State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, LOCAL 1801 FOR PELHAM SUPPORT STAFF Complainant	:	
v.	:	CASE NO. A-0520:14
TOWN OF PELHAM Respondent	:	DECISION NO. 1998-063

APPEARANCES

Representing AFSCME, Pelham Support Staff Employees:

James C. Anderson, Staff Representative

Representing Town of Pelham:

Gary W. Wulf, Negotiator

Also appearing:

Jack Tirrell, AFSCME, Local 1801
Annette Sutclifte, AFSCME, Local 1801
Anita Slusarczyk, AFSCME, Local 1801
Peter Flynn, Town Administrator

BACKGROUND

The American Federation of State, County and Municipal Employees (AFSCME), Local 1801 filed unfair labor practice (ULP) charges on behalf of Pelham Support Staff employees against the Town of Pelham on May 18, 1998 alleging violations of RSA 273-A:5 I (e), (g), (h) and (i) relating to bad faith bargaining, refusal to impact bargain and unilateral changes in work hours and benefits after contract negotiations were completed. The Town

filed its answer on May 28, 1998 after which this matter was heard by the PELRB on June 30, 1998.

FINDINGS OF FACT

1. The Town of Pelham employs personnel in the operation of its administrative, police, fire and highway departments and, thus, is a public employer within the meaning of RSA 273-A:1 X.

2. The American Federation of State County and Municipal Employees, Local 1801, is the duly certified bargaining agent for a bargaining unit of support staff employees employed by the Town of Pelham.

3. The Town and the Union are parties to a collective bargaining agreement (CBA) (Town Exhibit No. 1) for the period ending March 31, 1997, which continued under *status quo* until a successor contract was negotiated. Such an agreement has since been negotiated and is in place for the period April 1, 1997 to March 31, 1999, (Town Exhibit No. 4) but signed copies are not yet available to and have not been filed with the PELRB (RSA 273-A:16).

4. The parties began bargaining for the 1997-99 successor CBA in November of 1996. A tentative agreement was reached at a fact finding hearing, which the parties transformed into an additional mediation session, on December 8, 1997. This matter was not approved by the legislative body, the voters, until March of 1998. According to testimony from management negotiator Gary Wulf, who was called as the Union's first witness, the figures submitted to and approved by the legislative body included wages and benefit costs for the two clerical positions in question at thirty (30) hours per week with benefit levels the same as the incumbents received during calendar 1997.

5. Notwithstanding the foregoing, during a meeting of the Board of Selectmen on November 4, 1997 (Town Exhibit No. 2), they considered a report and recommendation from Tax Collector/Town Clerk Linda

Derby that, because computerization was causing the office to run more efficiently, the two (2) Clerk I positions each be reduced five (5) hours per week,, from 30 hours to 25 hours. After discussing the matter, the selectmen unanimously voted to decrease the Clerk I positions by 5 hours per week and to decrease the Town Clerk's salary line for the positions from $39,274.00 to $37,036.00. (Town Exhibit No. 2.) Following this action, Town Administrator Peter Flynn wrote to Clerk I Annette Sutcliffe on December 4, 1997 telling her "Specifically, your position will be funded, next year, up to, no more than, twenty-five (25) hours per week....The change in your schedule will be effective January 2, 1998." (Exhibit to ULP complaint.) In addition to a reduction in salary, the implementation of this schedule change impacted the accrual of benefits, *e.g.*, insurance and earned time benefits, which require an employee to be "employed in a permanent position of at least 75 percent time." (See Town Exhibit No. 1, Article XIX.)

6. The action of the selectmen described in Finding No. 5 was not conveyed to the exclusive bargaining agent (RSA 273-A:3 and 273-A:11) during the course of negotiations or before the tentative agreement on December 8, 1997. Mr. Wulf testified that he had not told the Union that the employer intended to change hours of work for certain employees prior to the fact-finding-turned-mediation session of December 8, 1997. Mr. Flynn testified that he had not informed the Union about either the contents or the sending of his letter of December 4, 1997 but that on December 3 or 4, 1997, he told Wulf that the hours for the two clerical positions would be changing. Chapter Chair Jack Tirrell, who also served on the union negotiating team, testified that he did not learn of the change in the clerks' hours, and hence wages and benefits, until one of them told him about Flynn's letter of December 4, 1997. The foregoing is consistent with the tentative agreement of December 8, 1997 (Town Exhibit No. 4) which does not show hours of work or changes in schedule to be an open issue in these negotiations.

7. After Tirrell learned of Flynn's letter of December 4, 1997, he filed a grievance (not in evidence) about the

complained-of changes in working conditions. The grievance was denied by Flynn and subsequently by the Board of Selectmen at steps one and two of the grievance procedure (Town Exhibit No. 1, Article VII). Notwithstanding that the CBA then calls for a third step involving final and binding arbitration, Tirrell said that he then requested impact bargaining and contacted the Union which filed this ULP. Impact bargaining was an element of the relief requested of the PELRB by the Union in its closing argument.

8. The Town claims its actions are protected by statutory managerial rights as found in RSA 273-A:1 XI, the ground rules for negotiations (Town Exhibit No. 3, Item 2) which prohibit the introduction of new negotiating topics after the third negotiating session and the CBA, namely, the management rights language (Article VII) and the "zipper clause" found at Article XXXI. These two contract articles read as follows:

Article VII, (1)

> The parties agree that all the rights and responsibilities of the Town which have not been specifically provided for in this agreement are retained in the sole discretion of the Town whose right to determine and structure the goals, purposes, functions, and policies of the Town without prior negotiation with the Union and without being subject to the grievance and arbitration procedures of this agreement shall include but not be limited to the following: a) the right to direct employees; to determine qualifications, promotional criteria, hiring criteria, standards for work and to hire, promote, transfer, assign, retain employees in positions; and to suspend, demote, discharge or take other disciplinary actions against an employee for proper and just cause, subject to the other provisions of this agreement, including grievance and arbitration; b) the right to relieve and employee from duty because of lack of work or other legitimate reasons; c) the right to take such action as in its judgment it deems necessary to maintain the efficiency of operations; d) the right to determine the means, methods, budgetary and financial procedures, and personnel by which the operations are to be

> conducted; e) the right to take such actions as may be necessary to carry out the missions of the Town in case of emergencies; f)the right to make rules, regulations, policies, not inconsistent with the provisions of this agreement and to require compliance therewith; and g) the right to subcontract.

Article XXXI, (2)

> The parties acknowledge that during the negotiations which resulted in this Agreement, each had unlimited right and opportunity to make demands with respect to any subject, or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Town and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even through such subjects or matters may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

DECISION AND ORDER

We dismiss the charges which allege violations of RSA 273-A:5 I (h) and (i). It is well settled that the public employer may determine and select both the number of and personnel required to accomplish its governmental functions. RSA 273-A:1 XI specifically defines and reserves to the public employer certain "managerial policy within [its] exclusive prerogative." That includes the "selection, direction and number of its personnel." See also Appeal of the International Association of Firefighters, AFL-CIO, Local 1088, 123 N.H. 404, 408 (1983).

The Town is also protected in its right to determine the number of work hours for the two clerical positions by the collective bargaining agreement. Article VIII, (1) provides, in pertinent part, "...the rights...retained in the sole direction of the Town...shall include but not be limited to ...b) the right to relieve an employee from duty because of lack of work... c) the right to take such actions as is in judgment it deems

necessary to maintain the efficiency of operations...." The evidence before us is unrefuted that there was a reduction in individual clerical work loads as the result of computerization and automation. (Town Exhibit No. 2.)

The alleged violations of RSA 273-A:5 I (e) and (g) involve, respectively, the obligation to bargain in particular and compliance with Chapter 273-A in general. The broader RSA 273-A:5 I (g) compliance provisions include the obligation to bargain in good faith found at RSA 273-A:3 and the exclusivity of rights conferred on certified bargaining agents as explained at RSA 273-A:11. The manner in which the decision to reduce hours for the two clerical positions was made and the failure to convey this information to the Union was not conducive to either of these purposes. While it is appropriate that the Town made a decision to reduce the hours in question, it was inappropriate to do so, leave the cost projections the same, and attempt to achieve ratification without conveying this information to the Union. The record is clear that the Town's negotiator knew about the projected change in hours before the fact-finding-turned-mediation session which settled the successor contract but failed to convey this to the exclusive bargaining agent, namely, the Union. Finding Nos. 5 and 6.

The obligation to engage in good faith bargaining involves the requirement "to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.... Neither side however, is required to agree to a proposal or to make a concession." Robert's Dictionary of Industrial Relations 286 (4th ed. 1994) and RSA 273-A:3 I. When good faith bargaining has been challenged or there is an alleged refusal to bargain, generally acceptable labor relations practice has been to look to the "totality of conduct" to test the quality of negotiations. This may involve assessing such factors as "surface bargaining, willingness to compromise, dilatory behavior, inadequate negotiators, imposing conditions, unilateral changes, bypassing recognized bargaining representatives, and commission of unfair labor practices." Roberts, *Id.*

Whether intended or not, when these indicia of the totality of conduct are weighted against the facts of this case, we find a clear unilateral change, a bypassing of bargaining representatives to the extent that information relative to the change was conveyed directly to the employees and not the

certified agent, and, potentially, surface bargaining resulting from the fact that the Union was negotiating from facts as it knew them, not from facts as the public employer had changed them in the meantime. The failure of one of the parties to communicate a change in working conditions induced the other to bargain about items having a false priority of importance while not being able to address items of immediate concern resulting from that same unilateral change in working conditions. Notwithstanding Ground Rule No. 2 (Finding No. 8), Ground Rule No. 11 does provide for the addition of items to be negotiated by mutual consent. (Town Exhibit No. 3.) It is clear that, given timely notice of the Town's unilateral decision to change working hours, the parities could have agreed to open negotiations on those portions of the contract which were impacted by the unilateral change, e. g. earned time provisions, eligibility level for insurance benefits and redefining when other benefits would apply. After all, the contract recognizes all full-time and permanent part-time employees of the stated departments as members of the bargaining unit, less specified exceptions. The clerks whose jobs were impacted by the unilateral and undeclared actions of the Town are still members of the bargaining unit entitled to representation by their certified bargaining agent for purposes of negotiating their terms and conditions of employment. The timing or silence of the Town relative to unilateral changes in working conditions cannot be used to disenfranchise the employees in question from these rights.

For these reasons, we find the Town to have violated RSA 273-A:5 I (e) and (g) by the actions described herein which were not made known to the certified bargaining agent in a timely manner during a very crucial stage in negotiations. The parties shall commence impact bargaining on the consequences of the Town's unilateral change forthwith when and if requested by the Union to do so.

So ordered.
Signed this 15th day of July, 1998.

EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members Seymour Osman and E. Vincent Hall present and voting.