

ARBITRATION AWARD

In the Matter of Arbitration
Between:

STATE EMPLOYEES BARGAINING
AGENT COALITION

vs.

STATE OF CONNECTICUT

Award Date: October 7, 2003

Hearing Dates: May 21, 2003;
July 8, 2003 and July 30,
2003

Arbitrator: Peter R. Blum,
Esq.

REPRESENTATIVES

Linda J. Yelmini, Esq.; Director of Labor Relations
For the State

Daniel E. Livingston, Esq.
For the Union

ISSUE I

Is the grievance filed by SEBAC identified as Joint Exhibit I
arbitrable?

Yes or No

ISSUE II

As Proposed by SEBAC:

Is the creation and/or implementation of an ERIP without SEBAC's
consent a violation of the Pension Agreement?

If so, what shall be the remedy?

As Proposed by the State of Connecticut:

Is the legislative enactment and implementation of an Early
Retirement Incentive Program as provided in PA 03-2 without SEBAC's
consent a violation of the Pension Agreement between the parties?

If so, what shall the remedy be?

FACTS

The parties to the Agreement under which the instant grievance arose are the State of Connecticut, hereinafter referred to as the "State" and the State Employees Bargaining Agent Coalition, hereinafter referred to as "SEBAC". SEBAC is the bargaining agent authorized by Connecticut General Statutes Section 5-278(f) to bargain about pension and health care on behalf of state employees with the State of Connecticut.

The current collective bargaining agreement concerning pension and health care is known as SEBAC 5A, which incorporates except as otherwise indicated, previous SEBAC agreements dating back to the interest arbitration award of James Healy dated September 8, 1989.

The immediate predecessor of SEBAC 5A, known as SEBAC 5, is a twenty year agreement, ratified by SEBAC constituent unions on March 13, 1997, and expiring on June 30, 2017. The agreement, incorporated except as specifically modified into SEBAC 5A, includes a provision, known as "General Provisions Section I", which allows the parties to engage in interim bargaining on "early retirement incentive programs (ERIPs) and related issues" by mutual agreement. By mutual agreement reached as part of the negotiations which lead to SEBAC 5, SEBAC and representatives of the Rowland administration engaged in interim bargaining about an ERIP and related issues in March and April of 1997.

No ERIP resulted from this bargaining with the Rowland administration but the Legislature passed an ERIP in May 1997.

On or about November 13, 2002, at the request of Governor John Rowland, representatives of SEBAC met with the Governor and other representatives of the administration. At the meeting, the Governor proposed an ERIP as part of an overall savings and concessions package with state employees. The day following that meeting, the Governor announced the lay off of 3000 state employees which he said could be avoided only by a concessions agreement with state employee unions. On December 5, 2002, the Governor set forth his specific plans for the laying off of 2800 unionized employees absent a concession agreement, and those layoffs began in January of 2003.

On repeated occasions between November 13, 2002 and February 1, 2003, the parties met to consider an ERIP as part of a package which would prevent or undo the layoff of state employees. These meetings ended on February 1, 2003. At no point in these discussions at the table did the administration assert that an ERIP could occur without bargaining with and agreement by SEBAC.

On or about February 27, 2003, after the veto of a previous bill that would have returned laid off workers to work, the General Assembly passed a bill, HB No. 6495, which included an ERIP which was not agreed to by SEBAC. Further, on February 28, 2003, SEBAC through its Chief Negotiator, transmitted two letters to the Governor reiterating its position that no ERIP could be implemented without SEBAC approval, and offering to bargain with the Governor about the ERIP so that a legal ERIP could occur. No response from the administration was ever received.

The State has implemented, and continues to implement the ERIP contained in HB No. 6495 without SEBAC's consent, and despite SEBAC's objection. H.B. No. 6495 was enacted as P.A. 03-2.

The grievance at issue was dated March 11, 2003, and reads as follows:

GRIEVANCE: SEBAC grieves the State's breach of its obligations under the SEBAC agreement through the creation of an Early Retirement Incentive Program without SEBAC's consent. Among other things, this improperly modifies contractual provisions concerning benefit computation, retirement eligibility, funding, sick leave, vacation, retirement equity, and rights upon recall from layoff.

REMEDY: SEBAC demands that the State (1) cease and desist from unilaterally modifying the agreement, and instead bargain with SEBAC as to a mutually agreeable ERIP; (2) in the absence of such a mutually acceptable agreement, make the pension fund whole for all violations of the agreement; (3) make individual employees whole for all violations of the agreement.

Due to the nature and imminence of the harm caused by the State's violation of the agreement, SEBAC requests that processing of this grievance be expedited to the greatest degree possible.

As the matter could not be resolved, it was brought to arbitration before this arbitrator as provided in the parties' 1989 Pension Agreement which has been incorporated into subsequent Pension Agreements. Hearings were held by the arbitrator on May 21, 2003, July 8, 2003 and July 30, 2003 in Hartford, Connecticut. At the aforementioned hearings, the parties presented their respective positions on the issues through the testimony of witnesses, the entry of exhibits and oral argument. The parties thereafter filed thorough briefs with the arbitrator dated August 21, 2003. There was also a reply brief filed by SEBAC dated August 26, 2003. In the aforementioned briefs, the parties argued

their respective positions concerning the arbitrability of the grievance and whether or not it should be sustained by the arbitrator and, if so, what remedy should be issued by the arbitrator in this matter.

CLAIMS AS TO ISSUE I

The State claims that the matter at issue is not arbitrable based upon the constitutional argument that the Legislature's constitutional role and duty is to enact laws. It is not within the purview of the arbitrator to find that the Legislature does not have the power to enact laws, or at least certain laws, in the State of Connecticut.

The State also argues that the matter is not substantially arbitrable because the Pension Agreement incorporates Connecticut General Statutes Section 5-156a(d) which provides:

No act liberalizing the Benefits of the plan shall be enacted by the General Assembly until the assembly has requested and received from the Retirement Commission a certification of the cost of such change under the actuarial funding basis adopted by section 5-154 and this section using full normal cost plus forty-year amortization.

The State claims that the above statutory language indicates that the State and Union have agreed to an express reservation by the Legislature to liberalize benefits under the State Employee Retirement System. The State also claims that it disagrees with the prior arbitration award of James Healy, which found a matter arbitrable which concerned whether the Legislature could enact a law, without

negotiation by the Union with the Executive branch, that benefits certain members of the State Employees Retirement System. The Union had filed a grievance, contesting the aforementioned action of the Legislature, which resulted in the Healy arbitration award.

SEBAC claims that with the exception of some disputes not relevant here, the parties have agreed that any dispute with regard to this Agreement is subject to grievance and arbitration (Joint Exhibit 2, Section 13). The parties have specifically agreed to the test for arbitrability under their Pension Agreement. The standards articulated in the Steelworkers' Trilogy shall be applied in any challenge to the arbitrability of any dispute under this Agreement.

Those standards, in relevant part, can be succinctly stated that when a contract contains an arbitration clause, there is a presumption of arbitrability for labor disputes. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 650, quoting Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). In other words, in the absence of a provisions excluding a particular grievance from arbitration, there is a presumption that the grievance is arbitrable.

In sum, the grievance charges the State of Connecticut with violating its Pension Agreement with SEBAC. That is exactly what the arbitration provision of the Agreement was created for. The

State may wish the Agreement's arbitration provisions were not there, just as it apparently wishes the Agreement itself were not there. Such wishes do not create an arbitrability defense.

DISCUSSION OF ISSUE I

The parties have stipulated that SEBAC, the State Employees Bargaining Agent Coalition, is the bargaining agent authorized by Connecticut General Statutes Section 5-278(f) to bargain about pension and health care on behalf of state employees. The current collective bargaining agreement concerning pension and health care is known as SEBAC 5A, which incorporates, except as otherwise indicated, previous SEBAC agreements dating back to the interest arbitration award of James Healy dated September 8, 1989.

However, since the agreement known as SEBAC 5A modifies only health care provisions, the Union claims that the governing document, for purposes of this dispute, is the most recent modification of the Pension plan set forth in SEBAC 5. That agreement incorporates prior agreements, including the so-called Healy Award of 1989.

That 1989 award contained the following governing language in Section 13, entitled "Disputes and Arbitration":

There shall be a labor-management review committee consisting of two representatives of the unions which are signatories to this agreement, who shall be designated by the unions representing a majority of the bargaining units and a majority of state employees, and two representatives of the State employer. The committee shall name an impartial arbitrator to decide disputes which may arise under this Agreement. Unless the

committee designates some other arbitrator to hear a dispute, the arbitrator shall be the Chairman or former Chairman of the retirement commission, provided that if the Chairman and a former Chair are both available, the person who will be first available shall hear the dispute.

Any dispute with regard to this Agreement, except for a claim under Section 1 submitted to the retirement commission pursuant to C.G.S. Sec. 5-155(j) and appealable therefrom pursuant to 5-155(k), may be submitted by any union to the labor-management review committee, which shall meet to consider the dispute within two weeks of the union's request. If the dispute is not resolved, the two union representatives may submit it to arbitration.

The standards articulated in the Steelworkers' Trilogy shall be applied to any challenge to the arbitrability of any dispute under this Agreement.

Said Section 13 language clearly and unambiguously indicates that "Any dispute with regard to this Agreement, except for a claim under Section 1 submitted to the retirement commission pursuant to C.G.S. Sec. 5-155(j) and appealable therefrom pursuant to 5-155(k), may be submitted by any union to the labor-management review committee" and thereafter if not resolved to arbitration. Moreover, the aforementioned Section 13 language states that the Steelworkers' Trilogy standards are to be applied to any challenge of arbitrability.

The State has the burden of proof to sustain when it claims that the instant matter is not arbitrable. That burden has not been met through a claim by the State that the Legislature under the State Constitution has the sole power to enact laws or by C.G.S. 5-156a(d).

There is no question that the Legislature under the division of powers among the State's three (3) branches has the sole right to enact laws. However, in the instant matter the specific language

of Section 13 must be interpreted by the arbitrator to decide whether the matter at issue is or is not arbitrable.

The parties are bound by the Section 13 language at issue as it is not only a part of their Pension Agreement, but has been previously ratified by the Legislature. There is no evidence in the record that the Section 13 language has been repealed or modified in any manner by the parties.

In a disputed matter between the parties in 1993, SEBAC filed a grievance claiming violations of both existing statute and the pension contract between the parties when the Legislature improved pension benefits without first getting a certification of costs from the retirement commission, as required under PA 92-226. Arbitrator Healy stated as part of his opinion when finding that there was an arbitrable dispute under Section 13 language, that the reference to the standards of the Steelworkers' Trilogy in Section 13 removed any doubt as to arbitrability. He based his reasoning on the fact that inclusion of a special clause commanded special attention. The arbitrator in his award quoted the Supreme Court, which stated "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail" and that whenever there is doubt as to whether a claim is arbitrable, it should be resolved in favor of coverage.

This arbitrator adopts the above reasoning as it reinforces and gives substance to the broad language of Section 13 as discussed above, which speaks of "Any dispute" if not resolved being submitted to arbitration.

CLAIMS AS TO ISSUE II

The Union claims that the State's legal position that one party can unilaterally modify a bilateral agreement is baseless and frivolous. The Union also claims that Connecticut General Statutes Section 5-156a(d) provides no defense to the State's breach of the Pension Agreement. The Union further claims that the Healy grievance award discussed under Issue I which found in favor of the Union on both arbitrability and the merits, remains good precedent for the parties.

The State claims that the language of Connecticut General Statutes Section 5-156a(d) indicates that the Legislature and the parties contemplated that the Legislature retained the ability to liberalize benefits of the plan without the concurrence of SEBAC. The State also claims that it did not need SEBAC's consent to enact an ERIP. Moreover, nothing in the Pension Agreement requires SEBAC's consent before the Legislature enacts any law. Further, the State claims that the language contained in the Pension Agreement concerning an early retirement incentive program is permissive at best. Nor is there contractual language that sets forth negotiations as the exclusive manner in which an ERIP can be implemented by the State.

The State also claims that the Union's attempt to muster a past practice argument must fail on several grounds. First, there is no past practice provision contained in any SEBAC agreement. Second, the language of the Agreement is plain and unambiguous. Third,

the constitutional argument raised under the arbitrability section of its, the State's, brief prevents such a finding. Lastly, there was no valid existence of a past practice. A finding by the arbitrator that required negotiations of an ERIP between the parties would be illegal. It would limit the Legislature's ability to enact laws, in violation of the Connecticut Constitution. Additionally, the State claims that the State Board of Labor Relations held that unilateral changes to conditions of employment by legislative feat, do not violate the State Employees Relations Act. Finally, it is the State's claim that reliance by SEBAC on Arbitrator Healy's grievance award is misplaced as it has no force and effect and is a violation of public policy and Connecticut General Statutes Section 52-148.

DISCUSSION OF ISSUE II

The parties have had a series of pension agreements since a 1989 arbitration award which was ratified by the Legislature. During the period from 1989 to 2003, there have also been several pension plan improvements. Said improvements have resulted both from negotiations with the Executive Branch and then ratification by the Legislature or by unilateral action of the Legislature. SEBAC has at times consented to the Legislature's unilateral actions of creating a pension benefit without prior negotiation by SEBAC and the Executive Branch. However, SEBAC did grieve a 1992 pension

benefit which was created by the Legislature without negotiation or consent by SEBAC. The grievance resulted in an arbitration award in SEBAC's favor by Arbitrator Healy, on both the issues of arbitrability and the merits. Though the State initially appealed the arbitration award to the Courts, the appeal was not pursued when SEBAC withdrew the award as part of a settlement with the State.

In deciding the instant grievance, it must be determined by the arbitrator whether the Legislature's exercise of its exclusive state constitutional right to make laws under Article 1, Section 1 of the State Constitution, violates Article 1, Section 10 of the U. S. Constitution, the so-called Contract Clause, and consequently the contractual rights of SEBAC under the Pension Agreement.

There are significant and relevant discussions concerning a state legislature's rights and duties concerning a pension plan in two Rhode Island District Court decisions and a Court of Appeals, First Circuit decision. The cases are entitled National Education Association Rhode Island v. Retirement Board of Rhode Island Employees' Retirement System, et als. The two (2) District Court matters are cited as 890 F. Supp. 1143 (1995) and 972 F. Supp. 100 (1997). The Court of Appeals case is cited as 172 F.3d 22 (1999).

In the aforementioned Rhode Island matter, a union and individuals brought action against the Retirement Board of Rhode Island Employees' Retirement System, challenging the constitutionality of the State's Eviction Act. Said act extinguished retirement benefits that had

been previously granted by the Legislature to teacher union employees. On the Retirement Board's motion to dismiss, the District Court, Chief Judge, held that:

(1) statute extending benefits to employees created implied-in-fact contract as matter of federal constitutional law, for purposes of determining whether later extinguishment of those benefits violated contract clause; (2) Act substantially impaired contractual relationship between employees and state, for purposes of determining whether employees stated cause of action for violations of contract clause; (3) employees sufficiently alleged that such impairment was not reasonable and necessary to serve important public interest, for purposes of determining whether employees stated cause of action for violation of contract clause; (4) employees stated cause of action for violations of due process clause; and (5) employees stated cause of action for violations of takings clause.

On a hearing on the merits in the District Court, it was held by said Court in August 1997 that the Eviction Act was unconstitutional as applied to all legally vested employees, but was constitutional as applied to nonvested employees.

The matter was then appealed to the United States Court of Appeals, First Circuit. That Court, in a March 24, 1999 decision, found that the legislation known as the Eviction Act did not violate the contract clause, takings clause or due process rights of union employees under the Constitution.

There is a significant difference between the instant matter in Connecticut and the Rhode Island case. In the Rhode Island matter, it was found that the State, through the Legislature, did not intend to bind itself contractually when it instituted a pension plan. There was in fact no contract between the State of Rhode Island and the

unions representing the employees covered by the pension plan. That is not the factual pattern found in Connecticut, where pension agreements are negotiated by the State through its Executive Branch with SEBAC, and then ratified by the Legislature. In fact, there has existed since 1989 a binding contract between the State and SEBAC which defines the rights and duties of the respective parties. The various pension agreements since 1989 have been ratified by the Legislature. However, the Legislature when passing the 2003 ERIP at issue, has unilaterally without negotiations with SEBAC or its, SEBAC's, consent, changed the terms of the pension contract. It is noted that the unilateral change instituted by P.A. 03-2 did not have a negative impact on members of the pension plan as was the case of the legislation in Rhode Island. In fact, four thousand six hundred fifty (4,650) employees took the new retirement benefit under the terms of the 2003 ERIP found in P.A. 03-2.

A contract being in place between the parties, it must be determined whether the action of the Legislature in enacting and implementing P.A. 03-2 was a violation of Article 1, Section 10 of the U. S. Constitution and consequently, violates the contractual rights of SEBAC under the Pension Agreement. Said Section 10 of Article 1, prohibits States from passing laws impairing obligations of contracts. The Section 10 prohibition is applicable to a state when it impairs its own contractual rights by enacting legislation. In the aforementioned Rhode Island cases, a three (3) part analysis is discussed as applicable when a contract is found between the

parties. Quoting from the decision in said Rhode Island case, "(F)irst a court 'must decide whether the challenged law infringes a right that arises from a contract or a 'contractual agreement'", National R. R. Passage Corp. v. Atchison Topeka & Santa Fe Ry. Co., 470 U.S. 451, 105 S. Ct. 1141, 84 L.Ed 2d 432 (1985). The Court's decision goes on to state "(I)f a court concludes that the law at issue impairs a contractual right it must then consider whether the impairment is substantial in nature". Thirdly, the decision states that "(A) challenged law may nonetheless survive scrutiny under the Contract Clause if 'the impairment is reasonable and necessary to serve an important public purpose'", quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 25, 97 S. Ct. 1505, 1519, 52 L.Ed 2d 92 (1977).

Under the language of the pension plan, SEBAC represented bargaining unit employees when bargaining with the State over the retirement plan benefits and in the instant matter, specifically concerning the benefit of an ERIP. This contractual right to negotiate benefits was clearly and definitely impaired by P.A. 03-2's unilateral institution of a contractual benefit, specifically the 2003 ERIP. The Legislature's action of impairment was substantial in nature in that the legislation provided for an ERIP without bargaining its form with SEBAC. SEBAC's right to bargaining benefits is a vital, essential, and substantial part of its contractual position as bargaining agent for state bargaining unit employees under the language of the Pension Agreement.

The third part of the analysis concerns whether P.A. 03-2's aforementioned substantial impairment of SEBAC's contractual right is reasonable and necessary to serve an important public purpose. P.A. 03-2 is entitled "An Act Concerning Modification To Current and Future State Expenditures and Revenues". The language of the Act dealt with reducing millions of dollars in funding to various state agencies, and towns and cities, the institution of new taxes or increases in existing taxes, and provided for an ERIP, in order to produce during a severe fiscal crisis a State budget under which agencies and departments that served the public could continue to operate. Twenty-eight hundred (2800) state employees had been laid off in January 2003 prior to the passage of P.A. 03-2.

The ERIP at issue, as a vital part of the budget crisis legislation, was instituted to save a large sum of money with the reduction in payroll through the retiring of senior employees. It was estimated that the P.A. 03-2 ERIP would save \$164.4 million dollars in 2003-04 and \$150.5 million dollars in 2004-05. Said reduction in manpower through an ERIP also served to stop the necessity of laying off bargaining unit employees who served the public at various State agencies.

In the instant matter, though there was a substantial impairing of SEBAC's contractual rights, the institution of an ERIP was reasonable and necessary to serve an important public purpose under the circumstances of the severe fiscal crisis. The enacting of the ERIP was an essential part of the resolution of the fiscal crisis.

Negotiations between the State, acting through the Governor, and SEBAC had not produced an ERIP. The State was correct to use its sovereign power to enact legislation which produced an ERIP which helped safeguard the welfare of the citizens by resolving the budgetary fiscal crisis. With a budget in place, the State government could continue to operate and serve the citizens of Connecticut.

The facts received and discussed above clearly indicate that P.A. 03-2 survives scrutiny under the Contract Clause as the substantial impairment of SEBAC's contractual right by the State was reasonable and necessary to serve the important public interest of enacting a budget to operate State government. Therefore, said impairment does not constitute a violation of the Pension Agreement.

AWARD

The parties have submitted their respective versions of what ISSUE II should be concerning the merits of the instant grievance. The arbitrator in his award has chosen to use the version submitted by the State, which appears on the first page of this Award.

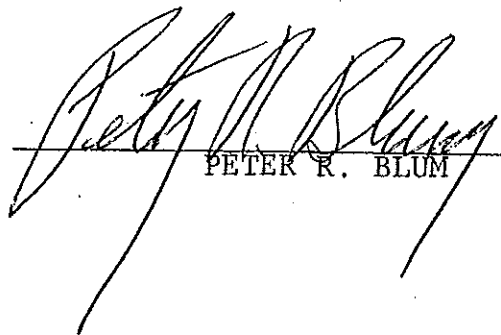
ISSUE I

The grievance filed by SEBAC identified as Joint Exhibit 1, is arbitrable.

AWARD - Continued

ISSUE II

The legislative enactment and implementation of an Early Retirement Incentive Program as provided in P.A. 03-2, without SEBAC's consent, is not a violation of the Pension Agreement between the parties.

 10/7/03
PETER R. BLUM