

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

KENOSHA EDUCATION ASSOCIATION

and

KENOSHA SCHOOL DISTRICT

Case 150
No. 54782
MA-9789

Appearances:

Mr. Bruce Meredith, Staff Counsel, on behalf of the Association.

Davis & Kuelthau, S.C., by Mr. Clifford B. Buelow, on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "District", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Kenosha, Wisconsin, on May 5, 1997. The hearing was transcribed and both parties thereafter filed briefs. The Association filed a reply brief that was received on August 14, 1997.

Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

Whether the District violated Article X, Section B, of the contract when it refused to let the Association use District mailboxes for political purposes and, if so, what is the appropriate remedy? 1/

BACKGROUND

The Union and the District are privy to a collective bargaining agreement which states in Article X, Section B:

The Association, in the performance of its obligation as negotiating agent for teachers, shall have the right to place notices,

1/ Both parties agreed at the hearing that I need not decide any constitutional issues in this proceeding and I have not done so.

circulars, and other material on bulletin boards designated for teacher use and in teachers' mailboxes. It is agreed that such material shall be professional in approach, will not deal in personal attack, or reflect unfavorably on the teaching profession or on the District. If these standards are violated, the privilege of using the teachers' mailboxes or posting on the bulletin boards may be revoked by the Office of the Superintendent with respect to the offending party. Revocation action will be subject to the grievance procedure commencing at the third step. (Emphasis added).

This proviso has been in prior contracts since 1968 (District Exhibit 2a).

The Association at various times has unsuccessfully attempted in contract negotiations to change this proviso. Thus, the Association in 1972 negotiations proposed contract language reading:

The Association shall have the right to place notices, circulars, and other material on bulletin boards designated for teacher use and in teachers' mailboxes.

This proposal therefore sought to delete that part of the contract which pegged the Association's right to distribute materials to "the performance of its obligations as negotiating agent for teachers. . ."

In subsequent negotiations for a 1972-1973 contract, the Association unsuccessfully proposed language reading:

The Association and its representatives shall have the right to post notices of activities and matters of Association concern on teacher bulletin boards, at least one of which shall be provided in each school building. The Association may use the district mail service and teacher mail boxes for communication to teachers.

This proposal, again, sought to delete that part of the contract which pegged the Association's right to distribute materials to "the performance of its obligations as negotiating agent for teachers. . ."

In the subsequent negotiations for a 1973-1974 contract, the Association unsuccessfully proposed language reading:

The Association, in the performance of its obligation as the legally elected representative of the teachers, shall have the right to place notices, circulars, and other material on bulletin boards designated for teacher use and in teachers' mailboxes.

This proposal, again, sought to delete that part of the contract which pegged the Association's right to distribute materials to "the performance of its obligations as negotiating agent for teachers. . ."

In 1981, the Association unsuccessfully proposed language reading:

The Association shall have the right to place notices, circulars, and other material on bulletin boards designated for employee use and in employees' mailboxes. . .

This proposal, again, sought to delete that part of the contract which pegged the Association's right to distribute materials to "the performance of its obligations as negotiating agent for teachers. . ."

This language notwithstanding, the Association and the District over the years disagreed as to whether the Association could use the District's mailboxes for political purposes. The record thus shows that the Association at times made political endorsements in GLUE, its monthly newsletter (Association Exhibits Nos. 1-38), and that the District at other times expressly told the Association, dating back to February 6, 1976, (District Exhibit No. 9), that it could not use the mailboxes for that purpose.

Former District Superintendent John Hosmanek testified that while the District had a general policy of prohibiting political endorsements, enforcement of the District's policy was left to individual school principals, some of whom did not enforce the policy. He thus over a 10-year period issued directives to his administrators wherein he expressly told them that the Association was prohibited from distributing GLUE if it contained political endorsements (District Exhibits 16-21). School Board member Joan Haubrich also testified about the "continuing argument about mailboxes" and explained how the Association at times did not use the District's mailboxes to convey its political endorsements but, instead, used the United States mail for that purpose. She also testified about the Association's attempts to change the contract language in the 1970's.

The Association hence is correct in stating that from the Union's perspective, "political endorsements were allowed because political endorsements were permitted", while from the District' perspective, "political endorsements were not allowed because there was a broad policy prohibiting such usage and sometimes individual principals were able to enforce the prohibition."

The District phrases the matter differently, saying there was a "running gun battle" between the two over this issue.

Throughout most of this time, the District has operated under a written policy which expressly forbids any of its employees from engaging in any political activities on District property (District Exhibits 4-7).

In 1989, the Association for the first time endorsed specific candidates for the Kenosha School Board.

In 1996, the Association took a position on a school referendum and who it favored in the 1996 presidential election and it therefore in August and September, 1996, distributed copies of GLUE in all District mailboxes which reflected its positions.

By letter dated September 17, 1996, District Superintendent Michael L. Johnson informed Association Executive Director Michel R. Bernier:

. . .

I have been asked to advise you of the Board of Education's decision to suspend the KEA's mailbox privileges from now through the date of the presidential election. The Board has reached this decision because recent issues of GLUE contained commentary urging a "yes" vote in the recent referendum and endorsements of several political candidates.

The District and the KEA have had several communications regarding similar matters in the past. For example, by letter dated March 24, 1993, Superintendent Bisciglia advised the KEA that such behavior was in violation of Board policy and the parties' collective bargaining agreement. A similar letter was sent by Acting Superintendent Mangi on February 28, 1996. (I am enclosing copies for your review.) In addition, shortly before the KEA distributed the recent issues of GLUE, Linda Euting advised you that the KEA could not use school mailboxes to distribute GLUE if it contained political commentary and endorsements.

In his letter of February 28, 1996, Acting Superintendent Mangi stated that the District was "putting the KEA on final notice" that the District would not tolerate such conduct in the future. In that same letter, Acting Superintendent Mangi stated that the District would take appropriate action if the KEA continued to engage in

such behavior, including, but not limited to, revocation of the KEA's privilege of using teacher mailboxes. Given the KEA's refusal to comply with Board policy and the parties' collective bargaining agreement, the Board deemed it appropriate to suspend the KEA's mailbox privileges until Wednesday, November 6, 1996.

. . .

The instant grievance followed on September 23, 1996.

POSITIONS OF THE PARTIES

The Association argues that it is entitled to use the District's mailboxes because its position is both "lawful and consistent with general principles of constitutional and labor law", whereas the District's position "could raise First Amendment concerns." The Association also claims that its interpretation is most consistent with "syntax and bargaining history"; that the "District's interpretation is undermined by a lack of consistency"; that the District's reliance on bargaining history is "meaningless"; that the District's argument about public monies should be ignored; and that the District has not "offered any affirmative basis to adopt its construction of Article X."

The District, in turn, maintains that the Association "does not act within its 'obligations' as 'negotiating agent' for the teachers when it engages in conduct unrelated to negotiations such as political activities and endorsements" and that bargaining history and past practice support its position.

DISCUSSION

The District is correct on all points.

Thus, Article X, Section B, of the contract is quite clear in limiting the Association's use of District's mailboxes to the "performance of its obligation as a negotiating agent. . ." Endorsing political candidates and taking positions on partisan, political matters do not fall within the scope of this limitation since the Association is not "obligated" to support political candidates or political causes. Instead, the Association is only "obligated" to act on behalf of its members regarding matters which involve their hours, wages and working conditions.

As for any past practice, the Association's Reply Brief states: "The Association concedes that the past practice has been mixed." Since the record establishes that that is so, and since the District over the years repeatedly told the Association that it could not distribute politically-related matters, there is no basis for finding that the Association's position is supported by any well-developed past practice which allows it to use District mailboxes for this purpose.

That leaves negotiating history. As to that, the Association first in 1972, and then in negotiations for the 1972-1973 contract, and then in negotiations for the 1973-1974 contract, and then in 1981 negotiations unsuccessfully tried to delete from Article X, Section B, any limitations on the kind of materials it could place in District mailboxes. The Association's attempts to change that language could only have reflected its understanding at that time that it did not have *carte blanche* to distribute political materials. Said understanding was well grounded because the District repeatedly told the Association that it could not use District mailboxes for political purposes.

The Association contends otherwise by asserting that no witnesses testified about the Association's past proposals; that "there is no evidence to suggest that the Association was attempting to secure the right to use the mailbox privileges for the purpose of distributing internal Union endorsements"; and that the Association was sometimes able to use the mailboxes for this purpose, thereby leading the Association to not make "more than a casual effort to clarify the ambiguity." It cites Copps Distributing Co., 54 LA 824, 828 (Krinsky, 1970), in support of this claim.

In Copps, the employer unsuccessfully tried in negotiations to obtain contract language which expressly limited bumping. That failure notwithstanding, Arbitrator Edward B. Krinsky ruled that the phrase "seniority shall prevail" did not allow employees the right to bump junior employees from jobs where there were no vacancies and where there were no layoffs. Id., at 827. Arbitrator Krinsky went on to find:

The final basis on which the Union supports its position is that the Company failed in previous negotiations to secure contract language specifically restricting bumping.

There was no testimony by either party conclusively showing the specific proposals made or the context in which they were made. The undersigned does not know what events prompted the Company in this bargaining relationship to propose restrictive language.

The fact that a Company proposes restrictive language in an agreement does not mean that it is attempting to gain rights which it does not already have. It may be attempting to clarify areas which the Union is attempting to change and which management considers its sole area of responsibility. Id., at 825.

Copps, however, is not really on point because the record here does clearly show the specific proposals made by the Association, just as it shows that the Association made those proposals because it knew that the District at that time was prohibiting the Association from using

its mailboxes for political purposes. The "events" leading to the Association's proposals hence were fully known, unlike the situation in Copps. In addition, the Association's proposals here were not aimed at clarifying Article X, Section B. They, instead, were aimed at totally deleting that part of Article X, Section B, which limited the Association's mailbox privileges to matters involving "the performance of its obligations as negotiating agent for teachers. . ." In Copps, there was no similar attempt to delete express contract language.

In addition, the Association's unsuccessful effort to delete this language can hardly be called "casual" when it made specific proposals to delete it on four separate occasions over a 10-year period. Moreover, while no Association representative testified about the Association's proposals, former School Board member Haubrich did. Based upon her testimony and the totality of the record, it is clear that the Association failed in past negotiations to obtain the result it wants here.

Moreover, there is no merit to the Association's claim that it can use the District's mailboxes for political purposes because the District allows it to use the bulletin board in the teacher's lounge for that purpose, as the District since the 1970's has repeatedly objected to the use of its mailboxes for political purposes; no similar objections, however, apparently were voiced over the bulletin boards. For reasons which remain unclear, the District therefore has treated the use of its mailboxes differently from the use of its bulletin boards. That difference is insufficient to overturn its longstanding mailbox ban.

As a result, the District under the contract can rightfully ban from its mailboxes any Association materials which involve political and/or School Board endorsements; which take positions on any proposed legislation at either the state or federal level not directly related to the Association's statutory obligations as a labor organization which it must perform; which take positions on any District or other public referenda; which solicit funds or assistance for any political or School Board candidates; which oppose or support any political or School Board candidates; which involve political commentary; or which advocate lobbying of any public body other than the School Board; 2/ and/or which in any other way involve political activity which must be performed by a bargaining agent.

In light of the above, it is my

AWARD

2/ Since the Association has contractually agreed to Article X, Section B, which limits its mailbox privileges in this fashion, there is no merit to the Association's claim that such agreed-to restrictions "could raise First Amendment concerns". Moreover, if the Association wishes to communicate with its members about political matters without using District facilities, nothing herein prevents it from doing so.

That the District has not violated Article X, Section B, of the contract by refusing to let the Association use District mailboxes for political purposes; the grievance is therefore denied.

Dated at Madison, Wisconsin, this 15th day of September, 1997.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator