State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

HILLSBORO-DEERING SCHOOL DISTRICT CUSTODIANS, AFSCME LOCAL 2715	:	
Petitioner	:	CASE NO. A-0569:1
v.	:	DECISION NO. 96-081
HILLSBORO-DEERING SCHOOL DISTRICT	:	
Respondent	:	

APPEARANCES

Representing Hillsboro-Deering Custodians:

Harriett Spencer, Staff Representative

Representing Hillsboro-Deering School District:

Gary Wulf

Also appearing:

Wayne Emerson, Hillsboro-Deering School Board
Lloyd Henderson, Messenger

BACKGROUND

The Hillsboro-Deering School District Custodians, AFSCME Local 2715 (Union) filed unfair labor practice (ULP) charges and a request for a cease and desist order against the Hillsboro-Deering School District (District) on June 27, 1996 alleging violations of RSA 273-A:5 I (h) and (i) resulting from the District's breach of the collective bargaining agreement (CBA) by subcontracting bargaining unit work. The District filed its answer on July 11, 1996. This matter was heard by the PELRB on September 5, 1996.

FINDINGS OF FACT

1. The Hillsboro-Deering School District is a

"public employer" within the meaning of RSA 273-A: 1 X.

2. The Hillsboro-Deering School District Custodians are represented by AFSCME Local 2715, Council 93 which is its certified bargaining agent.

3. The Union and the District are parties to a CBA for the period July 1, 1994 to June 30, 1997. Article IV is entitled "Work Policy and Regulations" and says in pertinent part:

> 4.1 The District may adopt rules for its operation and the conduct of its employees provided such rules do not conflict with any of the provisions of this Agreement
>
> 4.5 The District has the right to discipline or discharge employees for just cause.
>
> 4.6 Disciplinary actions shall normally follow this order: (A) verbal warning, (B) written warning, (C) suspension without pay, (D) discharge.

Article XVIII is entitled "Management Rights" and says:

> 18.1 Except as otherwise expressly and specifically provided in this Agreement, the Federation recognizes that the direction of the District operations; the determination of the methods and means by which such operations are to be conducted; the supervision, management and control of the District work force; the right to hire, promote, transfer, and lay off employees; the right, lawfully and for just cause, to demote, discipline, suspend or discharge employees; the right to determine hours and schedules of work and the work tasks and standards of performance for employees and all other rights and responsibilities not specifically provided in this Agreement, shall remain the function of management, all in accordance with RSA 273-A. It shall be the right of the Federation, [sic], however, to present and process grievances of its members and other rights, all as specifically provided in this Agreement.

18.2 The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

4. In negotiating the CBA, the parties agreed upon a recognition clause for the contract:

2.1 The District hereby recognizes that the union is the sole and exclusive representative of all permanent custodians and groundskeeper with the exception of the Supervisor, Building and Grounds, and the Custodians Coordinators as certified by order of PELRB Case #A-0569.

2.2 When used in this Agreement, the word "employee" means any member of the above bargaining unit who is a member of the Union, and has successfully completed the probationary period as provided herein.

Likewise, they negotiated that the contract "goes into effect July 1, 1994 and will expire on June 30, 1997. (Article XIX.)

5. The Hillsboro-Deering School Board held a special meeting on June 10, 1996 (Board Exhibit No. 5) at which time the members discussed and voted on a buildings and grounds reorganization proposal (Board Exhibit No. 4). At the conclusion of the meeting, the Board voted 3 to 0 to enter into a three year contract with S. J. Services in Salem, Massachusetts for inside custodial maintenance of school facilities effective 7/1/96 at a cost of $478,000. It also voted, also by 3 to 0, to enter into a three year contract with Barden Hill Landscaping of Hillsboro, N.H. for outdoor maintenance service of school property effective 7/1/96 at a cost of $104,461.84. Business Administrator Wayne Emerson testified before the PELRB that the subcontracting would save $91,008 from the funds budgeted by the School Board for SY 1996-97. (Board Exhibit No. 5, p. 11.)

6. On June 11, 1996, Emerson wrote bargaining unit

employees telling them of the Board's decision and that their employment would terminate on June 30, 1996. In that letter and in his testimony, Emerson stated that both S. J. Services and Barden Hill Landscaping had indicated that they would interview all current employees for employment opportunities existing in their respective companies. (Exhibit B appended to (ULP.) Emerson testified that S. J. Services hired two; Barden Hill hired one. Two other unit employees were rehired by the District on or after July 1, 1996 to help move furniture (not part of the sub-contracted duties) and paint in conjunction with a District a project to remove asbestos. This has created an environment where unit work was being and has been performed simultaneously by District personnel and by employee of the subcontractors.

DECISION AND ORDER

This case involves the assessment of competing interests, i.e., the right of the public employer to design, direct, control and maintain its ability to pay its work force as defined under RSA 273-A:1 XI compared to the right of public employees to organize, to bargain collectively, to resolve their differences, to reduce their agreement to writing and to suffer no domination, interference, restraint, coercion or retaliation for having done so, all as protected by RSA 273-A Sections 3, 4, 5, 6, 8 and 11. When we weigh all of these competing factors, we are compelled to find in favor of the Union.

The genesis of RSA 273-A dates to 1975 and the passage of Chapter 490 of the Laws of 1975. The Legislature avowed a policy of fostering harmonious and cooperative relations between public employers and their employees. To that end, it acknowledged "the right of public employees to organize and be represented for the purpose of bargaining collectively" and it required "public employers to negotiate in good faith and to reduce to writing any agreements reached with employee organizations...certified as representing their public employees." These elements of legislative intent were then incorporated into Chapter 273-A when it was enacted.

As we turn our attention to RSA 273-A:3, we find a statutorily-imposed duty for public employers and "employee organizations certified by the board," as was the Union in this case, to "negotiate in good faith." The breadth of "good faith" is again statutorily defined as "an effort to reach agreement on the terms of employment." Both RSA 273-A:4 and the policy announced in Chapter 490 of the Laws of 1975 envision that agreements negotiated under RSA 273-A "shall be reduced to writing," showing the importance of written agreements and the integrity of such contracts. Such a contract exists for a specified term between the District and the Union in this case. It

was during the specified term of that agreement that the District decided to subcontract, as described above. When the parties negotiated and signed that collective bargaining agreement for July 1, 1994 through June 30, 1997 they obligated themselves to adhere to its terms, terms which were the product of give and take collective negotiations and which created responsibilities and expectations involving higher standards than those required by statute. In Appeal of the City of Franklin, 137 NH 723 at 730 (1993), the Supreme Court said, "If the city council [the legislative body in that case] approves a CBA, it has no choice but to fund whatever benefits the teachers decide to enjoy pursuant to its terms." We take that to mean that the parties are bound to live by the terms of the agreement they negotiated and signed for its stated duration. Thus, under the circumstances of the pending case, for the District to continue to require the same job functions to be done but to subcontract them to another provider(s) during the term of the CBA is a breach of that agreement and is a ULP under RSA 273-A:5 I (h).

RSA 273-A:5 I (i) makes it a prohibited practice for a public employer to adopt any rule relative to the terms and conditions of employment which "would invalidate any portion of an agreement entered into by a public employer making or adopting such law, regulation or rule." This is exactly what resulted when the District decided to subcontract mid-term to the CBA in June of this year and, for, all intents and purposes, unilaterally repudiated its contract with the Union. The subcontracting decision is further exacerbated by the fact that the same job functions are still being done on behalf of the District, in some cases by the same individuals, under totally new, unilaterally-imposed and non-negotiated working conditions, through subcontractors of the District, thus permitting the District to abrogate and ignore the terms of its CBA with the Union. This is a usurpation of duly negotiated terms and conditions of employment. It is violative of RSA 273-A:5 I (i) and is contrary to the legislative intent of Chapter 490 of the Laws of 1975.

We see the actions of the District which led to subcontracting, the focus of this complaint, as unlawfully "shifting the balance of power guaranteed by RSA 273-A" in favor of the District. If this subcontracting were permitted, the CBA between the parties would not merely be impaired, it would be meaningless. Such shifting of the balance of power is to be avoided. Appeal of Franklin Education Association, 136 NH 332 at 337 (1992) and Appeal of Milton School District, 137 NH 240 at 245 (1993) vis-à-vis maintaining the status quo. This is not to say that the District can never properly decide to subcontract; it does mean that it cannot decide to subcontract during the negotiated term of a CBA in order to accomplish existing work agreed to be or formerly or customainly performed by bargaining unit employees.

In Appeal of Alton School District, 140 NH 303 at 308 (1995), the Supreme Court, said, "A unilateral change in a condition of

employment is equivalent to a refusal to negotiate that term and *destroys the level playing field* necessary for productive and fair labor negotiations." (Emphasis added.) The same result occurs here, but to a more dramatic extent, because the entire fabric of the collective bargaining relationship is completely unraveled by the complained-of subcontracting, as opposed to the mere loss of an entitlement or maintaining the status quo in an on-going bargaining relationship. Borrowing again from Appeal of Alton School District, 140 NH 303 at 311 (1995), "This would frustrate the entire collective bargaining process set forth in chapter RSA 273-A." Sub-contracting produces an even more devastating result which we find to be destructive of the collective bargaining relationship.

We cannot countenance such a result which runs counter to the very purposes of RSA 273-A. The acts complained of are violative of RSA 273-A:5 I (h) and (i). The District is directed to CEASE AND DESIST therefrom forthwith, to adhere to the terms and conditions of the CBA through its termination on June 30, 1997 and to make unit members whole for loss of wages or benefits suffered during the term of the impermissible subcontracting.

So ordered.

Signed this 8th day of November, 1996.

EDWARD J. HASELTINE
Chairman

By unanimous decision. Chairman Edward J. Haseltine presiding. Members E. Vincent Hall and Richard W. Roulx present and voting.