State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 3438 Complainant v. SULLIVAN COUNTY NURSING HOME Respondent	CASE NO. A-0491:41 DECISION NO. 1998-084

APPEARANCES

Representing AFSCME, Local 3438:

Jennifer Springer, Esq.

Representing Sullivan County Nursing Home:

Kathleen Peahl, Esq.

Also appearing:

Marie Trombley, Sullivan County
Robert Hemenway, Sullivan
P. F. Farrand, Sullivan County
Elizabeth Koski, AFSCME, Local 3438
Howard Tawney, Sullivan County
Robert B. Coutemarche, Local 3438
Judy McDonald, AFSCME

BACKGROUND

The American Federation of State, County and Municipal Employees (AFSCME), Local 3438 (Union) filed unfair labor practice (ULP) charges on behalf of certain employees at Sullivan

County Nursing Home on June 22, 1998, against Sullivan County (County) alleging violations of RSA 273-A:5 I (a), (e), (g) and (h) for a failure to bargain, making unilateral changes in working conditions (meeting pay), breach of contract and coercion of unit employees resulting from these changes. Sullivan County Nursing Home (County) filed its answer on July 7, 1998 after which this matter was heard by the PELRB on September 1, 1998. The record in this matter was closed on September 28, 1998 upon receipt of the parties' joint stipulation as to those circumstances when unit employees would be paid for meeting attendance and which, consequently, are no longer being contested as part of the ULP.

FINDINGS OF FACT

1. Sullivan County operates the Sullivan County Nursing Home and, in so doing, is a "public employer" of certain employees within the meaning of RSA 273-A:1 X.

2. The American Federation of State, County and Municipal Employees, Local 3438 is the duly certified bargaining agent for regular full-time and regular part-time non-supervisory and non-administrative employees at the Sullivan County Nursing Home.

3. The Union and the County are parties to a collective bargaining agreement (CBA) for the period July 1, 1994 to June 30, 1997 and continuing thereafter under the *status quo* doctrine. This contract is silent on the issue of paying unit members for attendance at certain meetings. For example, while the CBA describes the Safety Committee at Article 18, it does not specify whether unit members who attend these meetings should be paid by the County. Thus, the Union's case is one in which it asserts a theory of "past practice" in order to prevail in a finding that the County is obligated to continue to pay for employee attendance at certain job related meetings.

4. The Union's complaint, at paragraph 6, claims that the County has unilaterally stopped paying Union officers, who are also employees of the County, for attendance at safety committee meetings, labor-management meetings, sick leave committee meetings, arbitration hearings, PELRB hearings and contract negotiations.

In accordance with a PELRB directive at the conclusion of the hearing on September 1, 1998, the parties submitted a stipulation of facts on September 28, 1998, which stated:

> The parties have agreed that attendance at the following meetings will be compensated pursuant to the County's policy on mandatory meetings and are not in dispute in this case:
>
> Safety committee
> Sick Leave Committee
> Labor-Management Committee (limited to a reasonable number of employee representatives)
> "Fun" Committee
> Disciplinary Meetings (limited to Union Steward on duty)
> Grievance Meetings (limited to Union Steward on duty)

This leaves unresolved the issue of past practice with respect to arbitration hearings, PELRB hearings and contract negotiations. It is not disputed that the County has paid, and continues to pay, employees for attendance at meetings or hearings, such as have been described, when those meetings have occurred during the employee's scheduled hours of work. (See paragraphs 9 and 12 of pleadings and answer.) Likewise, it is not disputed that management has paid, and continues to pay, employees for any meeting outside their regularly scheduled shifts which they are asked to or required to attend at the convenience of the County. (Testimony of E. Koski, H. Tawney and R. Hemmenway. See also County Exhibit No. 1 regarding "Staff Meetings.")

5. Union witness Elizabeth Koski testified that she has punched in and been paid for attending arbitration and negotiations meetings both of which she has attended in her capacity as vice president. She said she had been told by Staff Coordinator Marie Trombley and former union president Clinton Tabor to do so. She has punched in and been paid for negotiating sessions outside her 3 to 11 shift and for attending a PELRB hearing in Concord. In November of 1997, when she attended the Mills arbitration, she was told not to punch in anymore. She confirmed that she continues to be paid for attending negotiating or disciplinary meetings on her shift or continuing uninterrupted thereafter if her attendance is required

by the County, e.g. as a steward. Koski said that she has a three year history, prior to November of 1997, of being paid for attending grievance and arbitration hearings where she has not been the primary Union representative.

6. Judy McDonald, currently the local president, has been a steward and member of the negotiating team. She has been paid for attending negotiations for the two prior CBA's, until these payments were stopped, for her in January of 1998. She attended a negotiating meeting in December of 1997 where she heard the County's former Human Resources Director, Howard Tawney, tell unit employees who were attending that meeting not to punch in when attending negotiating meetings unless it was during a time when they were already scheduled for work. She also heard Union Staff representative James Anderson agree with Tawney's assessment of the situation, namely, that non-scheduled employees did not qualify for pay.

7. Robert Coutemarche, a former local president, testified that he attended arbitration hearings as president but not as vice president. He punched in for some and not for others. Tabor had told him he should punch in. When he did so, he was paid. Coutemarche also said that he had called Marie Trombley to "sign him in" for certain meetings. He, too, was present when Tawney announced that non-scheduled unit employees should not punch in for negotiating sessions. This interchange between Tawney and Anderson is recorded in the minutes of the negotiating meeting on December 1, 1997 (County Exhibit No. 2).

8. Marie Trombley testified that she did not check with Tawney or Hemmenway about authorizing payment for attendance at negotiations and grievance meetings. The issue of payments for attendance at these meetings did not arise until "around 1995" when unit employees other than those on the day shift became active in Union matters. Trombley said that pay records would not necessarily alert a reviewer or supervisor about payment for attendance because such entries are indistinguishable from other entries,

such as for in-service training.

9. Both Tawney and Hemmenway testified that they did not know about payments for attending off-schedule negotiations sessions until after negotiations began in April of 1997. When Tawney learned of these payments, he checked with Hemenway, who verified that the payments were not authorized, and then confronted Anderson with a copy of RSA 273-A, namely Section 11 (II) which says:

> A reasonable number of employees who act as representatives of the bargaining unit shall be given a reasonable opportunity to meet with the employer or his representatives *during working hours* without loss of compensation or benefits. (Emphasis added.)

Anderson is reported by Koski, McDonald, Coutemarche, Tawney and Hemmenway to have agreed to Tawney's interpretation that pay is only due "during working hours" for attending the type of meetings in question.

DECISION

We assess this case from two perspectives, each of which yields the same result. The first perspective is the Union's role and authority under RSA 273-A. The Union is the duly certified bargaining agent for the bargaining unit employees involved in this case. Staff Representative Anderson is an established and well-known employee of AFSCME, Council 93. Both Union and employer witnesses have attested to his agreeing to the County's interpretation of RSA 273-A:11 II as it applies to "during working hours" compensation, or, conversely, to the lack of entitlement for non-working hours compensation unless mandated by the employer.

We also recognize that the negotiation and administration of the contract belongs to the parties. In this case, they are the County and the Union, not the County and a combination of its employees. This case was filed by staff counsel for AFSCME, not by the staff representative for the bargaining unit. The positions taken by the staff representative and the staff counsel appear at odds. We can find no reason why the county should have believed that the position taken by the staff representative on December 22, 1997 was not the position of the Union. See County Exhibit No. 2.

This brings us to our second area of inquiry: whether payment for attendance at the types of meetings under consideration in this case is a "past practice." The key purposes of the "past practice" doctrine are "to provide the basis of rules governing matters not included in the written contract...or to support allegations that clear language of the written contract has been amended by mutual action or agreement." Roberts' Dictionary of Industrial Relations 573 (4th ed. 1994). Thus, we must look to whether the alleged "practice" of paying for voluntary attendance at grievance and negotiations meetings is, indeed, a past practice. "In the absence of a written agreement, 'past practice,' to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." Elkouri and Elkouri, How Arbitration Works 632 (5th ed. 1997). Given the testimony presented to us and the remedial actions initiated once the County discovered that erroneous payments for voluntary attendance were being paid, we cannot conclude that the allege "past practice" was or had been known to and "accepted by both parties." Without that and without the open and knowledgeable participation of management in perpetuating the practice, we cannot find that a *bona fide* past practice existed, especially in light of the testimony from Marie Trombley (Finding No. 8). The ULP is DISMISSED.

So ordered.

Signed this 20th day of October, 1998.

EDWARD J. HASELTINE
Chairman

By majority vote. Chairman Edward J. Haseltine and Member William Kidder voting in the majority. Member Richard Molan voting in the minority.