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KETCHIKAN EDUCATION ASSOCIATION, NEA-ALASKA,
Petitioner,
vs.
KETCHIKAN GATEWAY BOROUGH SCHOOL DISTRICT,
Respondent.

CASE NO. 02-1170-CBA

DECISION AND ORDER NO. 266

Digest: The Petitioner's petition is denied. The collective bargaining agreement clearly and unambiguously gives the Ketchikan Gateway Borough School District final authority and responsibility for the development of education programs. Thus, there is no need to compel the parties to arbitration under their collective bargaining agreement because the District has final authority over modification of the elementary reading program. Both the agreement and Alaska law provide the District with this authority.

Appearances: Willie Anderson, Uniserv Director for Ketchikan Education Association, NEA-Alaska (Association); Mitchell Seaver, attorney for Ketchikan Gateway Borough School District (District).

Panel: Aaron Isaacs, Jr., Vice Chair; members Randall Frank and Dennis Niedermeyer.

DECISION

Statement of the Case

The Association filed a petition to enforce the alleged settlement of a grievance reached with the District. The Association asserts that the District backed out of a settlement regarding the teaching of aspects of the Spalding reading program by expanding the program to more

school grades than provided for in the parties' settlement, and by requiring teachers to apply more aspects of the program than agreed to in the settlement. The Association contends that the reading program modification implemented by the District constitutes curriculum, and the District violated the parties' collective bargaining agreement when it did not involve the teachers in the curriculum change. Finally, the Association requests that we compel the parties to arbitration.

The District denies the allegation. The District contends there was no settlement of the grievance as the term "settlement" is traditionally applied. The District argues that the Ketchikan Gateway Borough School District Board (School Board) denied the grievance, and in doing so, affirmed the District Superintendent's use of the Spalding program. The District contends the Superintendent has authority to make reading program changes. Regarding arbitration, the District argues that the Association failed to file a grievance based on the expansion of the Spalding program into the second grade, and the request for arbitration is therefore untimely.

The Alaska Labor Relations Agency Board panel heard this dispute in Ketchikan on May 20 and 21, 2003. Hearing Examiner Mark Torgerson presided. Two of the original board panel members (Dick Brickley and Raymond Smith) were subsequently replaced. The current panel reviewed the hearing tapes and record, and deliberated this dispute on May 6, 2004, at which time the record closed. The Board based its decision on the evidence admitted and testimony presented during the hearing.

Issue

1. Did the parties settle the grievance dispute after the District's School Board issued its decision regarding the grievance?

2. Should we order the parties to arbitration?

Findings of Fact

The panel, by a preponderance of the evidence, finds the following facts:

1. The Association is recognized as the exclusive bargaining representative for teachers employed by the District.

2. The District employs the Association's bargaining unit members and other employees of the District's schools.

3. The Association and District successfully negotiated a collective bargaining agreement for the period July 1, 1999, to June 30, 2002.

4. School Board members became concerned when they learned that 40 percent of the District's students were reading below their designated grade level. The District was also

concerned that different schools were using different methods and materials to teach language arts.

5. The District considered several ways of strengthening the language arts program.

6. Robin Edenshaw, a District teacher, reported to the School Board that she used the Spalding method of teaching phonics, and she experienced some success using the method. (Exh. A).

7. The District's Superintendent, Harry Martin, is a certified reading specialist. He researched the Spalding method of teaching spelling and phonics. After Ms. Edenshaw reported her success in applying the Spalding method, the District received a grant from the State of Alaska to send two groups of teachers and principals to Washington state schools to observe the teaching of this method.

8. The Spalding program impressed the teachers and principals who observed the program in the Washington schools, but they felt that implementing the program would require a change of curriculum.

9. The District did not want to change the curriculum. Superintendent Martin decided the District would implement the Spalding program on a limited basis.

10. The District encouraged teachers to use the Spalding program. Teachers were encouraged but not required to attend training offered by the District.

11. Linda Horstman has taught school for 20 years, 16 years in Ketchikan. She teaches special needs for pre-school and kindergarten children. She is a past president of Association. Horstman did not have the opportunity to attend training. She watched a video, but the training video was aimed at teaching third grade students. She believes implementing Spalding at the kindergarten level constituted a change of curriculum because students do not have spelling words as part of the kindergarten curriculum. Students work on letter formation. Horstman does not assign them or ask them to use words.

12. Diane Lord has taught in the District for 19 years. She was initially a teacher resource person. She has taught second grade for 15 years. She has a Bachelor of Arts in Education and has taken courses after receiving her undergraduate degree. Lord understood that only the flashcard portion of the Spalding program would be taught, but it was clear to her that implementation in the District also included spelling. She was confused about which aspects of Spalding she was supposed to apply. She felt training on Spalding was inadequate.

13. John Dickinson has worked in the District for 28 years. He has taught fourth and fifth grade and a special education class. Now he teaches a first and second grade combination class, with the majority of his students in the second grade. He has held the position of rights chair for the Association for three years.

14. Dickinson testified that district teachers received different and mixed messages from principals regarding implementation of the Spalding program.

15. The Association heard concerns from several bargaining unit members regarding implementation of the Spalding program. On October 1, 2001, the Association filed a grievance protesting use of the Spalding program. The Association asserted that introduction of the Spalding program of teaching constituted a change of curriculum, and that the District violated Area 4, Section 9 of the collective bargaining agreement by changing curriculum without following the procedures required by Section 9.

16. Area 4, Section 9 of the 1999-2002 collective bargaining agreement, titled "Curriculum Development," states:

> A. Philosophy
> The ASSOCIATION and the KGBSD feel that the professional knowledge of teachers is necessary, beneficial, and desirable in the development of effective curriculum.
>
> B. Procedure
> 1. Teachers will be involved in the development of curriculum at both the building level and District level.
>
> 2. Whenever District-wide curriculum committees are formed, the Central Office administrator responsible for curriculum supervision and development shall request the staff of each building to select a representative, who has expertise in the curriculum area, to serve on the committee. The DISTRICT may supplement the committee with representatives from among other administrative personnel, parents, Board members, or members of the community not to exceed 50% of the total committee membership.
>
> 3. The chair of the curriculum committee will send copies of the curriculum committees' final reports to the ASSOCIATION.
>
> C. The ASSOCIATION will select a teacher representative to serve on inservice committees whose responsibility will be to recommend the content and schedules of teacher inservice sessions.
>
> D. It is understood that final decisions concerning the development of education programs are the sole responsibility of the SCHOOL BOARD.

(Exh. CC at 14) (Emphasis in original).

17. The District rejected the Association's grievance at steps one and two. In accordance with Area 3, Section 4(C), the Association filed a level three appeal with Superintendent Martin. (Exh. CC at 10). On October 30, 2001, Superintendent Martin sent Dickinson a letter rejecting the grievance at step three.

18. The final step in the parties' contractual grievance process required a hearing before the District's School Board. The School Board reviewed the Association's grievance appeal and, in a January 8, 2002, decision, affirmed the Superintendent's level three rejection. The School Board found there had been no change to the existing curriculum. Citing Area 4, Sections 9A, 9B(1) and 9B(2), the School Board stated:

> Instructional materials adopted during the Language Arts review cycle have not been replaced. The Board also finds that the items to be used are supplementary to the existing materials. The past practice of the District has been the adoption of instructional materials in conjunction with a curriculum review, i.e., every six years. Materials related to instructional strategies or methods that do not supplant use of the basic texts have not been and are not subject to this adoption process.
>
> The Superintendent has determined that the Spalding method should be used as an element of spelling and phonics instruction within the existing curriculum. Under BP6000(b), it is the role of the Superintendent to decide the general methods of instruction to be used. The Association argued that the use of rules as part of the Spalding method constitutes a curriculum change. However, all methods of spelling and phonics instruction use rules, and the Board finds that use of the Spalding method in this regard is not a change to the established Language Arts curriculum.
>
> The Association also argued that based on past practices under Area 4, Section 9, curriculum committees also review instructional materials and that, therefore, the Contract has been violated because the Spalding materials were not reviewed by such a curriculum committee. This argument overlooks the fact that such committees have only reviewed instructional materials as part of the periodic curriculum review process required by state regulation (4 AAC 05.080). Here, there has been no change in curriculum. In fact, at the time the District started using the Spalding method, there was no Language Arts Curriculum Committee in place because the curriculum was not undergoing the required periodic review.

(Exh. V at 2).

19. On January 10, 2002, the Association notified the School Board that it accepted the Board's decision. On a document that gave the Association a choice to appeal the School Board's decision to an arbitrator, the Association did not mark the box that indicated it would appeal to the next step: arbitration. Instead, the Association indicated that it accepted the School Board's Decision. In doing so, the Association spelled out its acceptance of the decision by inserting four "understandings" into its acceptance:

1) As stated on page 1 of the Board decision, ... "use of the Spalding method of handwriting is not required by the District. It is only an optional method that the classroom teacher may choose to use or not use." It is our understanding that the classroom teacher will decide which method of handwriting instruction and materials he/she will use.

2) As stated on page 2 of the Board decision, ... "at the Board level hearing, the Superintendent stated that the only special items being used in conjunction with the Spalding method were flashcards." It is our understanding that the Spalding flashcards will be used by all K-1 elementary teachers, and that these materials are the only component of the Spalding program that must be used.

3) As stated on page 1 of the Board decision, ... "at the time the District started using the Spalding method there was no Language Arts Curriculum Committee in place because the curriculum was not undergoing the required periodic review." It is our understanding that a Language Arts Curriculum Committee will be convened, selected as set forth in our negotiated agreement, before any substantive changes to the curriculum and adopted materials occur.

4) As stated on page 2 of the Board decision, ... "the Spalding method materials are supplementary materials not instructional materials under BP6161.1, that they do not supplant the use of basic texts . . . . . .", therefore, it is our understanding that all teachers will continue to follow the adopted Language Arts Curriculum and use the materials that were selected by the Language Arts Curriculum Committee, approved by the Curriculum Advisory Council, and adopted by the Board.

(Exh. W).

20. Sometime between January 10 and January 14, 2002, the District's attorney, Mitchell Seaver, requested that the Association amend wording in the understandings. As Association President at the time, Linda Horstman was aware that there was "a lot of back and forth" discussion between the Association and District representatives. As a consequence, the parties agreed to make a change to the understandings, and the Association signed and submitted a revised list of understandings on January 14, 2002. One word was changed from the original understandings. (Exh. X).

21. The Association agreed to relinquish its right to proceed to arbitration, based on the January 14, 2002, understandings.

22. Subsequently, Association members became concerned because they felt the District expanded its application of the Spalding program when the District began requiring the teaching of the Spalding program, in the curriculum, beyond what the Association understood from the School Board's January 8, 2002, decision, and the negotiated understandings agreed to by the parties. The teachers interpreted the School Board's Order and the understandings to mean the Spalding program and methods were supplemental materials, to be applied at the

discretion of each teacher. The teachers believed that the District not only expanded application of additional aspects of the Spalding program but also made the program mandatory.

23. On January 17, 2002, Supervisor John Luhrs sent two teachers ("Barbara" and "Jan") a staff memorandum regarding implementation of the Spalding program and the Association's understandings. Luhrs' interpretation of the understandings differed from that of the two staff teachers:

> As your supervisor I directed you to use the Spalding phonogram cards and follow the directions found on pages 2 or 3, Spelling section of the Spalding book several weeks ago. Today I received both in writing and verbal form that all anybody is required to do is use the phonogram cards in your instruction. Please refer to the second sentence of item 2 on the acceptance of decision document. The sentence reads "it is our understanding that the Spalding methodology will be used in conjunction with the flash cards by all K-1 elementary teachers . . . ." My interpretation of this acceptance is that the Spalding phonogram cards will be used as intended according to the Spalding Method teaching guide.

(Exh. 7).

24. In a letter dated February 6, 2002, Bob Hewitt, Principal of Point Higgins School, wrote Linda Horstman, Jenny Elliot, Christie Willet, and Sheila Miller. Hewitt indicated he had spoken to Superintendent Martin "in detail about the Spalding program. I fear I have not given you clear direction regarding the expectations of the superintendent. Here is my understanding and what I am directing you to do immediately." Hewitt proceeded to instruct the teachers on daily use of the Spalding program, including "written and oral phonograms review and spelling dictation of high frequency words. I suggest you use the Ayers words which are provided for you starting on page 134 of "The Writing Road to Reading." Hewitt indicated, among other instructions, that the daily oral phonogram review included having students read the phonograms. The written review required the students to write the phonograms. Hewitt also attached a form that he said he would use to evaluate how well the teachers are implementing the Spalding program. (Exh. 5).

25. On February 25, 2002, John Dickinson sent Superintendent Martin a "notice of arbitration" letter. In the letter, Dickinson noted that the parties' representatives met on February 11, 2002, "to discuss the KEA, School Board agreement of January 14, 2002. Your implementation of [the January 14, 2002] agreement is not consistent with our understanding of that agreement." Dickinson added that because the District failed to respond to the Association's concern, the Association would ask an arbitrator to rule on the "2001-2002-1 Curriculum Development" grievance. (Exh. Z).

26. Dickinson testified that in discussing implementation of the Spalding program, Superintendent Martin underestimated that the flashcard portion of the program would take only 20 minutes. Dickinson asserted that the written work required by Martin and Hewitt exceeds not only the time estimate but also the agreement that only the flashcard portion of the Spalding

program would be implemented. Dickinson testified that the District's directions on the Spalding program have changed from discretionary, supplemental materials to mandatory use of Spalding.

27. Area Three, subsection 1A of the parties' collective bargaining agreement defines "grievance" as "an alleged violation of this Contract or terms and conditions of employment specified in adopted BOARD Policy, Federal Law, Alaska State Law, Department of Education Rules and Regulations or Administrative Regulations." (Exh. CC at 9. (Capital letters in original).

28. Area Three, section E describes the agreement's arbitration process. Subsection 1A states:

> A grievance dispute which is not resolved at level three or level four may be submitted by the ASSOCIATION to arbitration by filing with the DISTRICT a notice of Arbitration. Only grievances involving the application of this Contract may be submitted to arbitration. The notice shall be filed within ten (10) days after receipt of the level three (3) or level four (4) decision.

(Exh. CC at 11).

29. The Association requested arbitration because the District refused to change its expanded policy.

30. The District refused to arbitrate. The District believes that implementation of the Spalding program at the second grade level was not a violation of the parties' agreement because the January 14, 2002, agreement resolving the grievance concerned only kindergarten and first grade classes, and the Association failed to file a grievance regarding expansion of the program into the second grade.

ANALYSIS

1. Did the parties settle the Association's grievance regarding the Spalding program implementation?

The Association contends that the parties settled their differences over the Association's grievance regarding application of the Spalding program method of teaching. First, the Association argues that implementing the Spalding program caused a change in curriculum that violated the collective bargaining agreement. Second, the Association argues that the District violated the resolution of the grievance by expanding application of the Spalding program beyond the parameters of the parties' January 14, 2002, understandings.

As a remedy, the Association requests that we order the District to honor the settlement agreement, or order the parties to attend arbitration in accordance with their collective bargaining agreement. The parties' agreement states in pertinent part: "A grievance dispute which is not resolved at level three or level four may be submitted by the ASSOCIATION to arbitration by

filing with the DISTRICT a notice of Arbitration. Only grievances involving the application of this Contract may be submitted to arbitration." (Exh. CC at 11).

AS 23.40.210 authorizes this agency to enforce collective bargaining agreements: AS 23.40.210(a) provides in part: "Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency."

In *Alaska Public Employees Association (APEA) vs. Alaska State Housing Authority*, Decision and Order No. 133 (May 29, 1991), the Agency heard a dispute that arose when the parties disagreed how to interpret a grievance settlement. They disputed the amount due a bargaining unit employee for back pay. The parties' collective bargaining agreement provided that settlement of a grievance should be given the same effect as that of an arbitrator's decision. (Decision and Order No. 133 at 6).

The Board panel in Decision and Order No. 133 concluded that "[w]here a contractual grievance procedure culminates in a settlement agreement, breach of the settlement agreement should constitute a breach of the grievance provision in the contract." (Decision and Order No. 133 at 7). Therefore, if the understandings that the parties reached here constitute a settlement agreement, any breach of the agreement would constitute a breach of the contract.

The District contends there was no settlement in the traditional sense. Further, the District asserts that the Association waived its right to request arbitration by agreeing to resolve the grievance. Alternatively, the District argues that it did not violate the parties' resolution of the grievance because its expanded application of the Spalding program into second grade classrooms was not at issue in the Association's grievance. We agree. The parties did not create a settlement when the Association included “understandings” in its acceptance. Clearly, the Association’s remedy – if it wished to pursue this dispute – was to appeal to arbitration in a timely manner. Instead, the Association chose to write its own interpretation of the School Board’s decision. The Association’s interpretation does not constitute a settlement. The fact that the District’s attorney persuaded the Association to change one word does not alter the nature of the understandings.

We further find the Association waived its right to proceed to arbitration when it decided to accept the School Board’s decision. To allow the Association to create its interpretation of the School Board’s decision and then appeal to arbitration at an unknown future time – because it believed the District altered the Association’s interpretation of the School Board’s decision – would muddy the process that was already confused by insertion of the “understandings.” The Association’s act of providing understandings and declining to request arbitration, waived its rights for arbitration under the grievance it filed, and ended the dispute.

2. Should we order the parties to arbitration?

The next question is whether the Association's petition triggers the arbitration provision of the collective bargaining agreement. Before we may order the parties to attend arbitration

under their contract, there must be a dispute and the dispute must involve application of a provision of the collective bargaining agreement.

The panel in Decision and Order Number 133 stressed the importance of resolving disputes through arbitration: "The requirement in AS 23.40.210 that each collective bargaining agreement include 'a grievance arbitration procedure which shall have binding arbitration as its final step' supports resolving disputes through grievance arbitration procedures. This Agency's policy is to promote arbitration by deferring to arbitration in appropriate cases." (*Id*. at 7-8) (citations omitted).[1] *See also State of Alaska vs. Alaska State Employees Association, AFSCME LOCAL 52, AFL-CIO*, Decision and Order No. 214 (March 4, 1997). In Decision and Order No. 214, the Board panel stressed the importance of honoring the parties' negotiated agreement: "If the petitioner prevails, the Agency will usually compel the parties to arbitration. The Agency returns the parties to their contractual process, rather than decide the actual contract dispute; the Agency does not substitute itself for the arbitrator." *Id.* at 4, *citing Fairbanks Fire Fighters Ass'n v. City of Fairbanks*, Decision & Order No. 142 (August 7, 1992).

In Decision and Order No. 133, the Board panel explained the negative effect of overstepping the grievance/arbitration process: "We believe that taking jurisdiction in this case would undercut the grievance arbitration clause in the parties' contract and encourage cases before this Agency that more properly belong before an arbitrator." (Decision and Order No. 133 at 8). We agree with this analysis and reasoning and apply it to this particular case. *See also Lower Kuskokwim Education Association/NEA-Alaska v. Lower Kuskokwim School District*, Decision and Order No. 172 (March 2, 1994).

The federal courts likewise favor arbitration of contract disputes when appropriate. The United States Supreme Court addressed arbitration and arbitrability in the *Steelworkers Trilogy* [2]and subsequently in *AT & T Technologies, Inc. v. Communications Worker*, 475 U.S. 643 (1986). In *Armco Employees Independent Federation v. AK Steel Corporation*, 252 F.3d 854(2001), the United States Court of Appeals, Sixth Circuit analyzed *AT&T* and cautioned against construing parties' contracts:

> This case is a reaffirmation of the *Steelworkers* principles that arbitration is the preferred method of settling labor disputes and that a court's only role should be determining whether disputes over interpretation of the collective bargaining agreement are subject to the arbitration provision. (citation omitted). Courts have no authority 'to construe collective-bargaining contracts and arbitration clauses, or to consider any other evidence that might unmistakably demonstrate that a particular grievance was not to be subject to arbitration.'

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[1] The panel also noted that if a dispute covers both an unfair labor practice allegation and a grievance, the Agency has discretion to hear the dispute or defer it to arbitration.

[2] The *Steelworkers Trilogy* includes *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564; *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574; and *United Steelworkers v. Enter. Wheel and Car Corp*., 363 U.S. 593 (1960).

252 F.3d 854, 859.

We reiterate that parties must exhaust their grievance arbitration process in appropriate cases. But we will not order the parties to proceed to arbitration when the relevant provisions in their collective bargaining agreement are clear and unambiguous. We have reviewed the parties' collective bargaining agreement and find that the specific question here is whether the collective bargaining agreement unambiguously authorizes the School District to decide matters of program development, and whether the dispute here clearly involves program development. Area 4, Section 9 of the agreement addresses curriculum and teacher involvement in development of curriculum. It requires teacher involvement, but only when curriculum committees are formed. There was no committee formed at the time this action occurred. Further, and more importantly, section 9(D) gives the School Board "sole responsibility" for "final decisions concerning the development of education programs . . ."

We find that developing a reading program at the elementary level is clearly related to program development. This dispute centered around the use of flash cards, and then the expansion of the Spalding program. We find the contract unambiguously gives final authority and responsibility to the School Board to develop this program.

We conclude the contract unambiguously authorized the District to take the action it took regarding the Spalding reading program. We find it is important that the School Board, as an elected body, have final say over the development of education programs.

We further conclude that the Association failed to prove its claim by a preponderance of the evidence. Accordingly, we deny and dismiss the Association's petition.

CONCLUSIONS OF LAW

1. The Ketchikan Education Association is an organization under AS 23.40.250(5), and the Ketchikan Gateway Borough School District is a public employer under AS 23.40.250(7).

2. This Agency has jurisdiction under 23.40.210 to enforce the parties' collective bargaining agreement, including requiring the parties to conduct arbitration in accordance with the grievance arbitration clause in their agreement.

3. As petitioner, the Association must prove each element of its case by a preponderance of the evidence.

4. The parties did not create a settlement when the Association included "understandings" in the acceptance of the School Board's decision on January 10, 2002, and January 14, 2002.

5. The parties' collective bargaining agreement requires that the Association must timely request arbitration to determine whether the District violated the collective bargaining

agreement. The Association waived its right to proceed to arbitration when it accepted the School Board's decision regarding the Association's October 1, 2001, grievance.

6. The Association failed to follow the parties' collective bargaining agreement regarding grievance and arbitration procedures when it did not file a grievance after the District expanded the Spalding Program beyond the kindergarten and first grade levels.

7. The District did not violate the parties' collective bargaining agreement. The collective bargaining agreement clearly and unmistakably provides that the School Board has final and sole authority and responsibility over development of education programs. Arbitration is unnecessary.

8. The Association failed to prove its case by a preponderance of the evidence.

ORDER

1. The Board denies the Association's petition against the District. The petition is dismissed.

2. The District shall post a notice of this decision and order at all work sites where members of the bargaining unit affected by the decision and order are employed or, alternatively, serve each employee affected personally. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

_____
Aaron Isaacs, Jr., Vice Chair

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Dennis Niedermeyer, Board Member

_____
Randall Frank, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of filing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the order in the matter of the *Ketchikan Education Association, NEA-Alaska, v. Ketchikan Gateway Borough School District*, Case No. 02-1170-CBA, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 18th day of June, 2004.

_____
Margie Yadlosky
Human Resource Specialist I

This is to certify that on the ____day of June 2004, a true and correct copy of the foregoing was faxed and mailed, postage prepaid, to
Willie Anderson, NEA-Alaska
Mitchell Seaver, KGB School District

_____
Signature