State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, LOCAL 1984, SEIU, AFL-CIO (ROCKINGHAM COUNTY CORRECTIONS EMPLOYEES)	:	
Complainant	:	CASE NO. S-0386:3
v.	:	DECISION NO. 96-012
ROCKINGHAM COUNTY (CORRECTIONS)	:	
Respondent	:	

APPEARANCES

Representing State Employees Association:

Robert DeSchuiteneer

Representing Rockingham County:

Renny Perry

Also appearing:

Mark Van Auken, State Employees Association
Henry Raymond, State Employees Association
Derrick L. Washington, State Employees Association
Jim Punchard, State Employees Association

BACKGROUND

The State Employees Association of New Hampshire Local 1984, S.E.I.U. (Union) filed unfair labor practice (ULP) charges on behalf of Rockingham County Corrections Department employees against Rockingham County (County) on November 16, 1995 alleging a violation of RSA 273-A:5 (h), a breach of contract for the County's failing to pay contractually provided wage increases to

correctional officers upon attainment of certification or completion of one (1) year of service under contract Article 23.4 and refusal to process this claim to arbitration under contract Article 15. The County filed its answer on December 1, 1995. This matter was heard by the PELRB on February 13, 1996.

FINDINGS OF FACT

1. Rockingham County, by and on behalf of its Department of Corrections, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The State Employees Association of New Hampshire, Local 1984, S.E.I.U., is the duly certified bargaining agent for employees of Rockingham County in its Department of Corrections.

3. The Union and the County were parties to a collective bargaining agreement effective from on or about February 14, 1994 through midnight on June 30, 1995. Thereafter, the parties have been negotiating on the terms for a successor CBA but have not reached agreement thereon. Accordingly, the status quo doctrine applies to the expired CBA under Appeal of Milton School District, 137 N.H. 240 at 245-248 (1993) and Appeal of Alton School District et al. (slip op., October 24, 1995).

4. Two contract articles are at issue in these proceedings. First, Article 23.4 under "Wages" provides, in pertinent part, "the entry rate for employees newly hired during the period July 1, 1994 to June 30, 1995 shall be eight dollars and seventy-two cents ($8.72) per hour.... Beginning July 1, 1994, employees who receive Correctional Officer Certification or who complete one (1) continuous year of employment shall receive a pay adjustment to nine dollars and thirty-nine cents ($9.39) per hour. Newly hired employees who are certified shall receive at a minimum the appropriate "Certification Rate" stated above or an hourly rate established by the Superintendent above the minimum rate but that does not exceed the hourly rate of Correctional Officers already employed who are certified and possess similar qualifications." Second, Article 15.6 of the contract provides for final and binding aribtra-

tion of grievances at Step 5 of a review process which is described at Article 15.2.1 of the CBA. Article 15.1.1 defines a grievance as "a dispute or difference of opinion raised by an employee covered by the Contract, or by the County, or by the Union involving the meaning, interpretation or application of one or more provisions of the Contract that have allegedly been violated."

5. According to the ULP and the answer of the County, the Union filed a grievance pursuant to the provisions of the CBA and a hearing was held before the Commissioners, Step 4 of the process described in Article 15.2.1. The Commissioners then rendered a decision which the union appealed to arbitration by letter of October 2, 1995. That letter asked for a discussion pertaining to the selection of the third non-proponent arbitrator as contemplated under Article 15.3 (c) of the CBA. The County has not participated in the selection of that arbitrator for the reasons set forth in paragraph 9 of its answer, inclusive of its belief that the matter is non-arbitrable because it involves an unfunded step increase.

6. Uncontroverted testimony provided by Union witness James Punchard, president of the local, was that the County has continued to pay shift differential, weekend differential and longevity pay, under Articles 23.6, 23.7 and 23.8, respectively, after the CBA expired on June 30, 1995, notwithstanding its refusal to make pay adjustments under Article 23.4, all pay elements being part of the same wage article of the contract.

7. Uncontroverted testimony provided by Union witness Derrick Washington established that the County has made correction officer job postings since the expiration of the CBA, namely, on July 12, 1995 and February 7, 1996. Those postings both show a non-certified rate of $8.72 per hour and a certified rate of $9.39 per hour. Washington testified that certified officers hired after June 30, 1995 have been paid $9.39. He, on the other hand, attained certification and one year of service after June 30, 1995 and remains at the $8.72 per hour rate.

DECISION AND ORDER

This matter was presented to us as an issue of arbitrability. After reviewing Article 23 pertaining to wages and the definition of a "grievance" as found in Article 15, we conclude that there is no "positive assurance" that the parties contemplated that disputes about wages would be exempt from coverage under the grievance procedure.

As we noted in Lincoln-Woodstock Cooperative School District, Decision No. 96-01 (January 16, 1996), the two leading cases on arbitrability are Appeal of Westmoreland School Board, 132 N.H. 103 (1989) and Appeal of City of Nashua School Board, 132 N.H. 699 (1990). In Westmoreland, the New Hampshire Supreme Court (Court), citing to Steelworkers v. Warrior and Gulf Co., 363 U.S. 574 (1960), discussed the "positive assurance" test. "Under the 'positive assurance' standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists and 'in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Thus, we find "positive assurance" to be missing in this case and the presumption of arbitrability to apply.

If this had been a "straight step increase" case under Milton School District, 137 N.H. 240 (1993), as argued by the County, there may have been "positive assurance" that an arbitrator would have been without authority to hear this case or render an award. We find that not to have been the case for four reasons. First, the contract language in question provides, in the alternative, two reasons for salary adjustment, namely certification or attainment of one year of continuous employment. Under Appeal of Alton School District, supra, at least part of the contested language in Article 23 relates to "a raise based on additional training [which] is not an experience increase and cannot be considered its equivalent for purposes of defining and maintaining the status quo." Second, witness Derrick Washington, according to his testimony, has an actionable claim based on either additional training/certification or longevity. Third, whether by intention or not, the County may have been waived its right to assert the step increase argument by denying to pay it and, according to testimony, continuing to pay longevity increments under Article 23.8 to other employees. It is inappropriate and inequitable for one of the negotiating parties to determine unilaterally which provisions of the wage article pertaining to adjustments based on additional or continued service are to be paid under the status quo doctrine and which are to be discontinued. The same policies would apply to both.

As we noted in White Mountain Educ. Assn., Decision No. 95-119 (January 15, 1996), "without an appropriation of additional funds for the payment of longevity benefits to newly eligible employees, the status quo remains...[employees] must continue to receive benefits in the same amount as had been the practice in [prior] years...." Fourth and finally, it is detrimental "harmonious labor relations" contemplated by the Public Employee Labor Relations Act to pay newly hired certified personnel more than continuing employees who have attained the same certification. This not only impacts the morale and effectiveness of the continuing employees but, because they may be union members or union activists, may discriminate or coerce them because they have exercised rights protected by Chapter 273-A. We acknowledge that no such claim has been made in this case but note this issue as a reason to avoid a two-tiered compensation system which discriminates against continuing employees.

For the foregoing reasons, we find the County to have committed a ULP in violation of RSA 273-A:5 I (h) by breaching the CBA when it failed to proceed with the selection of the third member of the arbitration panel as contemplated by Article 15.3. The County is directed to CEASE and DESIST from this practice immediately and to proceed forthwith with the arbitrator selection process and with processing this case through the Step 5 arbitration procedures contemplated by the CBA.

So ordered.

Signed this 22nd day of February, 1996.

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Alternate Chairman Jack Buckley presiding. Members E. Vincent Hall and Richard Roulx present and voting.