FST CV 08 4015485 S	: SUPERIOR COURT
STAMFORD EDUCATION ASSOCIATION	: JUDICIAL DISTRICT OF
	: STAMFORD/NORWALK
V.	: AT STAMFORD
STAMFORD BOARD OF EDUCATION	: OCTOBER 23, 2009

MEMORANDUM OF DECISION
Re: APPLICATION TO VACATE
ARBITRATION AWARD

I. Background and Facts

The plaintiff Stamford Education Association (SEA) is the recognized bargaining unit or agent for teachers employed by the defendant Stamford Board of Education (Board). SEA and the Board are parties to a collective bargaining agreement in effect from July 1, 2007 through June 30, 2010. SEA has made application to vacate an arbitration award made under the provisions of what is known as the Teacher Negotiation Act (TNA) specifically, General Statutes § 10-153f(c). The Board opposes the application to vacate.

The controversies that were arbitrated arose from the selection of Westhill High School in Stamford, Connecticut to participate in Project Opening Doors' (POD) Advance Placement Teaching Training Incentive Program (APTTIP) which is a six year program focused on increasing student participation and performance in math, science and English Advance Placement (AP) courses and tests in a particular school district. Tr. 27; D. Exs. 103, 115[1]. POD is a Connecticut

[1] References to "Tr. __" are to the transcript of the arbitration hearing. References to "D" Ex are to the Board's exhibits admitted during the arbitration. References to "P". Ex. are to SEA exhibits.

organization which receives funding and support from the federal government, the State of Connecticut, and private sector corporations and foundations through the National Math and Science Iniative, a non-profit organization (NMSI). Tr. 27; D. Exs. 103-106. NMSI made a grant to the State of Connecticut and the Connecticut Business & Industry Association to support POD. Tr. 27; D. Ex. 103. Westhill, one of ten school districts selected in Connecticut for project, is expected to receive about $594,000, over the life of the program if it meets the POD requirements. Tr. 40; D. Exs. 108, 114, 115.

Westhill is considered a "gain" school, i.e., one where there is an existing AP program that can be reinforced. This is distinct from a "launch" school where the AP program is weak or non-existent. Tr. 34. A significant component of POD's APTTIP are financial incentives directed to AP teachers, but as the only "gain" school in the Connecticut program, teacher incentives at Westhill will be limited to $1,000, $2,000 or $3,000 annually, depending on the number of students who do well on the AP exams, defined as scoring 3 or better. Tr. 36, 38; D. Exs. 108, 109, 112, 113, 120.

In February 2008 the Superintendent of Stamford Public Schools was notified that Westhill had been selected for POD's APTTIP. The letter of notification outlined the POD money to be available ($594,267.) and what financial commitments by Westhill were expected ($275,309.) D. Ex. 120, February 19, 2008 letter from Vautour, pp. 9, 10. The notification specified that up to $21,000 annually in teacher incentive pay and $9,000 in stipends annually for lead AP teachers were included in the POD grant. Id., Vautour letter, p. 9. In March 2008 the Superintendent signed a letter agreement with POD committing Westhill to the POD program. P. Ex. 5-20 to 5-27. The agreement stated in several places that the POD program would rely on incentive payment to

teachers for students' academic achievement and specified that annual payments would be made to individual AP teachers of $1 - 3,000 depending on the number of students achieving a "3" on AP exams. Id., 5-23, 5-24.

According to SEA the first time it learned of the letter agreement with POD was a month later, on April 7, 2008. Tr. 80. SEA demanded negotiations relative to the POD program. P. Ex. 5-32. Negotiations and a mediation pursuant to TNA ensued, and some agreements were reached between SEA and the Board. However, two outstanding issues remained namely the incentive payments, and the precedential impact of the agreement, and the parties agreed to take these to arbitration in accordance with General Statutes §10-153f(c).[2]

Pursuant to General Statutes § 10-153f(c)(4) the parties submitted their "last best offer" on the two disputed issues. On the issue of incentive payments to teachers the SEA's last best offer stated:

> "As part of the "Implementation of Westhill High School Advanced Placement Initiative," there shall be no merit, incentive, or bonus payments to any Westhill High School AP mathematics, science or language arts teacher based upon student test scores on AP mathematics, science, or language art exams."

The Board's last best offer stated:

> "Incentive payments by Project Opening Doors directly to participating teachers is a decision made by Project Opening Doors not directed by the Stamford Public Schools."

On the issue of precedential impact the SEA last best offer was:

> "Implementation of this initiative shall not be considered to be part of the 'negotiations history' in any future negotiations and arbitrations and, under no circumstances, be admissible in any TNA arbitration for any purpose. Moreover,

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[2]The negotiation, mediation and arbitration provisions of TNA are described quite fully in *Education Association of Clinton v. Board of Education*, 259 Conn. 5 (2002).

participation in such program shall not be construed as an acknowledgment or admission by the Stamford Education Association as approval of any mode of compensation based on merit or bonus pay or any other design different from the single base salary schedule."

The Board's last best offer was:

"The parties agree that implementation of this required element by Project Opening Doors shall not set a precedent with respect to differentiated compensation, and the parties shall not cite the various elements of participation in Project Opening Doors as setting a past practice or precedent in any other setting, including but not limited to future successor contract negotiations."

The three-person arbitration panel, by a two-to-one vote, awarded the last best offer of the Board on the incentive payments issue and awarded SEA's last best offer on the precedential impact.

II. Scope of Review

The arbitration decision is subject to judicial review upon the filing of an application to vacate or modify the decision. The statute providing for such review states:

"The superior court, after hearing, may vacate or modify the decision if substantial rights of a party have been prejudiced because such decision is: (A) In violation of constitutional or statutory provisions; (B) in excess of the statutory authority of the panel; (C) made upon unlawful procedure; (D) affected by other error of law; (E) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

General Statutes § 10-153f(c)(8)

As noted by the Connecticut Supreme Court, this court's authority to vacate or modify the arbitration award is confined to the six grounds set out in the statute which were described as "narrow." *Education Association of Clinton* v. *Board of Education*, supra, 259 Conn. 21. Both parties agree that the standards set out in General Statutes § 10-153f(c)(8) are the same as found in

the Uniform Administrative Procedures Act (UAPA). See General Statutes § 4-183(j). The standard of judicial review under the UAPA has been characterized as "very restricted". *Bancroft v. Commissioner of Motor Vehicles*, 48 Conn. App. 391, 399 (1988) [quoting *Costello v. Kozlowski*, 47 Conn. App. 111, 114 (1997).] "The plaintiff must do more than simply show that another decision maker, such as the trial court, might have reached a different conclusion. . . . the plaintiff must establish that substantial evidence does not exist in the record as a whole to support the agency's decision . . . [the] substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts" *Tarullo v. Inland Wetlands and Watercourses Commission*, 263 Conn. 572, 584 (2003).

III. The Arbitration Award

The overriding conflict between the parties to this dispute is the issue of incentive payments to AP teachers based on their students' performance on AP exams. The incentive payments were considered an integral part of APTTIP by both POD and NMSI, the sources of the grant money. As reflected in its last best offer, the Board agreed to these payments which were to be made, if earned, directly to the teachers by POD. As evidenced by its last best offer, SEA was opposed.

After hearings on October 3, 2008 for procedural matters and an evidentiary hearing on October 17, 2008, the arbitration award (Award) was issued on November 17, 2008, after receipt of post hearing briefs. As noted, the issue involving incentive payments was decided in favor of the Board's position by a two-to-one majority. Both the majority and dissent wrote extensively in support of their respective positions. The Award in favor of SEA's position on the precedential

impact issue was relatively brief. The Award also contained a Side Letter which set forth the areas of agreement reached during the negotiation and mediation process. These agreements included an annual stipend of $2,250 for each of three "lead" AP teachers and a site coordinator and compensation for other AP teachers in math, science and language arts for activities outside normal contract hours, at the contracted summer school rate.

Both the majority and dissent recognize that a Connecticut Statute requires the arbitrators to consider specific factors as follows:

> "In arriving at a decision, the arbitrators or the single arbitrator shall give priority to the public interest and the financial capability of the town or towns in the school district, including consideration of other demands on the financial capability of the town or towns in the school district. In assessing the financial capability of the town or towns, there shall be an irrebuttable presumption that a budget reserve of five per cent or less is not available for payment of the cost of any item subject to arbitration under this chapter. The arbitrators or the single arbitrator shall further consider, in light of such financial capability, the following factors: (A) The negotiations between the parties prior to arbitration, including the offers and the range of discussion of the issues; (B) the interests and welfare of the employee group; (C) changes in the cost of living averaged over the preceding three years; (D) the existing conditions of employment of the employee group and those of similar groups; and (E) the salaries, fringe benefits, and other conditions of employment prevailing in the state labor market, including the terms of recent contract settlements or awards in collective bargaining for other municipal employee organizations and developments in private sector wages and benefits."

General Statutes 10-153f(c)(4). Both the majority and dissent discussed the above factors or criteria in arriving at disparate conclusions. They differed significantly in determining whether these factors supported the Board's or SEA's position. However, it is not this court's role under the applicable law to adjudicate which analysis is the more persuasive or more correct, rather, as set forth above, it is to determine whether "substantial rights of a party have been prejudiced" because of one of the six grounds delineated in General Statute § 10-153f(c)(8). The court will now

turn to those grounds.

A. Violation of, or compliance with, Constitutional or Statutory Provisions. Section 10-153f(c)(8)(A).

At the outset, the court finds that the majority award very carefully and specifically followed and considered the factors mandated by Section 10-153f(c)(4), and to that extent it is in full compliance with that critical statutory mandate. SEA contends that the Board and SEA must deal exclusively with each other regarding teachers' working conditions. Without citing to any statute, SEA quotes extensively from *West Hartford Education Association* v. *DeCourcey*, 162 Conn. 566 (1972).

> "Section 10-153d makes it unlawful for the board to interfere with, restrain or coerce employees in the exercise of their rights under the Teacher Negotiation Act. A similar prohibition appears in the National Labor Relations Act, 29 U.S.C. § 158 (a)(1) which makes it an unfair labor practice to interfere with, restrain or coerce employees who seek to pursue their rights under that act. Thus, we can again turn to cases arising under the federal act for guidance.
>
> The National Labor Relations Act makes it an employer's duty to bargain collectively with the chosen representatives of his employees, and since this obligation is exclusive, it exacts the negative duty to treat with no other. (Citations omitted.) After a duly authorized collective bargaining representative has been selected, the employer cannot negotiate wages or other terms of employment with individual workers. (Citations omitted.) Thus, an employer interferes with his employees' right to bargain collectively in violation of 29 U.S.C. § 158 (a) (1) when he treats directly with employees and grants them a wage increase in return for their promise to repudiate the union which they have designated as their representative. (Citation omitted.) The statutory obligation thus imposed is to deal with the employees through the union rather than dealing with the union through the employees."

Id., 592-593. SEA argues that the award subjects SEA to the "dictates" of POD by allowing APTTIP to go forward with its incentive payments to certain teachers who meet the goals. The court finds this argument to be a stretch.

First SEA has not identified any statute which precludes bonus payments from outside sources for achievement. Second, there are no facts in the record to show that the Board acted contrary to *DeCourcey* and offered, or made, payments to teachers for the purposes of repudiating SEA, or dealt with SEA in any way other than face-to-face. Third, the Board has negotiated all substantive working condition issues with SEA that are under its sole control. To say that SEA is subject to POD's dictates is simply not accurate, nor is it particularly relevant since outside factors such as public policy dictates often affect teacher working conditions, e.g., municipal fire and safety codes.

Furthermore, the subject of the POD program was the subject of full negotiations with SEA as required by the Teacher Negotiation Act. A majority of the issues subject to this negotiation were resolved including the issue of lead AP teachers, lead teacher stipends and other compensation as set forth in the Side Letter. Although SEA makes little mention of it in its memorandum, there were also negotiations concerning the incentive payments. These included discussions as to whether the incentive payments could, or must, be contributed to charity, Tr. 56-57, 82, and requests to POD and NMSI that the incentive payments be eliminated. These requests were soundly rejected by the sponsor NMSI. Tr. 53-56, D. Exs. 9, 10, 14. The record clearly shows the Board did not negotiate with POD to obtain the payments.

Based on the record of negotiations, including negotiations concerning issues arising from the POD grant, and the lack of any statutory prohibitions against accepting the grant money, the rather blunt and unfocused argument that the Award violates statutory requirements is unpersuasive, and the court rejects it.

B. Whether the Award Exceeds the Arbitrators' Authority. Section 10-153f(c)(8)(B)

SEA argues that the Award should be vacated because it was in excess of the panel's authority in that it was "not final." SEA contends that since the statute requires the panel to select one of the last best offers submitted by the parties, and "last" equals "final", the Award must be final and it is "not final" because the precise amount of incentive payments to be made is not known. Notwithstanding the rather tortured and unpersuasive argument by SEA that a "not final" award is outside the panel's authority, the court will consider this issue.

The court disagrees with SEA's analysis. All the necessary parameters for the incentive payments have been established. Incentive payments of $1000, $2000 or $3000 will be made depending on the number of AP students attaining a "3" or better on the AP exam. That number is outside the present control and knowledge of SEA and the Board. All other factors such as eligibility and amounts of the payments are established; thus the award is complete and as "final" as it can be.

C. Unlawful Procedure. Section 10-153f(c)(8)(D).

SEA, in arguing that the Award was "made upon unlawful procedure restates its previous argument that the entire POD program represents an improper abdication by the Board to the APTTIP and that the last best offer of the Board really represents the position of POD. SEA also argues again that the Award is not a final award. The court notes that this presentation adds nothing in the way of substantive argument to what has been presented before, and the court rejects it.

D. Other Error of Law. Section 10-153f(c)(8)(C).

SEA makes the same argument to vacate the award under Section 10-153f(c)(8)(D) and it too is rejected.

E. Clearly Erroneous in View of the Evidence in the Record. Section 10-153(c)(8)(E).

SEA contends that the award should be vacated pursuant to General Statute § 10-153f(c)(8)(E) because it is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." The focus of this argument is based on the conclusion that the panel majority refused to consider the history of the parties' negotiations as required by General Statutes 10-153f(c)(4)(A). SEA provides a lengthy discussion of the parties' obligation to bargain in good faith and concludes that the Board failed to meet this obligation when it agreed to accept the POD mandate that certain AP teachers be eligible to receive incentive payments.

Essentially this is the heart of the dispute that was arbitrated. The Board determined that it was appropriate to accept the POD program which contained a requirement that AP teachers receive incentive payments if earned. SEA was equally determined that no incentive payments should be paid on the basis of test scores. The panel majority accepted the Board's position that POD could make incentive payments to teachers and rejected SEA's position. It is this court's duty to decide whether the panel's Award was clearly erroneous based on the record evidence, or put another way, whether there was substantial evidence to support the Award.

As noted, SEA hangs its hat on the contention that the panel majority decision was not supported by substantial evidence because it seemingly ignored the history of negotiations. In analyzing this issue the court notes that the negotiations history is only one of several matters the panel was required to consider. First and foremost the panel was required to "give priority to the public interest and the financial capability of the town or towns in the school district . . ." Section 10-153f(c)(4). After those two priority considerations five other factors are to be considered one of which is the negotiations history of the parties including "offers and the range of discussion of

the issues." Id., § 153f(c)(8)(A) - (E). This court concludes that the statutory language does not automatically mandate vacating an award if one of the five factors is ignored when, as here, the panel majority found in favor of the Board on the two priority issues.

Nevertheless, the record evidence and the facts found by the panel majority show there was substantial evidence that the negotiations history was considered by the panel and correctly determined in the Award. The panel majority found the following: there were "for the most part, mutual attempts by the parties to reach an agreeable solution"; and "[t]he record shows that both sides made efforts to reach agreement that were relatively extensive." Award, 14. These findings were clearly supported by the record. First, there is the Side Letter evidencing the concrete results of reaching a negotiated compromise on the three contested issues before the arbitration began. Second, it is noted there appears only to be an infinitesimal difference between the Board's and SEA's position on the second issue arbitrated, that of precedential impact. Third, there is extensive documentation in the record of the extent and scope of the parties' negotiations. See e.g., P.Exs. 5-1, 5-2, 5-32, 5-33, through 5-39, 5-45 through 5-49, 5-51, 5-52.

The crux of SEA's motion to vacate is their argument that the Board did not seriously negotiate the incentive payment issue because it would lose the POD grant money, and therefore the Board was a "hostage" to POD and NMSI. Without getting into characterization, the evidence was clear that if the Board did not accept the incentive payments part of the program, it would not receive the POD grant. The panel majority recognized this conundrum, yet found in favor of the Board's position to accept the incentive payments on both priority considerations of municipal financial resources and public interest. It is worth noting as well that Connecticut statutes do not compel a good faith negotiator to agree to a specific proposal or make a specific concession.

General Statute § 10-153e(d).[3]

There is little evidence to support SEA's general contention that the panel failed to consider the parties' negotiating history, and the court finds substantial evidence to support the panel majority's conclusion that "nothing in the negotiating history overrides [the] findings on the priority factors." Award, 16.

SEA also seeks to vacate the Award on the grounds that panel majority "illegally" refused to consider other relevant evidence regarding the bargaining history. This evidence apparently was SEA's allegations that the Board failed to bargain in good faith. The Award makes clear, however, that the panel majority did consider these allegations and determined that the State Board of Labor Relations was the "appropriate forum . . . to address these concerns," noting that SEA had already filed a complaint with the Board. Award, 15. SEA provides no support for its contention that the panel's determination was "illegal" or improper in any respect, particularly since the panel had already found, as noted above, that the negotiating history was perfectly adequate.

F. Arbitrary, Capricious, Abuse of Discretion. Section 10-153f(c)(8)(F).

In arguing that the Award should be vacated because it was in violation of General Statutes § 10-153f(c)(8)(F) SEA merely and perfunctorily summarizes several of the arguments made and discussed above, and claims the Award was arbitrary or an abuse of discretion. The carefully written Award and the record on which it is based, are substantial evidence to belie any claims of arbitrary or capricious behavior or an unwarranted or abusive exercise of discretion. This argument

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[3] On the other side of the coin, there was evidence in the record indicating that SEA had very strong views about the incentive payments and never deviated from its opposition to them throughout the negotiations. See P. Ex. 5-46, (also D. Ex. 9) a summary of a very early negotiating session which stated "paying teachers for test scores is against the core belief of SEA, CEA and NEA."

is unpersuasive.

IV. Conclusion

The court finds no basis to vacate the Award under General Statutes § 10-153(f(c)(8) and the application to vacate is denied.

TAGGART D. ADAMS
SUPERIOR COURT JUDGE

10-23-09
Decision to enter in accordance with the foregoing. All counsel notified.
P. Doré
Adm Asst