State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, LOCAL 1984, on behalf of ASHLAND TOWN EMPLOYEES Complainant	:	
v.	:	CASE NO. S-0404:2
TOWN OF ASHLAND Respondent	:	DECISION NO. 1999-120

APPEARANCES

Representing State Employees Association, Local 1984 for Ashland Town Employees:

Dennis Martino, Orally
Glenn Milner, Esq., On brief

Representing Town of Ashland:

Mark Broth, Esq.

Also appearing:

Thomas Gaydos, Town Administrator

BACKGROUND

The State Employees Association of New Hampshire, Local 1984, S.E.I.U. (Union) filed unfair labor practice (ULP) charges on behalf of Ashland town employees on August 18, 1999 against the Town of Ashland (Town) alleging violations of RSA 273-A:5 I (e) and (g) resulting from a refusal to bargain and changing overtime policies after the Union's certification as bargaining

agent on May 10, 1999. The Town of Ashland filed an answer on September 2, 1999. This matter was then heard by the PELRB on September 28, 1999, at which time the Town also filed a motion to dismiss. Post hearing briefs were received from the Union and the Town on October 27, 1999 and October 28, 1999, respectively, after which the record was closed.

FINDINGS OF FACT

1. The Town of Ashland employs personnel in the operation of its town government and is a "public employer" within the meaning of RSA 273-A:1 X.

2. The State Employees Association of New Hampshire, S.E.I.U. Local 1984, was certified as bargaining agent for a bargaining unit of Ashland town employees after a certification election held on May 10, 1999 in which ten (10) eligible employees voted, nine (9) for representation and one (1) against representation, in accordance with RSA 273-A:10 IV. A formal certification and order to negotiate was thereafter issued by the PELRB on June 2, 1999.

3. For more than three years prior to the bargaining agent election, the Town had a work schedule policy, as adopted January 15, 1996. It was entered as Town Exhibit No. 1 and provides as follows:

> GENERAL HOURS OF WORK
>
> For full-time non-exempt employees, the regular work week will consist of eight hours per day, five days per week. Most employees will be assigned to a work schedule of 8 AM to 5 PM, Monday through Friday, excluding the nonpaid lunch period. The police department workday includes a paid lunch hour due to the nature of their work.
>
> Actual starting and quitting times vary from department to department. The department head, with the approval of the Town Manager, will determine the hours of work both daily and weekly. The normal work day is eight (8) hours which is interrupted around the mid-point with a thirty minute unpaid lunch period. All schedules must be reviewed and approved prior to implementation.
>
> Although the hours set forth herein are those presently followed, these hours may be changed, with proper notice, as conditions warrant or as the Town Manager deems necessary.

Likewise, according to paragraph 2 of the pleadings and answer, if employees were required to work in excess of forty (40) hours per pay period, they were compensated on an overtime basis.

4. After the bargaining agent election of May 10, 1999 but commensurate with the Town's pay period ending on May 15, 1999, the Union (1) requested to negotiate and (2) learned that the Town had changed its overtime policy to eliminate the need for overtime compensation for certain Saturday coverage. The Town, in its motion to dismiss, explained that it had discovered a "substantial and previously unknown deficit in its operating budget" causing it "to look for methods to reduce" its cost of operations. Prior to May, 1999, the Town achieved weekend coverage for certain public works functions by selecting an employee to work an additional (Saturday) work day. As this additional day of work would result in the employee working more than forty (40) hours in a pay period, the employee would be paid for the additional day at overtime rates. Beginning in May, 1999, and allegedly in response to the financial emergency, the Town exercised its rights under the "General Hours of Work" policy to change certain hours of work to achieve weekend coverage without an overtime cost. Each week, an employee would be scheduled to work only four (4) days between Monday and Friday, with a fifth workday occurring on the weekend. As the employee would have only worked forty (40) hours in the pay period, all hours worked would be paid at straight time rates. The Union complained of this change by letter to the Town dated July 29, 1999 as described and acknowledged by paragraph 5 of the complaint and answer.

5. By way of further answer, the Town "admits that it has not responded in writing to [the Union representative's] letters of July 15 and July 25, 1999. The Town further admits that changes have been made in the work schedules of some employees." (Town answer, paragraph 6.)

6. The Town has asserted a further affirmative defense

that it need not honor the Union's request to engage in collective negotiations because the number of employees in the bargaining unit has dropped below ten (10).[RSA 273-A:8 I (d).] (Town answer, Item A.) According to representations made by the Town's counsel to the PELRB, the current number of employees eligible for inclusion in the bargaining unit is nine (9), as as of the date of the hearing, soon to be reduced to eight (8). This is the result of the Town's deciding not to fill certain vacancies in bargaining unit positions.

7. RSA 273-A:10 VI provides that "Certification as an exclusive representative shall remain valid until the employee organization is dissolved, voluntarily surrenders certification, loses a valid election or is decertified."

DECISION AND ORDER

There are two concepts for us to address relative to the disposition of this case. First is the notion that the Town is no longer obligated to bargain with the certified agent because the number of eligible employees has fallen below ten. Second is the issue of whether the Town's conduct violated the obligation to maintain the *status quo* during the course of negotiations for a first contract.

The record, as well as the law, does not support the Town's contention that it is no longer obligated to bargain now that the number of employees in the bargaining unit has fallen below ten. The number of employees met the statutory requirements both when the unit was formed and when the election results were certified. Using a discrete number, whether it be ten (10) or otherwise, necessarily poses the potential for argumentative situations when the number of employees in question is on the cusp of the statutory requirement. In order to avoid such situations and/or unwarranted or inappropriate machinations in order to impact the statutorily set number, this Board follows a number of protective procedures, and has done so historically.

Initially, we note the statutory provisions. RSA 273-A provides that we shall not certify "a bargaining unit of less than ten employees." Our actions have been consistent with that mandate. Then, as noted in the Union's post-hearing brief (page

4) and in Finding No. 7 above, the statute provides that certification "shall remain valid" until certain actions shall have occurred, none of which have happened in this case.

Next, we look to the public policy leading to the passage of RSA 273-A. The Statement of Policy found at Chapter 490:1 of the Laws of 1975 contemplated "foster[ing] harmonious and cooperative relations" and "requiring public employers to negotiate in good faith...." If we were to subscribe to the Town's arguments about the "rule of ten," this legislative policy as well as the obligations imposed by RSA 273-A:3 are susceptible of being frustrated and avoided merely by an on-going fluctuation or tinkering, for whatever reason(s), above or below the statutorily required ten employees. This would make the obligation to bargain an ever changing "moving target" vis-à-vis the requirement to negotiate in good faith. In order to avoid such a situation, we take a "snapshot" of the status of the bargaining unit as of the time it is organized and recognized, whether by mutual agreement or by decision. If this "snapshot" passes the "rule of ten" test, then the obligation to bargain attaches; to hold otherwise would make that obligation an unacceptable "moving target." In this vein, we cannot and do not accept the Town's assertions (Town brief page 5) that private sector principles adopted and used by the National Labor Relations Board (NLRB) should apply to this case. The NLRB standard is set at two (2) employees to help answer voter anonymity and to insure the ability for "collective negotiations. It's tests for negotiating turn on certain "commerce" and "enterprise" concepts not utilized in the New Hampshire public sector and not appropriate in attempting to define a "public employer" in this state.

Finally, we cannot subscribe to the Town's "below the 'rule of ten'" argument merely because, by its own admission, it "has no intention of filling the position," (Post-hearing brief, p. 6.) Given that the position still exists and could be filled at any time, we again have a "moving target" on the issue of "getting to ten," an eventuality which would foster ineffective and uncertain labor relations contrary to the purposes of RSA 273-A. Likewise, we do not concur that there is a difference in the employer's obligation to bargain (Town brief, page 6) merely because this bargaining involves a first contract rather than a successor agreement. To so hold would ignore the principle that the *status quo* doctrine and the public employer's obligations under it apply to bargaining units negotiating their first CBA "in the same way that it applies to [bargaining units] whose

contracts have expired." Appeal of Conway School District, 140 N.H. 303 at 315 (1995).

This is an appropriate segue to our last area of assessment in this case, namely, whether the Town adhered to its obligations to maintain the *status quo* after the election was conducted and the bargaining agent was certified. We find that it did not.

It is undisputed that the Town altered work schedules and what had become planned overtime within a week of the date when unit members voted for union representation. The Town would have us find that such an alteration was not "material, substantial and significant," so that there was neither a refusal to bargain nor a violation of the *status quo* requirement. (Town brief, p. 7.) Timed as it was, the alteration of work schedules and overtime policies, within a week of the certification election, cannot be excused as the consequences of a financial exigency which had been known to exist for a matter of months before that election, albeit the extent of the financial exigency may have been a "moving target" of another sort during that period of time.

The alteration of work schedules and overtime policies impacted both wages and hours, clearly terms and conditions of employment and clearly more akin to terms and conditions of employment than to matters of broad managerial policy, as discussed in Appeal of State of New Hampshire, 138 NH 716 at 722 (1994). Likewise, this situation is to be distinguished from Visiting Nurse Services v. NLRB, 177 F 3d 52, 57 (1st Cir. 1999) relied upon by the Town (brief, p. 8) because there the parties had a bargaining relationship, had prior contracts, and reached impasse on a successor CBA, all before the unilateral change occurred. In the instant case, the parties never had a first meeting at the bargaining table and had strained communications, at best, between themselves. Thus, the Town cannot rely upon the "general impasse" rule utilized in the private sector.

It is essential to maintain the *status quo* if the "balance of power guaranteed by RSA 273-A" is to be preserved. Appeal of Milton School District, 137 N.H. 240, 245 (1993). Without this balance, the "level playing field" required of the collective bargaining process in destroyed, especially if the option to withdraw from the negotiations process or to maintain existing working conditions were to be left to the unilateral determination of one of the parties, and, as was the case here,

were allowed to be implemented after the outcome of the bargaining agent election is known. "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." Appeal of Alton School District, 140 N.H. 303, 308 (1995).

The Town's complained of conduct is violative of the obligations contained in RSA 273-A:3 and constitutes an unfair labor practice in violation of RSA 273-A:5 I (e) and (g). The Town is directed to CEASE and DESIST this prohibited conduct forthwith and to enter into collective negotiations with the certified bargaining agent not later than ten (10) days after receiving a request from the bargaining agent to do so.

So ordered.

Signed this 23rd day of November, 1999.

JACK BUCKLEY
Chairman

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