5-11-2012

State of New York Public Employment Relations Board Decisions from May 11, 2012

New York State Public Employment Relations Board

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Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and- **CASE NO. C-6111**

SEWANHAKA CENTRAL HIGH SCHOOL DISTRICT,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSSOCIATION, INC., LOCAL 100, AFSCME, AFL-CIO,

Intervenor/Incumbent.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named

public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time non-supervisory cooks.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 11, 2012
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 317,

Petitioner,

-and-

CASE NO. C-6112

TOWN OF FREMONT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Teamsters Local 317 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and regularly scheduled part-time Motor Equipment Operators.

Excluded: Highway Superintendent.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 317. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 11, 2012
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FEDERATION OF TEACHERS,

Petitioner,

-and- **CASE NO. M2011-351**

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondent.

STROOCK & STROOCK & LAVAN LLP (ALAN M. KLINGER of counsel), MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (BARRY J. PEEK of counsel), and ADAM S. ROSS, ESQ., & CAROL L. GERSTL, ESQ. for Petitioner

DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE BARGAINING (RUSSELL J. PLATZEK of counsel) for Respondent

BOARD DECISION AND ORDER

This matter comes to the Board on exceptions filed by the Board of Education of the City School District of the City of New York (District) to a decision of the Director of Conciliation (Director) dated March 19, 2012, concluding that an impasse exists in negotiations between the District and the United Federation of Teachers (UFT) within the meaning of §209.3 of the Public Employees' Fair Employment Act (Act) concerning teacher evaluation procedures at certain District schools based upon the terms of a District-UFT memorandum of agreement (MOA), dated July 15, 2011.

On April 23, 2012, we issued an interim decision, which granted a preference in considering the issues raised in the District's exceptions and UFT's response. In our decision, we denied UFT's request for an order directing that mediation proceed during

the pendency of the exceptions, and denied the District's request for oral argument pursuant to §213.5 of the Rules of Procedure (Rules).[1]

EXCEPTIONS

In its exceptions, the District asserts that the Director erred in concluding that an impasse exists under the Act based upon the terms of the MOA. According to the District, the parties intended that, if they were unable to reach a voluntary agreement, they would return to the *status quo*. The District also challenges the Director's conclusion that there is no evidence that it formally abandoned its grant application with the New York State Department of Education (SED). Finally, the District asserts that the deadlock in negotiations is now moot because it formally withdrew its application with SED, submitted a new and different grant application and opted to terminate the MOA.

UFT supports the Director's decision and urges denial of the District's exceptions.

FACTS

In May 2011, the District submitted a School Improvement Grant Application (Grant Application) to SED under the School Improvement Grant (SIG) program seeking an award of federal funds during the 2011-12 and 2012-13 school years for use in persistently lowest-achieving District schools. SIG is a federal funding program established pursuant to §1003(g) of the Elementary and Secondary Education Act of

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[1] *Board of Educ of the City Sch Dist of the City of New York*, 45 PERB ¶3018 (2012).

1965,[2] designed to enable lowest-achieving schools to meet accountability requirements through one of four school intervention models: Transformation, Restart, Turnaround and School Closure. Under the Transformation Model, a school's principal is replaced, a rigorous system of staff evaluation and development is adopted, and comprehensive instructional reform is implemented. Schools subject to the Restart Model are converted to a charter school, or closed and reopened under a charter school operator or a charter management organization. The Turnaround Model requires that a school's principal be replaced and no more than 50% of the school's staff rehired. Finally, as its name suggests, schools subject to the School Closure Model are closed and its students are transferred to higher achieving schools.[3]

The May 2011 Grant Application filed by the District sought SIG funding to be used in 33 specific District schools identified by SED as being persistently lowest-achieving. The application includes two lists of schools. One identifies the schools where the Transformation Model would be implemented, and the other identifies the schools that would be subject to the Restart Model. Consistent with federal guidelines, the Grant Application was accompanied by signed appendices by UFT and another

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[2] 20 USC §6303(g).

[3] *See*, U.S. Department of Education, *Guidance on Fiscal Year 2010 School Improvement Grants under Section 1003(g) of the Elementary and Secondary Education Act of 1965*, pp. 26-42 (Mar 1, 2012) available at http://www2.ed.gov/programs/sif/sigguidance03012012.doc.

employee organization affirming that the District engaged in appropriate consultation and/or collaboration with them prior to filing the Grant Application.[4]

In July 2011, the District and UFT entered into the MOA modifying the parties' collective bargaining agreement (agreement) for District schools subject to the Transformation and Restart Models under the Grant Application.[5] Section I(D) of the MOA states:

> This agreement applies to, and only to, schools identified by the New York State Education Department ("SED") as "Persistently Lowest Achieving" where the DOE, in plans submitted to SED, chooses to implement either the "Transformation Model" (hereinafter "Transformation Schools") or the "Restart Model" (hereinafter "Restart Schools") and such plan is approved. (For purposes of this Agreement, the terms "Transformation Model" and "Restart Model" shall be defined as they are in SED and U.S. Department of Education regulations.) This Agreement is not a precedent for any other Department school or program.

The MOA creates two new titles, Turnaround Teacher and Master Teacher, for the schools subject to the Transformation and Restart Models. It also defines the job selection process, job duties and terms and conditions of employment for the new titles. While the parties were able to agree in the MOA upon certain procedural aspects of a

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[4] We have taken administrative notice of the complete copy of the District's 2011 Grant Application, Appendix and Update available at SED's website: http://www.p12.nysed.gov/nclb/programs/titleia/sig1003g/1112/docs/NYCC2FY12CentralFinal.pdf; http://www.p12.nysed.gov/nclb/programs/titleia/sig1003g/1112/docs/AppendixBEFG.pdf http://www.p12.nysed.gov/nclb/programs/titleia/sig1003g/1112/docs/nycc1y2sigapp.pdf.

[5] The July 2011 agreement is attached to UFT's January 25, 2012 letter to the Director.

teacher evaluation system in the Transformation and Restart schools, they left remaining issues over the evaluation system to future negotiations.

Section VII(A) of the MOA states:

> The Department and UFT agree to negotiate an evaluation system (the "Evaluation System") to be used in Transformation Schools and Restart Schools only, that is consistent with the requirements in Education Law § 3012-c or otherwise for negotiations between the UFT and the Department), which shall be used until (i) a system for conducting the annual professional performance reviews of all classroom teachers employed by the Department is established (the "New Evaluation System"), in which case such system shall be used in all DOE schools including those designated as Transformation and Restart Schools, (ii) the end of the 2012-2013 school year, or (iii) this Agreement is terminated pursuant to Section IX.

The duration of the MOA is set forth in Article IX(A), which states, in part:

> This Agreement shall be in effect through the 2012-2013 school year and expire on June 30, 2013, provided that, either the UFT or the Department may cancel this Agreement at any time following the last day of the 2011-2012 school year.

On August 29, 2011, the District and UFT submitted a joint commitment letter to SED in support of the Grant Application.[6] The letter repeated the terms of §VII(A) of the MOA concerning negotiations by the parties over an evaluation system to be utilized in schools under the Transformation and Restart Models. In addition, the letter stated:

> It is understood that if the UFT and DOE do not reach an

[6] The letter is attached as Exhibit 6 to the January 27, 2012 letter from the District to the Director.

> agreement on the Evaluation System to be used in Transformation and Restart Schools or the Evaluation System ends prior to 2012-2013 because the MOA is terminated by either the UFT or the DOE, the consequences will be that the Transformation and Restart Schools will not participate in the SIG program and shall remain subject to the Commissioner's regulations regarding accountability status (8 NYCRR § 100.2[p]).
>
> Nothing contained herein shall constitute an agreement to change the currently existing evaluation system in schools other than Transformation or Restart Schools, nor shall any agreement that may be entered into, pursuant to this commitment letter, constitute a successor to the UFT-DOE collective bargaining agreement covering teachers that expired on October 31, 2009.

On or about September 7, 2011, SED announced its approval of the Grant Application, awarding a SIG grant to the District for implementation of the Restart and Transformation Models at the 33 lowest-achieving schools.[7] Thereafter, SED set a deadline of December 31, 2011 for the District and UFT to reach a negotiated modification of their expired agreement concerning the evaluation system at the at-issue schools.

Between November 21, 2011 and December 30, 2011, the parties participated in multiple sessions aimed at reaching a negotiated resolution of the remaining elements of an evaluation system for the at-issue schools. It is undisputed that the negotiations resulted in agreement concerning most outstanding issues. Differences remained

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[7] *See*, SED Press Release, *State Education Department Announces $60 Million in School Improvement Grant Awards to New York City and Greenburgh Eleven To Support Restart, Turnaround, and Transformation in 45 Schools.* (Sept 7, 2011) available at http://www.oms.nysed.gov/press/SIG.NYC.60M.html.

between the parties, however, over certain key points relating to the teacher rating appeal process.[8]

On December 30, 2011, the District notified SED of the parties' inability to reach agreement on an evaluation system by the December 31, 2011 deadline, which resulted in SED suspending the SIG grant for implementation of the Transformation and Restart Models at the at-issue schools. In his January 3, 2012 letter, SED Commissioner John B. King, Jr. stated, in part:

> In your letter dated December 30, 2011, you notified me that the New York City Department of Education is unable to comply with the requirements of its 2011-2012 School Improvement Grant (SIG) application related to teacher and leader evaluation and support in its schools, including necessary revisions to teacher and principal contracts. Since your district is unable to implement the Transformation and Restart models as described in your SIG application, the State Education Department is suspending your SIG grant effective immediately to the extent it implements the Transformation and Restart models. Your district must immediately cease obligating SIG funds in its Transformation and Restart model schools and will be required to submit a revised FS-10 budget to the Department documenting anticipated costs attributable to models other than Transformation and Restart, if any. Your district must also notify the Department if it intends to seek approval to

[8] Educ Law §3012-c was amended, effective March 27, 2012, to include a subsection concerning the appeal process for annual ratings of UFT-represented classroom teachers in all District schools. That appeal process will go into effect on January 16, 2013 unless the District and UFT reach a negotiated teacher evaluation and appeals plan in conformity with Educ Law §3012-c, and with the approval of SED. L 2012, c 21, §12.

> amend its application to shift to a different intervention model in the current year.[9]

In response to SED Commissioner King's letter, the District submitted a letter dated January 12, 2012, which proposed amending the Grant Application.[10] Under the proposal, 13 schools under the Transformation Model would be converted to the Turnaround Model, and 14 at-issue schools subject to the Restart Model would also be converted to the Turnaround Model.

In addition, the District's letter notified SED that it planned to utilize non-SIG funding to support reforms in the remaining six schools referenced in the Grant Application, which are subject to the Transformation Model:

> Two of these schools have already been proposed for phase out. Two of these schools have deep reforms underway and thus we do not want to implement a different strategy in these schools at this time. And for performance-based reasons, we will not be pursuing Turnaround in two schools currently implementing the Transformation model.

With respect to an evaluation system at these schools, the District stated in its January 12, 2012 letter:

> As a requirement of the Turnaround model, the Department is committing in these schools to measure and screen existing staff using rigorous school-based competencies, and to re-hire a significant portion of them using this criteria. We believe that this requirement is achievable within the DOE's current collective bargaining agreement with the UFT.

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[9] The letter is attached as Exhibit 9 to the January 27, 2012 letter from the District to the Director.

[10] The letter is attached as Exhibit 10 to the January 27, 2012 letter from the District to the Director.

In its exceptions, the District relies upon two events that took place following the Director's March 19, 2011 decision, and his appointment of a mediator. The District submitted a letter to SED Commissioner King dated March 27, 2012, stating that, as a result of its submission of an application to implement the Turnaround Model, it "formally withdraws its prior application, submitted on May 13, 2011, to implement the Restart and Transformation models in 33 schools."[11] In addition, the District sent a letter to UFT terminating the July 2011 MOA effective at the end of the 2011-12 school year.[12] Those subsequent District actions are irrelevant to our review of the merits of the Director's decision, but we will consider them with respect to the District's exception asserting that the Director's decision should be reversed because the dispute is moot.[13]

DISCUSSION

While issues connected with professional evaluation systems in public education have substantial importance for the parties and their constituencies, the question before us is a procedural one: whether an impasse in negotiations exists under the Act based upon the terms of the parties' July 2011 MOA, Education Law §3012-c, and the actions of the District, UFT and SED.

The obligations to negotiate and participate in impasse procedures under the Act can be revived by an agreement between the parties to reopen a previously negotiated

[11] Respondent's Exceptions pursuant to Taylor Law §213.2, Exhibit B.

[12] Respondent's Exceptions pursuant to Taylor Law §213.2, Exhibit C.

[13] *See*, Rules, §213.2; *UFT (Goldstein)*, 42 PERB ¶3035 (2009).

collective agreement.[14] The scope and duration of such obligations, however, can be set by the terms of the agreement to reopen.

In the present case, the MOA states that negotiations concerning an evaluation system will be "consistent with the requirements in Education Law § 3012-c or otherwise." As originally enacted, and as recently amended, Education Law §3012-c requires that procedures relating to annual professional performance review of classroom teachers and building principals be developed through collective negotiations pursuant to the requirements of the Act.[15]

By definition, mediation and fact-finding under the Act constitute a continuation of negotiations.[16] In mediation, a third-party is appointed to assist the parties in reaching a voluntary agreement. As part of mediation, parties may continue to exchange proposals reasonably related to the subject matter of their negotiations or the discussions before the mediator.[17] In the fact-finding process, a third-party is appointed to make findings of fact and recommendations to the parties for resolution of the impasse.

The MOA does not waive the applicability of impasse procedures under the Act to the parties' negotiations. Pursuant to §I(D) of the MOA, the obligation to commence

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[14] *Roma v Ruffo*, 92 NY2d 489, 31 PERB ¶7504 (1998); *East Aurora PBA*, 17 PERB ¶3080 (1984).

[15] L 2010, c 103; L 2012, c 21.

[16] *Village of Wappingers Falls*, 40 PERB ¶3020 (2007). *See also, Poughkeepsie Pub Sch Teachers Ass'n*, 27 PERB ¶3079 (1994).

[17] *Village/Town of Mount Kisco*, 45 PERB ¶3017 (2012).

negotiations for a modification of the parties' agreement commenced upon SED's September 2011 approval of the District's May 2011 Grant Application. Consistent with §IX of the MOA, that obligation to negotiate terminates on June 30, 2013, unless one party cancels it "at any time following the last day of the 2011-2012 school year." [18] Under the MOA, failure of the parties to reach agreement prior to the December 31, 2011 deadline set by SED, and/or SED's suspension of payment under the SIG grant does not terminate the obligation to continue to negotiate. If anything, those events demonstrate the need for mediation to help the parties reach a voluntary agreement consistent with the MOA and Education Law §3012-c. In fact, SED lifted the suspensions of SIG funding to other school districts after those districts were able to reach negotiated agreements with employee organizations regarding evaluation procedures following the December 31, 2011 deadline.

Contrary to the District's argument, the joint August 29, 2011 letter to SED does not evince an intent to return to the *status quo* or to forego impasse procedures under the Act during the duration of the MOA. Rather, the letter identifies the consequences that will result if a party terminates the MOA: the at-issue schools will not participate in the SIG program.

Furthermore, the District's January 2011 proposal to SED to amend the previously approved Grant Application for implementation of the Transformation and Restart Models does not nullify its obligations under the MOA. While the District's letter

[18] Based upon the District's letter to UFT dated April 10, 2012, it appears that the MOA terminates at the end of the 2011-12 school year.

to SED does indicate a proposed change of position regarding the models to be implemented at the at-issue schools, we have no proof before us that SED approved the proposal to amend the Grant Application. Nor has the District cited statutory or regulatory authority demonstrating that an approved SIG grant can be amended in the middle of a school year.

We are also not persuaded by the District's argument that the dispute between the parties is now moot. While the District notified SED on March 27, 2012 that it was formally withdrawing the Grant Application to implement the Transformation and Restart Models because it had submitted a new application to implement the Turnaround Model concerning some of the at-issue schools, there is no evidence in the record that SED has approved either the District's withdrawal or its new application, the specifics of which are not in the record before us. Furthermore, the District stated in its January 2011 letter to SED that it intends to continue to utilize the Transformation Model in at least some of the at-issue schools. Finally, although the District has sent UFT a notice of termination, the MOA remains in effect through the end of the 2011-12 school year.

Based upon the foregoing, the District's exceptions are denied, and we affirm the Director's decision. SO ORDERED.

DATED: May 11, 2012
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member