COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS
BEFORE THE COMMONWEALTH EMPLOYMENT RELATIONS BOARD

In the Matter of HOLYOKE SCHOOL COMMITTEE and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1459	Case No. RBA-23-10408 Issued: July 23, 2024

CERB Members Participating:

Marjorie F. Wittner, Chair
Kelly B. Strong, CERB Member
Victoria B. Caldwell, CERB Member

Appearances:

David Connelly, Esq. - Representing the Holyoke School Committee

G. Alexander Robertson, Esq. - Representing UFCW, Local 1459

CERB RULING ON REQUEST FOR BINDING ARBITRATION

Summary

On December 29, 2023, the United Food and Commercial Workers, Local 1459 (UFCW or Union) filed a request for binding arbitration (RBA) with the Department of Labor Relations (DLR) pursuant to Section 8 of M.G. L. c. 150E (the Law) and DLR Regulation 456 CMR 16.02. The Union seeks to arbitrate a dispute that arose out of a memorandum of agreement (MOA or agreement) that the Union and the Receiver of the Holyoke Public Schools (HPS) signed on September 11, 2023. On March 11, 2024, the DLR sent the Union and the Holyoke School Committee (School Committee) a letter seeking their respective positions on the RBA. Both parties submitted timely responses.

The Commonwealth Employment Relations Board (CERB) has considered these submissions and grants the request for the reasons set forth below.

Facts

The Union represented a bargaining unit of food service/cafeteria workers in the Holyoke Public Schools. The Union and the School Committee were parties to a collective bargaining agreement (CBA) that expired on June 30, 2022. The CBA contained a formal grievance procedure that included binding arbitration. During negotiations for a successor agreement, the Union proposed outsourcing cafeteria work to a private vendor. The parties' negotiations culminated in an MOA that stated in pertinent part:

> MEMORANDUM OF AGREEMENT
> BY AND BETWEEN
> THE RECEIVER OF THE HOLYOKE PUBLIC SCHOOLS
> AND
> HOLYOKE CAFETERIA WORKERS, UFCW, LOCAL 1459
>
> WHEREAS Holyoke Cafeteria Workers, UFCW, Local 1459 (Union) proposed that the Receiver consider outsourcing the cafeteria work performed in the Holyoke Public Schools (HPS or District) to a private vendor; and
>
> WHEREAS the Receiver, following such consideration which included an RFP process, decided to move forward with outsourcing the cafeteria work; and
>
> WHEREAS the parties have engaged in negotiations regarding both outsourcing and the expired CBA between the parties; and
>
> WHEREAS the parties have successfully concluded negotiations on all issues relating to the outsourcing and the CBA;
>
> NOW THEREFORE, the parties agree as follows:
>
> 1. As soon as administratively and operationally practicable, but no later than **September 30, 2023**, HPS shall cease providing in-house cafeteria work, and instead shall outsource that work to a private vendor ....

2. At the close of school business on the date of the transfer of the work to a private vendor, bargaining unit members' employment with HPS shall terminate.

3. It is the expectation that bargaining unit members shall seek employment with the new provider of cafeteria services . . . HPS will provide information as available and appropriate to facilitate the transition.

4. If a bargaining unit member chooses not to apply to work for [the new provider], HPS will assist said employee in finding an alternate position for which he/she is qualified within HPS . . . The parties agree that there is no guarantee of continued employment for an employee who chooses not to transition to [private vendor]. Any such employee who remains employed with HPS shall maintain their current seniority with the District. Any bargaining unit member who chooses not to apply to work for [private vendor] must notify the District HR Department as soon as possible but no later than **September 22, 2023**, in order to be considered for alternate employment with HPS. Employees who choose not to transition to [private vendor] shall receive a one-time lump sum payment equivalent to the severance payment they would have qualified for if they had chosen to transition to [private vendor]. (Emphasis in original).

* * *

6. HPS will pay the following amounts (less any standard and applicable withholding) as severance for any employee who transfers to [private vendor]:

A. Employees who have ten (10) or more years of service as a cafeteria worker for the District: $4500.
B. Employees who have less than ten (10) but more than five (5) years of service as a cafeteria worker for the district: $2,250
C. Employees who have less than five (5) years of service as a cafeteria worker for the district, but were hired prior to 1/1/2023: $1,000.
D. Employees who were hired on or after 1/1/2023 and worked as a cafeteria worker for the district: $500.

The payments referenced above shall be made as soon as practicable following the effective date of the member's separation from service with HPS.

* * *

8. This Memorandum of Agreement amicably resolves all issues and/or disputes that currently exist or could have been raised during the negotiations referenced herein. The parties agree that all bargaining obligations (if any) have been satisfied).

* * *

The MOA was dated September 11, 2023, and signed by UFCW Representative, Crystal Bouchie (Bouchie), and two employer representatives, Superintendent/Receiver Anthony Sota (Sota) and Chief HR Officer Beth Gage (Gage).[1]

There is no dispute that the MOA did not contain a grievance procedure or any provision for final and binding arbitration.

The Dispute

From October 6 - October 30, 2023, Gage and Bouchie exchanged several emails regarding Tammy Deschaine (Deschaine), a cafeteria worker who had applied for a paraprofessional position at HPS the prior school year. Deschaine began working in her new position sometime after August 17, 2023, but before the MOA was signed. On October 6, 2023, Bouchie sent Gage an email informing her that Deschaine had been denied severance pay. Bouchie opined that Deschaine should have received severance pay because she had "transitioned into another position per the agreement." Bouchie asked Gage to look into the matter so they could "get it resolved." Gage replied on October 11, 2023, indicating that Deschaine would not qualify for severance because she had "transitioned out of the unit prior to the agreement" and had been "working on this transition before the Union expressed an interest in being outsourced." Bouchie wrote back on October 30, stating in part that although Deschaine had transitioned before the agreement was signed, she had not transitioned before August 17. According

[1] The MOA that the Union provided with the RBA contained an empty signature line for Commissioner of Elementary and Secondary Education Jeffrey C. Riley (Riley). In the emails between Bouchie and Gage discussed above, Bouchie states that the MOA was fully executed on September 14, 2023. Neither party contends that the absence of Riley's signature renders the MOA invalid in any way.

to the Union, August 17 was the date on which the parties had reached a "tentative" agreement. Bouchie also expressed that Deschaine was being treated differently from a similarly situated bargaining unit member. Gage wrote back on October 30 stating in part:

> The agreement negotiated was for positions covered by UFCW as outlined in the CBA; the union signed the transition agreement on 9/11/2023 and was fully executed on 9/14/23. [Deschaine] was not a member with UFCW in a position covered by that agreement on 9/11/2023.
>
> Although the union may have made the request to be outsourced, the Receiver did not make that decision until much later and after the point in time in which [Deschaine] accepted the conditional offer to become a paraprofessional (which was on April 12, 2023).

Opinion

Section 8 of the Law permits "parties" to "any written agreement" to "include a grievance procedure culminating in final and binding arbitration to be invoked in the event of any dispute concerning the interpretation or application of such written agreement."[2]

[2] M.G.L. c. 150E, §8 states in its entirety:

> The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration to be invoked in the event of any dispute concerning the interpretation or application of such written agreement. In the absence of such grievance procedure, binding arbitration may be ordered by the commission upon the request of either party; provided that any such grievance procedure shall, wherever applicable, be exclusive and shall supersede any otherwise applicable grievance procedure provided by law; and further provided that binding arbitration hereunder shall be enforceable under the provisions of chapter one hundred and fifty C and shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of sections thirty-nine and forty-one to forty-five, inclusive, of chapter thirty-one, section sixteen of chapter thirty-two, or sections forty-two through forty-three A, inclusive, of chapter seventy-one. Where binding arbitration is provided under the terms of a collective bargaining agreement as a means of resolving grievances

In the absence of such grievance procedure, Section 8 authorizes the CERB to "order binding arbitration at the request of either party."[3] The CERB will order binding arbitration where there is: 1) a written agreement in effect at the time of the alleged event; 2) there is a dispute over the interpretation or application of the written agreement; and 3) the agreement does not provide for final and binding arbitration. Essex County Sheriff's Department, 29 MLC 75, 76, RBA-01-151, 152 (October 10, 2002). When ruling on RBA petitions, the CERB does not address the question of arbitrability because that is a threshold question for the arbitrator to decide. Instead, the CERB performs a limited review of the merits to ensure that it is at least "arguably arbitrable." Board of Higher Education, 29 MLC 91, RBA-02-154 (2002) (the CERB performs "…this review to ensure that its order does not compel the parties to perform a futile act." (citing Essex County Management Association, 20 MLC 1519, 1521, RBA-133 (April 29, 1994)). See also Town of Grafton, 8 MLC 1796, 1798, RBA-68 (January 29, 1982) (citing Town of Danvers, 1 MLC 1231, 1232, MUP-2068 (December 20, 1974)).

All three requirements are present here. The MOA is a written agreement that was in effect when Deschaine was denied severance; there is an arguably arbitrable dispute

> concerning job abolition, demotion, promotion, layoff, recall, or appointment and where an employee elects such binding arbitration as the method of resolution under said collective bargaining agreement, such binding arbitration shall be the exclusive procedure for resolving any such grievance, notwithstanding any contrary provisions of sections thirty-seven, thirty-eight, forty-two to forty-three A, inclusive, and section fifty-nine B of chapter seventy-one.

[3] The CERB is the successor to the Labor Relations Commission. See St. 2007, c. 145, Section 5, 7, and 8.

over whether Deschaine was entitled to severance pay under the Sections 4 and 6 of the MOA; and the MOA does not provide for final and binding arbitration.

The School Committee contends, however, that binding arbitration should not be ordered in circumstances where, as here, there is neither a current collective bargaining agreement nor a continuing bargaining relationship between the parties, and the parties did not expressly agree that disputes would survive the cessation of the parties' collective bargaining relationship. As part of this argument, the School Committee contends that the reference to a "written agreement" in Section 8 of the Law must necessarily mean a collective bargaining agreement. Although the School Committee acknowledges that the terms "written agreement" and "parties" are not defined in the Law, it claims that a contrary interpretation would allow anyone with any dispute arising out of a written agreement to seek the intervention of the DLR. We address these arguments below.

First, assuming that the School Committee is correct that the reference to "any written agreement" in Section 8 refers to collective bargaining agreements,[4] the CERB has previously treated written documents such as MOAs, side letters of agreement, and court approved settlements as the equivalent of collective bargaining agreements subject

[4] We note that although the third sentence of Section 8 expressly refers to a "collective bargaining agreement," the first sentence does not. Instead, it uses the broader term "any written agreement" when granting parties the option to include "in any written agreement a grievance procedure culminating in final and binding arbitration" or to seek binding arbitration from the CERB if there is no such grievance procedure. The use of the term "collective bargaining agreement" later in Section 8 and in other sections of Chapter 150E, including Sections 7 and 9, strongly suggests that this choice of words was deliberate, with the term "any written agreement" being intentionally broader than the term collective bargaining agreement. Because, for reasons set forth below, we construe the MOA here as the equivalent of a collective bargaining agreement, we need not conduct a full statutory analysis as to whether the term "any written agreement" necessarily refers to a collective bargaining agreement as the School Committee argues.

to Sections 7 and 8 of the Law. See Town of Sharon, 22 MLC 1695, RBA-139 (April 23, 1996) (binding arbitration ordered where the agreement lacking a binding arbitration provision was a collectively- bargained memorandum of agreement, not a CBA); Board of Trustees of the University of Massachusetts (Amherst), 30 MLC 106, SUP-02-4890 (January 21, 2004) (settlement agreement of a court case concerning a wage-reopener provision is the equivalent to a CBA for purposes of seeking funding for the agreement pursuant to Section 7(c) of the Law); Town of Ipswich, 11 MLC 1403, MUP-5248 (February 7, 1985), *aff'd sub nom.* Town of Ipswich v. Labor Relations Commission, 21 Mass. App. Ct. 1113 (1986) (treating a side letter agreement negotiated within the context of successor contract negotiations as an enforceable CBA). If the agreement reflects a meeting of the minds between a public employer and an employee organization representing its employees, and covers a mandatory subject of bargaining, it may be equivalent to a collective bargaining agreement. Board of Trustees of the University of Massachusetts (Amherst), 30 MLC at 108.

We similarly find the MOA at issue here to be the equivalent of a collective bargaining agreement for purposes of Section 8. The preamble to the MOA reflects that the parties' objective was to negotiate over "both outsourcing and the expired CBA between the parties." It thus arose out the parties' collective bargaining relationship and, upon execution, reflected the parties' mutual understanding of how the cessation of that relationship would be finalized, i.e., through their negotiations over outsourcing and severance pay, both mandatory subjects of bargaining. See Commonwealth of Massachusetts, 26 MLC 161, 163, SUP-3835 (March 13, 2000) (the decision to subcontract work formerly performed by bargaining unit members is a mandatory subject

of bargaining). Newton School Committee, 5 MLC 1016, 1023, MUP-2507 (June 2, 1978) (severance pay is a mandatory subject of bargaining). Under these limited circumstances, and as a matter of first impression, we find that the MOA in this case is the equivalent of a collective bargaining agreement that falls within the meaning of "any written agreement" covered by Section 8 of the Law.

Further support for this conclusion may be found in the second sentence of Section 8, which states that binding arbitration under this section "shall be enforceable under the provisions of Chapter 150C." Like Section 8 of the Law, Section 1 of Chapter 150C, titled "Legal status of agreements," uses the term "written agreement" and provides as follows:

> A written agreement or a provision in a written agreement between a labor organization . . . and an employer . . . to submit to arbitration any existing controversy or any controversy thereafter arising between parties to the agreement, including but not restricted to any controversy dealing with rates of pay, wages, hours or other terms and conditions of employment of any employee or employees . . . shall be valid, enforceable and irrevocable, except as otherwise provided by law or inequity for the revocation of any contract.

Reading both statutes as a harmonious whole, and in light of Chapter 150E's overarching mission to prevent, or to promote the prompt resolution of, *labor* disputes, see generally, M.G.L. c. 23, § 9O, we find that the reference to "any written agreement" in the first sentence of Section 8 refers to a written agreement between an employer and a union covering mandatory bargaining subjects, such as the MOA at issue here. See David Miller v. Board of Regents of Higher Education, 405 Mass. 475, 480 (1989) (construing the term "parties" in Section 1 of Chapter 150C as the parties to a collective

bargaining agreement, i.e., a labor organization or organizations and an employer or employers).[5]

Ultimately, as a written and collectively-bargained agreement between a labor organization and an employer that addresses bargaining unit members' terms and conditions of employment in light of the imminent outsourcing of bargaining unit work, it is the appropriate subject of an RBA under Section 8 of the Law.

This is the case even if, due to the outsourcing, the parties no longer have a continuing collective bargaining relationship. The Employer cites no cases and we have not found any which hold that an ongoing bargaining relationship is a condition precedent to a valid RBA. Rather, as set forth above, an order for binding arbitration requires only that the written agreement be in effect when an "arguably arbitrable" dispute occurs. See Essex County Sheriff's Department, 29 MLC at 76. This requirement is consistent with federal precedent holding that certain provisions in collective bargaining agreements are enforceable through arbitration even after they have expired, so long as the agreement was in effect when the dispute arose. See Litton Financial Printing Division, A Division of Litton Business Systems, Inc. v. National Labor Relations Board, 501 U.S. 190, 205-206 (1991) (citing Nolde Brothers, Inc. v. Bakery Workers, 430 U.S. 243 (deeming post-contract expiration dispute over severance pay arbitrable where dispute arose under the contract). Moreover, although the parties' collective bargaining relationship would soon end, the MOA expressly contemplated that some of the outsourced individuals would continue to provide services to their former public sector employer. The DLR's mission

[5] Based on Miller, there is no merit to the Employer's argument that granting this RBA in this case would set a precedent that would allow anyone with any dispute arising out of a written agreement to seek the DLR's intervention.

of promoting the prompt resolution of labor disputes in the public sector would thus be served by ordering arbitration here. Finally, the parties entered into the MOA fully aware that their bargaining relationship was about to end due to outsourcing. Such an agreement would be illusory if, absent a specific provision to the contrary, the cessation of the relationship prevented the Union from seeking to enforce its key provision.

For these reasons, and those set forth above, we conclude that it is appropriate to grant this RBA.

WHEREFORE, the CERB, by virtue of the power vested in Section 8 of the Law, HEREBY ORDERS:

1. That the dispute raised by the Union's request for binding arbitration be promptly submitted to binding arbitration.
2. That within thirty (30) days of the date of this decision, the parties shall inform the CERB of the arbitrator selected. If the parties do not agree on an arbitrator, they shall submit the dispute for arbitration before the DLR.

SO ORDERED.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

Marjorie F Wittner

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MARJORIE F. WITTNER, CHAIR

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KELLY B. STRONG, CERB MEMBER

Victoria B. Caldwell

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VICTORIA B. CALDWELL, CERB MEMBER