# State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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| STATE EMPLOYEES ASSOCIATION<br>NEW HAMPSHIRE, SEIU, LOCAL 1984<br><br>Complainant<br><br>v.<br><br>MERRIMACK COUNTY,<br>DEPARTMENT OF CORRECTIONS<br><br>Respondent | : | CASE NO. S-0327:26<br><br>DECISION NO. 2000-077 |

## APPEARANCES

Representing State Employees Association of New Hampshire:

Michael Reynolds, Esquire

Representing Merrimack County, Department of Corrections:

Renny Perry, Consultant

Also appearing:

Kathleen Bateson, Merrimack County
Richard G. Doucet, Merrimack County
Carole A. Anderson, Merrimack County
David Perez, Merrimack County/SEA
Lawrence Untiet, Merrimack County/SEA
Bill McCann, State Employees Association
Daniel Ward, Merrimack County/SEA

## BACKGROUND

The State Employees Association of New Hampshire, Local 1984, S.E.I.U. (Union) filed unfair labor practice (ULP) charges on April 28, 2000 against the Merrimack County Commissioners (County) alleging violations of RSA 273-A:5 I (a), (e) and (i) resulting from a refusal to bargain in good faith and unilateral changes made to a contract settlement after both sides had agreed on the recommendations of a fact finder's report relating to a "service bonus." Merrimack County filed its answer on May 17, 2000 after which this matter was heard by the PELRB on June 15, 2000. The record was closed after receipt of post-hearing briefs from both parties on July 7, 2000.

## FINDINGS OF FACT

1. Merrimack County, by virtue of its operation of a confinement facility under 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 correctional officers and other employees employed by Merrimack County at its Department of Corrections.

3. The Union and the County entered into negotiations for a successor collective bargaining agreement (CBA) in September of 1998. There followed a period of several months when proposals and counter-proposals were exchanged, none of which resulted in a contract settlement. Thus, the Union requested the appointment of a mediator on June 14, 1999. On July 14, 1999, the parties met with the mediator but came to no agreement. The pleadings and answer (para. 5) assert that the wage scale was not an issue during the mediation process, with the exception of the matter of retroactivity. When no agreement was concluded, the Union requested the appointment of a fact finder on July 29, 1999. The fact finding hearing was held on October 9, 1999 during which the wage scale was not an issue but the matter of retroactivity was an issue, i.e., whether the date of implementation of the not-contested wage scale should be when the CBA is executed or backdated to July 1, 1999. The fact finder issued his report on December 28, 1999 which, according to the pleadings and answer (para. 12), was amended or revised on or about January 12, 2000 to address an omission.

4. The fact finder's report (Joint Exhibit No. 2) introduced the concept of a "service bonus" in lieu of "retroactivity." This was a means to address earned income increases lost during the negotiations process while not compounding the cost by adding the "service bonus" to the employee's new base salaries. The fact finder reasoned:

> Consistent with the competing obligations of the County, it would appear that the payment of a service bonus to current employees in an amount equal to that which would ordinarily have been paid had the increase gone into effect on July 1, 1999, would be appropriate. The service bonus would only be paid to those employees who are employed on or after July 1, 1999 and who remained on the payroll when this contract is executed. This comports with the County's desire to retain qualified employees...

Thereafter, the fact finder made the following wage recommendations:

> For 7/1/99, Schedule One reflecting a 2% general increase. County does not agree with certain employees going immediately to Step 8 (shown on County's revised Schedule One)
>
> The July 1, 1999 schedule will be effective as of the execution of the contract. However, any payment of the general increase for the period July 1, 1999 and the execution of this collective bargaining

contract shall be made as a service bonus only. Only those employees who were on the payroll on or after July 1, 1999 and remain on the payroll at the execution date of the contract are eligible for the service bonus.

For 7/1/2000, a 3% increase to the 7/1/99 pay schedule (shown on County's revised Schedule One)

For 7/1/2001, a 3 % increase to the 7/1/2000 pay schedule (shown on County's revised Schedule One)

5. Notwithstanding what was apparently a revision to the factfinder's report on January 12, 2000 (Complaint, para. 12), the County Commissioners considered that report on January 5, 2000 (County Exhibit No. 1) and approved it unanimously. Their discussion of the fact finder's wage recommendations was reflected in the minutes of the January 5th meeting, to wit:

> Issue 2- Wage and Salary Administration: The County had presented a new wage scale, which the union liked, but because the contract went passed [sic] July 1st retroactivity became an issue. The fact finder's report recommendation is a "split the baby" decision. The factfinder tried to make each party have a little bit of a loss and a little of what they wanted. The wage scale would be implemented when contract was executed but as of July 1st, Correction Officers should get a 2% increase given in the form of a 1-% Bonus not added to base. The Factfinder's recommendation is that the Union should get something but the implementation of the new wages wouldn't take place until the execution of the contract. Cost would be approximately $24,000.

6. On or about March 24, 2000 after agreeing to the fact finder's report, both parties executed their new CBA for the period April 1, 1999 to April 1, 2002. It contained a wage article (Article 10.1.1) which reads:

> Employees on the payroll on or after July 1, 1999 and who are on the payroll on the execution date of this Agreement shall be paid a one-time lump sum service bonus equivalent to a two percent (2%) increase to the employee's base rate of pay for the period from July 1, 1999 to the execution date of this Agreement.

Article 10.1.2 also provided that "upon the execution of this Agreement, unit employees shall be paid in accordance with the salary schedule as set forth in Appendix A-1." When the service bonus was subsequently paid "the Union's worst fear happened" (Complaint, para. 19), namely, the service bonus did not meet the expectations of the recipients. The disparity presented at hearing involved the County's calculation of the 2% service bonus based on the "old" salary schedule whereas it was the Union's expectation that it would be calculated based upon the "new" salary schedule in effect upon execution of the 1999-2002 CBA. The Union claimed that its expectations were logical because the fact finder "gave back" issues to the County involving military matters, longevity and union time in order to make the "service bonus" an acceptable alternative to management. The County argued that the language of the recommendation referring to the period between July 1,

1999 and the date of execution implicitly suggested that the calculation be based on the only wage schedule then in effect, the "old" one.

7. Corrections Officer Larry Untiet served on the Union negotiating team in 1999. He said that no County negotiator ever represented that the service bonus would be calculated from the "old" wage scale. Further, since the fact finder created the concept of a "service bonus," he believed the 2% was based on the new steps and tracks of the wage scale.

8. David Ward, a correctional officer for 7 years and a member of the Union's negotiating team, testified that the unit employees would not have accepted the fact finder's report and the 2% service bonus if they knew it was to be calculated on the "old" wage scale. He explained that the Union signed the CBA (Joint Ex. No. 1) two days after management, on March 24th, because they used the intervening time to check sources and gain assurances that all monies, steps and adjustments were included. Ward said that he was assured twice by the Union's chief negotiator, Bill McCann, between March 22 and March 24, that the 2% bonus would be based on the "new" wage scale.

9. Corporal David Perez has served on the Union negotiations team three times. Thus, he was aware of the County's opposition to the notion of retroactivity. This caused him to ask County Administrator Kathleen Bateson on March 22nd if "everything was all set?" and if "all the money is there?" She assured him it was.

10. Union negotiator McCann testified that the "service bonus" concept came from the fact finder, not the parties. Therefore, he had conversations with County negotiator Perry about how it would be interpreted. He claims to have been reassured by Perry that step increases would be included when checks were issued. McCann concluded the fact finder was trying to award retroactivity without calling it by that name. McCann said he and Perry met on February 29th when Perry presented a corrected copy of the CBA. Once McCann was assured that steps, overtime and adjustments were included in the wage scale, he had no further concerns. He denied that Perry ever referenced the 2% bonus as being based on the "old" wage scale.

11. County negotiator Renny Perry testified that McCann has asked him about steps and overtime. Perry referred to pages 5-6 of the fact finder's report (Finding No. 4, above) and to how this led him to believe the 2% would be calculated on the "old" wage scale. He said McCann originally disagreed with this. Perry explained the computations and McCann then agreed with the concept. When Perry asked if they, he and McCann, should recontact the fact finder, McCann said that would not be necessary. Perry then drafted the first version of Articles 10.1.1 and 10.1.2 which remained unchanged through the execution of the CBA. Perry said, "Ultimately, he [McCann] agreed" that the calculation should be

2% on the existing wage scale.

12. County administrator Kathleen Bateson reported that the Commissioners accepted the fact finder's report on January 12, 2000 and that their minutes contained a typographical error when "1%" should have been "2%." When she met with Ward and McCann, she claims to have explained to them that the 2% would be calculated on 1998 pay because that was the only scale then in existence. Likewise, the 2% would not be calculated on newly added steps of new wage rates (e.g., progression on the wage scale) because those steps or moves, as the case maybe, were not to become effective until the new contract was executed, as happened by March 24, 2000. New step or progressions simply would not be there, allowing for movement, until the 1999-2002 CBA was signed. The bonus the County paid from July 1, 1999 to March 11, 2000 was based on straight time, overtime, sick time and annual time accrued during that period, based on what was actually paid, i.e., under the "old" wage scale then in effect. Bateson said the Commissioners would not have accepted the settlement based on the method in which the Union is now seeking to utilize to calculate 2% service bonus. .

## DECISION AND ORDER

Even the most casual review of the parties' positions reveals that they disagree as to the meaning of the contract provisions which they approved and ratified after reading and discussing the fact finder's recommendations. The County, for the reasons stated, believed that the service bonus was to be calculated using the "old" salary scale, before the embellishment to tracks and steps, as well as before the general wage increase which was defined as a "service bonus" and which was not added to the base or "old" wage scale. Conversely, the Union believed that the 2% wage increase would be larger precisely because it would be calculated on an enhanced base inclusive of steps and tracks which they expected to be in place when that calculation was made.

Consistent with the foregoing diverse expectations, witnesses for each side testified that their constituencies would not have approved the CBA had the service bonus been calculated in the manner advocated by the other side. While this further exacerbates both the misunderstanding and the divergence of expectations, it serves to confirm a key consideration, namely, that there apparently never was a meeting of the minds on what the respective parties ratified when they accepted the fact finder's report.

Whether by design or happenstance, the parties appear to have included a provision in their 1999-2000 CBA which suggests how they would address a situation where a contract provision was flawed, namely, the separability clause found at Article 21. Without ascribing guilt or blame on either side, the parties have each agreed to the fact finder's language which, to each of them, means something different. This is a flaw, albeit inadvertent, in the ratification and approval process. Neither side can be held to a "deal" which they did not contemplate and, thus, there can be no finding of bad faith bargaining or of an unfair labor practice. Instead, consistent with the provisions of contract Article 21, we find there to have been no mutual understanding as to the meaning of the fact finder's recommendations relating to how the service bonus should be calculated; that the remaining provisions of the CBA remain intact; and that the parties are obligated to reopen negotiations immediately on the issue of how the service bonus is to be

calculated, keeping in mind that any agreement thereon should be expeditious in order to avoid the need for additional funding beyond this contract year in order to fund a benefit due during this contract year.

The ULP is DISMISSED. The parties' obligations are as outlined in this decision; they shall reopen negotiations on the service bonus calculation issue forthwith upon demand by either side to do so.

So ordered

Signed this 29th day of August, 2000.

DORIS M. DESAUTEL
Alternate Chairman

By unanimous vote. Alternate Chairman Doris M. Desautel presiding. Members Seymour Osman and E. Vincent Hall present and voting.