Laingsburg 7/1/75 FF

1326

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Fact-Finding Between

LAINGSBURG COMMUNITY SCHOOLS

-and-

LAINGSBURG EDUCATION ASSOCIATION

Case No. D74-D1475

Hearing Held December 19, 1974

Before Richard I. Bloch, Esq. Arbitrator
Appointed by the Michigan Employment
Relations Commission

Appearances:

For the Association

Charles Agerstrand, Representative

For the Community Schools

Douglas J. Robson, Esq.

Laingsburg Community Schools

FINDINGS OF FACT AND RECOMMENDATIONS

The parties to the instant dispute are signatories to a three-year collective bargaining agreement commencing with the 1972-73 school year. Article XXIV, Negotiations Procedures, allows re-opening the contract during its term:

> . . .B. Between April 1st and April 15th, the parties shall initiate negotiations limited to appendixes A, B and C (School Calendar, Salary Schedule, and Extra-Curricular Schedules). Either party may also present up to three additional proposals for negotiations.

Having re-opened, the parties subsequently reach
on two issues. The first concerns proposed amendments
XVI, Professional Behavior. The second concerns the ex
insurance coverage and the identity of the carrier. N
between the parties began in the Spring of 1974. Fail
resolve these issues brought them to fact-finding on I
1974. Additional evidence and post hearing briefs wer
thereafter.

Professional Behavior

The present collective bargaining agreement st

> Article XVI, Professional Behavior:
> . . .D. No teacher shall be disciplined, rep
> reduced in rank or compensation or deprived o
> professional advantage without just cause. A
> discipline, reprimand, or reduction in rank,
> compensation or advantage, including alleged
> evaluation of teacher performance, asserted b
> Board or represented thereof shall be subjec
> the professional grievance procedure herein
> set forth. All information forming the basi
> disciplinary action will be made available t
> teacher and the Association.

The Association would retain the language as is. T
however, proposes the following amendment:

> D. A teacher may be disciplined for infrac
> this contract or established Board policy i
> with paragraph B of this Article. No teach
> disciplined, reprimanded or demoted without
>
> Any teacher who is denied Tenure or is reli
> probationary teacher shall not be allowed t
> grievance for his dismissal under this cont
> shall be granted a hearing by the Board, i
> so desires.

This language significantly restricts the scope of the previous contract section insofar as it carves out discharge matters from the grievance procedure. Arguably, teachers could have processed such complaints through the grievance procedure up to and including arbitration under the prior language.

In requesting retention of the original clause, the Association notes that the concept of "just cause" is widely accepted in labor relations in both the public and private sector. According to the evidence, just cause provisions are included in a majority of public sector education contracts in Michigan. They should be. Basic fairness requires that an Employer act reasonably and refrain from arbitrary or capricious activity in the employment relationship. This, however, does not compel the conclusion that protection against improper discharge[1] necessarily resides in the grievance procedure. Article IV, Section 1 of Michigan's Teacher Tenure Act provides "just cause" constraints and establishes procedural protections:

> Section 1. Discharge or demotion of a teacher on continuing tenure may be made only for reasonable and just cause, and only after such charges, notice, hearing, and determination thereof, as are hereinafter provided. Nothing in this Act shall be construed as preventing any controlling Board from establishing a reasonable policy for retirement to apply equally to all teachers who are eligible for retirement under Act No. 136 of the Public Acts of 1945 or having established a reasonable retirement age policy, from temporarily continuing on criteria equally applied to all teachers the contract on a year-to-year basis of any teacher whom the controlling Board might wish to retain beyond the established retirement age for the benefit of the school system. (MCL 38.101.)

---

[1] The strong implication of the first paragraph of the Board's suggested language is that all actions short of discharge may be grieved and are held to a standard of "due process."

Thus, Michigan teachers may pursue discharge matters, among others, through Tenure Act procedures, including a hearing before the local Board of Education and appeal to the State Tenure Commission.[2] The Tenure Act, then, provides the protection sought by the Association *via* the contractual grievance procedure. There may be arguments supporting the existence of such dual remedies,[3] but they have not been introduced here, nor does the past history of the parties suggest the need for such overlap.

Probationary teachers do not enjoy the same rights under the Tenure Act as do tenured teachers. Excepting only the requirement of sixty days notice prior to termination[4] such teachers are

---

[2] Long v. Board of Education, Dist. No. 1, Fractional Royal Tp. and City of Oak Park, 350 Mich. 324; Shiffer v. Board of Education of Gibralter School Dist., 45 Mich. App. 190.

[3] School districts and employee bargaining representatives have, at times, agreed to open the grievance procedure to tenured and non-tenured employees as well in cases of discipline, dismissal and, indeed, non-renewal. This practice has been recognized both judicially and in arbitration. See School Dist. of City of Ferndale V. Lester and Ferndale Education Association, Oakland County Circuit Court Opinion No. 71-72232 (1972); North Central Education Association and North Central Public School District, American Arbitration Association Case No. 54 30 0369 71 (August 26, 1971 -- Roumell, Arbitrator).

[4] Section 3 of the Tenure Act stages: "At least 60 days before the close of each school year the controlling Board shall provide the probationary teacher with a definite written statement as to whether or not his work has been satisfactory. Failure to submit a written statement shall be considered as conclusive evidence that the teachers' work is satisfactory. Any probationary teacher or teacher not on continuing contract shall be employed for the ensuring year unless notified in writing at least 60 days before the close of the school year that his services will be discontinued. (MCL 38.33)

retained at the discretion of the Administration. The right to give a trial or probationary period may be viewed as a reasonable extension of the right to hire. During this time, management observes and must be granted substantial discretion in deciding whether an employee fits the particular working requirements. However, conscience, equity and the law mandate that standards be applied equally and, should the situation so require, that the decision not to rehire be made in good faith, free of discriminatory or capricious motives.[5] Yet, even assuming the probationary teacher should be afforded due process, (the statute requires and the Board's suggested language promises this) it is still not clear that the subsequent negative decision regarding a probationary teacher should be appealable through the grievance process. Where a probationary teacher wishes to challenge the substance or procedures concerning his or her dismissal, the circuit courts are available for review[6], as are the varying administrative agencies and judicial fora in cases of claimed discrimination. For these

---

[5] See Munro V. Elk Rapids Schools, 385 Mich. 518 (on reh. revg. 17 Mich. App. 368). There, the court stated:

> We are not saying that the Board lacks any discretion to retain or not to retain a probationary teacher. The probationary period is just that -- a period of proof. We are saying that the intent of the entire Act was to eliminate capricious and arbitrary employment policies of local school boards. This includes the probationary as well as the tenure period of employment.

[6] M.S.A. S27A.631; See also Caddell v. Ecorse Board of Education, 17 Mich. App. 632.

reasons, the Fact Finder recommends the Board's suggested language.

Insurance Coverage

The essence of the parties' dispute in this area concerns the nature and identity of insurance coverage under the collective bargaining agreement.

(A) and (B) of Article XII of the current contract, Insurance Protection, states:

> A. The Board will provide, upon application, Medical care protection for each full time teacher and his family for the year beginning September 1st through August 31st of the following year through any of the Board's approved medical insurance programs. For the school year 1973-74, this will be the MESSA Super-Med health insurance.
>
> B. The Boards' carrier shall provide medical care insurance and options equal to or better than those available through MESSA Super-Med.

At the outset, several distinctions are in order. It is important to keep the nature of this dispute in focus. During the first two years of the contract, Article XX provided that the Board would provide MESSA Super-Med Health Insurance. The dispute concerning the third year of the contract is two-fold. First, the Association requests an expansion of coverage from that equivalent to the basic Super-Med policy to an expanded "Super-Med II" coverage. Additionally, it objects to the Board's attempting to supply insurance coverage through a different carrier. As to this latter issue, one must assume the Association is, in the process of "re-opening," attempting to change the otherwise clear terms of the contract which refer to "the Board's carrier,"

and therefore imply rather unequivocally that the Board has the right to select its carrier so long as the coverage is equal to or better than that available through MESSA.[7] In briefs which are notably thorough and well-reasoned, both parties direct themselves to the issue of whether the identity of an insurance carrier may be a mandatory subject of bargaining. In the appropriate case, such arguments may well be a vital part of the proceedings. Here, however, it would appear from the record that bargaining on this issue has occurred and the Fact Finder need not, therefore does not, decide that issue in the context of the present dispute.[8] In this case, the parties have engaged in extensive discussions -- to no avail -- over the question of whose carrier shall be selected. Neither the contract nor the Public Employment Relations Act in Michigan requires either party to agree to a particular proposal or concede on a particular point.[9]

---

[7]If the dispute is not for the purpose of modifying this contract provision, then it is more properly channeled through the grievance procedure and the only issue is to whether the Board's suggested insurance is equal to or better than the comparable MESSA policy.

[8]In any event, final disposition of an issue arising over the question of whether the Board must bargain its choice of carrier is more properly lodged under the aegis of the Michigan Employment Relations Commission.

[9]Section 15 of the Act states:

> A public employer shall bargain collectively with the representative if its employees as defined in Section 11 and is authorized to make and enter into collective bargaining agreements with such representatives. For the purposes of this Section, to bargain

It is apparent, however, that the issue of whether carrier identity need be bargained is not before the Fact Finder. Thus, the specific issue is which of the two proposed plans is the more acceptable. In this regard, and without reference to the 'mandatory subject of bargaining' question, the identity of the carrier is possibly relevant. For example, if it may be shown that certain benefits are inextricably associated with a particular carrier or one company is demonstrably more reliable or responsive, this may be grounds in the appropriate case, for its preference.

The Fact Finder has carefully reviewed the arguments of the parties and the extensive direct evidence of the respective insurance coverages, and concludes that, as between the basic programs with substantially equivalent premiums, there is no significant difference.[10] Both parties have provided the Fact

---

Continuation of Footnote 9

collectively is the performance of the mutual obligation of the Employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiations of an execution of a written contract, ordinance or resolution incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to proposal or require the making of a concession. (MCL 423.215).

[10]The relevent comparison in this case is with the basic SET Ultramed "B" with MESSA Super-Med I, wherein the monthly premium differs by $.50 or less in all categories of covered individuals.

Finder with post-hearing submissions from experts concerning comparison of the various insurance packages. Were it not for the fact that each side's consultants apparently agree in substance, that evidence might otherwise be accorded little weight. However, a review of the respective opinions indicates that those individuals reach essentially the same opinion as the Fact Finder -- the expanded Super-Med II coverage is more comprehensive but at a higher cost; the two basic policies differ only in negligible respects.[11] Nor may it be said that the identity of the carrier

---

[11] Mr. Hoekenga, retained by the Association to compare the insurances states in a memo of April 18, 1975:

> "I did note several additional advantages of the MESSA programs involving options and post-school employment, but they did not appear to germane to the issue. I think it is evident from the comparison that I find Super-Med I to be slightly lower in cost to Ultramed "B" with better benefits for the most part. Super-Med II appeared to be substantially better in coverage than both programs but with a correspondingly higher premium."

The Board's consultant, Mr. Wenck, states in a letter of March 31, 1975:

> "I have been involved in reviewing and working with these types of forms for almost twenty-five years and I have never before reviewed a "package" of forms offered by two different organizations and insurers which in total are as similar to each other as those reviewed. One can not say they are identical, but they are so similar, with only such minor differences as to be insignificant in the overall picture that I do not believe either set of forms can be found either superior or inferior to the other set In my opinion, for all practical purposes, the contract provisions, benefits and rates for corresponding forms are equivalent. This does not mean, however, that the forms listed above under the Set Inc. column . . . and those listed under the MESSA column . . . are equivalent . . . the [T] Super-Med II Major Medical Insurance provides for extensive benefits at a higher premium rate than does Set Inc. Ultramed "B" Major Medical at a lower premium rate."

provides a rational basis for distinction as between the basic policies (of comparible premium and coverage). Testimony fails to convince the Fact Finder that there exists any serious allegiance to the coverage other than that engendered by the various relationships between the Education Association and MESSA, on the one hand and the Board and MASB-SET on the other. In this respect, a caveat is in order and the Fact Finder would reiterate his holding in an earlier dispute involving Springport Public Schools and the Jackson County Education Association:

> First, neither the Association nor the Board should be in the business of selling insurance or acting as agents for those who do. Lest the parties lose perspective as concerns their role in these proceedings, several matters should be emphasized. The parties to this dispute owe an obligation to their respective constituents and, jointly, to the public in providing a sound education for the students of this school district. That premise establishes the guiding principle relevant to the negotiations and specifically relevant to the question of insurance coverage. To the extent that either party promotes its plan with an eye to benefiting the insurance carrier as opposed to the school system and its employees, its efforts are misguided. The coverage must be selected with an eye to the broadest and most reliable coverage for the employee at the least cost to the Employer and the taxpayers. Any other motive is unacceptable.

The remaining issue is whether the expanded coverage, regardless of carrier, is warranted. The finding here is that it is not. Comparison evidence concerning surrounding communities indicates that approximately half have the Super-Med II coverage. However, there is no evidence demonstrating the remaining economic composition of those packages, nor is there evidence here which would tend to support expanded insurance benefits to compensate for,

Langsburg

for example, an otherwise deficient economic settlement. Absent such evidence, or other facts tending to indicate the existing coverage is somehow inadequate, requests for its expansion are not recommended.

In sum, the Fact Finder recommends, with respect to the disputed issues:

1. That the language concerning Professional Behavior be modified in accordance with the Board proposal, and

2. The Association's proposal concerning expansion of existing insurance benefits is not recommended. Moreover, the parties having bargained and reached impasse on the issue of carrier identity, the finding is that there is no meaningful difference in the basic plans submitted. The Board is clearly permitted by the terms of the prior agreement to select any carrier that supplies as beneficial terms as the MESSA plan. The finding here is that while adoption of the MASB-SET plan is not necessarily recommended over any other, neither is the Board prohibited from implementing it, nor is it unreasonable for it to do so.

Richard I. Bloch

Richard I. Bloch, Fact Finder

July 1, 1975