement procedure or the statutory procedure applies.

The focal point for review in this matter is Article 31 of the 1996-99 Agreement dealing with issues of negotiation, severability, and duration. Article 31, Section 1 states in part:

A. The granting of any increase in fringe benefits or wages to any employee group during the duration of this agreement shall automatically serve to reopen negotiations with the [Union] for those items.

- B. Negotiations with the [Union] for salaries and fringe benefits shall automatically reopen upon the availability of new monies from the following sources:
1. Passage of any new regular or emergency school levy or the passage of any income tax earmarked for the District.
 2. Increase in county tax collection.
 3. Additional money realized by the District because of action of the State Legislature.
- The District shall inform the Union if new monies become available.

* * *

- E. The procedure set forth in Ohio Revised Code Section 4117.14 will be followed, except that the fact-finding process must be scheduled such that the fact-finder's report is required to be submitted to the parties no earlier than the third Monday in *May, 1999*, and no later than the first Monday in *June, 1999*. (emphasis added).

The question before us is whether the mutually agreed-upon dispute settlement procedure in Section 1(E) is a valid MAD that supersedes the statutory procedure not only as it applies to a successor collective bargaining agreement, but also to the reopener negotiations pursuant to Section 1(B). For the reasons below, we find that the MAD in Section 1(E) is a valid MAD as it applies to successor collective bargaining agreement negotiations, but not as it applies to the reopener negotiations; thus, the statutory dispute resolution procedure applies to these reopener negotiations.

Reopener provisions are contractual agreements by both parties to postpone negotiations on specific and limited issues to an agreed-upon date certain or a specific contingency occurring during the term of the collective bargaining agreement. Utilizing reopener provisions greatly contributes to the stability of labor relations by providing an effective and efficient instrument for reaching multi-year settlements and avoiding strikes where parties cannot agree on how to forecast economics and other conditions over extended periods. Public policy dictates that contractual reopener provisions

should be given full credit. As SERB has held previously, the statutory dispute resolution procedures apply to reopener negotiations, including the right to strike for “strike permissive” employees.²

Three-year collective bargaining agreements frequently include a wage reopener for the second or third years — or both years — where the parties agree upon a specific raise in the first year, but postpone the decision on the subsequent years for later.

The nature of reopener negotiations is such that, while the scope is limited normally to monetary issues, the rest of the contract stays intact and the purpose is to close some unfinished business between the parties for the existing agreement’s duration.

²*In re Carlisle Bd of Ed SERB 87-025 (11-10-87)*

It is a well-accepted principle of contract interpretation that, whenever possible, contracts must be interpreted to give reasonable meaning to all provisions of the contract; all attempts must be made to interpret a contract so as not to render any words, phrases, or terms ineffective, invalid, or meaningless.³ The intent of the parties is presumed to reside in the language they chose to employ in the agreement.⁴ If the terms are clear and unambiguous, the court need not go beyond the plain language of the contract.⁵ Where the terms used in a contract are clear and unambiguous, extrinsic evidence may not be used to aid in its interpretation.⁶

³*See, e.g., Seringetti Constr. Co. v. Cincinnati*, 51 Ohio App.3d 1 (CA, Hamilton, 1988); *Conoco, Inc. v. United States*, 35 Fed.Cl. 309 (U.S. Ct. Fed. Claims 1996); *KMS Fusion, Inc. v. United States*, 36 Fed. Cl. 68 (U.S. Ct. Fed. Claims 1996); *Bank of New York v. Murphy*, 645 N.Y.S.2d 800 (S.Ct., App. Div., 1st Dept. NY 1996); and *SC Testing Technology, Inc. v. Dept. of Environmental Protection*, 688 A.2d 421 (S.Ct. ME 1996).

⁴*Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, paragraph one of the syllabus.

⁵*Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, 246; *Seringetti Construction Co. v. Cincinnati*, *supra*.

⁶*Rose v. New York Life Ins. Co.* (1933), 127 Ohio St. 265; *Todd v. City of Oregon*, 147 L.R.R.M. 2056 (CA, Lucas, 1994).

We cannot emphasize enough the importance of the parties' responsibility to carefully draft a MAD if they choose to have one. The Board's policy has consistently been not to intervene in the contractual provisions of the alternate dispute resolution procedure unless compelling public policy is involved.⁷ The statutory commitment to superseding MADs reflects the legislative conclusion that the parties may choose a process better suited for themselves than the one provided in the statute, especially when the MAD's entire intent and purpose are to tailor a procedure for the specific needs of the parties.⁸ But the parties must realize that while they are under no obligation to agree to a MAD, once they choose to adopt one they have a responsibility to write the MAD so that it lends itself to a peaceful resolution, and it must have finality.⁹

Reopeners are meaningful only if they occur at a different time than the negotiations for a successor agreement. If the dispute resolution procedure for a reopener coincides with the dispute resolution procedure for the new collective bargaining agreement where *all* of the terms are opened and are subject to bargaining, then the reopener's specific topic may be negotiated in the framework of the successor agreement.

As a result, the reopener is superfluous and meaningless. It is a compelling public policy to ensure the effectiveness of reopeners.

⁷*In re Vandalia-Butler City School District*, SERB 86-012 (3-27-86).

⁸*Id.* See also *In re Niles City Bd of Ed*, SERB 91-010 (11-8-91).

⁹"Parties who forego the statutory dispute resolution procedures for their own alternatives are well-advised to draft language which is clear and self-explanatory. Clear language avoids disputes such as the one before us here." *In re Springfield Local Bd of Ed*, SERB 92-016 (9-10-92) at p. 3-54.

It is also a compelling public policy that dispute resolution procedures, when applied to successor agreements and reopeners, achieve finality. The Board has consistently held that a MAD procedure must be capable of bringing finality to the collective bargaining process.¹⁰ The MAD, like its statutory counterpart, is a dispute *resolution* procedure and, as such, must effectively and timely resolve impasse disputes in the collective bargaining negotiations. Finality is a key to meaningful negotiations and to peaceful and orderly dispute resolution. If a MAD does not bring finality within a reasonable time, it cannot effectively resolve any dispute.

In the present case, the parties' collective bargaining agreement establishes an *automatic reopener* for negotiations of salaries and fringe benefits upon the availability of new monies from specific sources, including the passage of a school levy. The plain language of the automatic reopener in Section 1(B) indicates the importance of the time element: "*Negotiations* with the [Union] for salaries and fringe benefits *shall automatically reopen upon* the availability of new monies[.]" (emphasis added). The negotiations for salaries and fringe benefits in the reopener, pursuant to the Section 1(B), were triggered by the passage of the operating levy on November 5, 1996. Applying the MAD to the Section 1(B) reopener in the case before us could lead to a 32-month delay in resolving an impasse since the parties will not be required to utilize a fact finder to resolve wage negotiations reopened by the 1996 levy passage until 1999. At that time, the parties will negotiate wages, hours, terms, and other conditions of employment for the successor agreement under the same MAD with the same deadlines. The MAD, if it applies to the reopener negotiations, will not bring finality within a reasonable period of time to the bargaining process triggered by the passage of the November 5, 1996 levy. Hence,

¹⁰ *In re City of Columbus*, SERB 85-004 (2-6-85); *In re Mad River-Green Local Bd of Ed*, SERB 88-016 (9-29-88); *In re Niles City Bd of Ed*, SERB 91-010 (11-8-91).

we find that the MAD in Article 31, Section 1(E) is invalid as it applies to these reopener negotiations and conclude that the present reopener negotiations are governed by the statutory dispute resolution procedure as stated in O.R.C. §4117.14.

In addition, applying the parties' MAD to reopener negotiations will result in multiple fact-finding hearings at the same time (late May/early June 1999) as well as a fact-finding hearing for the successor agreement negotiations. These multiple hearings would have separate fact finders, separate hearings, and separate, potentially conflicting, recommendations all occurring at the same time. The practical solution would probably be to deal with all the issues in the negotiations for the successor agreement, but then the contractual reopener clause would be rendered meaningless. Thus, the MAD, as it applies to these reopener negotiations, is faulty since it has no effective finality and renders the reopener meaningless. In these circumstances, we must find that the MAD is valid as it applies to the successor contract negotiations, but the MAD is invalid as it applies to the reopener negotiations. As a result, the reopener negotiations fall under the statutory dispute resolution procedure.

III. CONCLUSIONS OF LAW

1. The Cleveland City School District Board of Education is an employer as defined by O.R.C. §4117.01(B).

2. The Cleveland Teachers Union AFT Local 279 is an employee organization as defined by O.R.C. § 4117.01(D).

3. The mutually agreed-upon dispute settlement procedure in Article 31, Section 1(E) of the parties' 1996-1999 collective bargaining agreement is not a valid

procedure as it applies to reopener negotiations; the reopener negotiations fall under the statutory dispute resolution procedure in O.R.C. §4117.14 with all of the statutory timelines.

IV. ADJUDICATION

For the reasons above, we find that the mutually agreed-upon dispute settlement procedure in Article 31, Section 1(E) of the parties' 1996-1999 collective bargaining agreement is not valid as it applies to reopener negotiations. Consequently, we find that the current reopener negotiations between the parties, triggered by the passing of the operating levy pursuant to Article 31, Section 1(B) of the 1996-99 Agreement, fall under the statutory dispute resolution procedure with all of the statutory timelines.

The Cleveland City School District Board of Education's motion to stay the statutory negotiations procedure is denied.

McGee, Vice Chairman, concurs; Mason, Board Member, concurs in a separate opinion.