State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION SEIU, LOCAL 1984	*	
Petitioner	*	**CASE NO. S-0394-1**
and	*	**DECISION NO. 2000-097**
STATE OF NEW HAMPSHIRE NEW HAMPSHIRE HOSPITAL	*	
Respondent	*	

REPRESENTATIVES

Representing State Employees Association:

Dennis T. Martino, Collective Bargaining Manager

Representing State of New Hampshire, New Hampshire Hospital:

Thomas F. Manning, Director of Personnel

BACKGROUND

The State Employees Association, SEIU, Local 1984 (SEA), filed unfair labor practice charges on May 10, 2000 alleging that the State of New Hampshire (State) and its agents failed to bargain in good faith in violation of RSA 273-A:5, I (e), when the State failed to submit the Fact Finder's report, dated August 30, 1999 to the Executive Council. The State generally admits the allegations contained in the Details of Charges within the Petition and denies that its refusal to present the report is a violation of RSA 273-A. Further, the State asserts that these negotiations were undertaken pursuant to RSA 273-A:9 and that the matters addressed by the Fact Finder involved issues of lateral transfers and labor management committees. As such, the State asserts that these issues are not unique to a single unit but affect state employees generally and are not, therefore, proper subjects of bargaining at the unit level. The State then attempts to cross-complain that to insist upon permissive or prohibited subjects of bargaining beyond the point of impasse constitutes an unfair labor practice on the part of SEA. No statutory reference accompanies this cross-complaint. Nevertheless the State seeks relief in the form of the PELRB dismissing SEA's complaint and finding that it has committed an unfair labor practice and further determining that the issues in dispute are not proper subjects of bargaining at the unit level. SEA, for its part, seeks to have the PELRB compel the State to put the Fact Finder's Report on the Executive Council's Agenda.

The parties have waived an evidentiary hearing, having submitted stipulated facts and legal memoranda to support their respective positions and ask that the Board make its decision based upon the record as submitted.

STIPULATED FACTS

The parties have submitted the following stipulated statement of facts and the Board thereby finds as follows:

1. Throughout the Winter and Spring of 1999, the SEA, SEIU Local 1984 engaged in bargaining for a new sub-unit collective bargaining agreement with New Hampshire Hospital. (NHH)

2. The State was represented by then Employee Relations Manager, Thomas F. Manning.

3. In August 2000 (sic), SEA and the State, having reached impasse, utilized Fact Finding for DOT, New Hampshire Hospital and Health and Human Services.

4. The Fact Finder, Nancy Peace, issued a report in September.

5. As prescribed by the rules and the law, SEA met with the State to try to craft an agreement. At that time, Mr. Manning stated he would inquire of the NHH management if they could agree to the provisions outlined in the report. After a week or two, Mr. Manning reported that the NHH management could not agree to the provisions.

6. SEA gave (sic) the report to a vote of its membership as prescribed by RSA 273-A.

7. The membership of SEA voted to accept the report. Mr. Manning was notified of the vote. He was then to place the report on the agenda of the Executive Council for their vote.

8. SEA has inquired numerous times as to the exact date that the Fact Finder's Report would be on the Executive Council's agenda. After months of waiting, SEA inquired of Mr. Manning if he intended to put the item on the agenda. On May 4, 2000 Mr. Manning informed SEA by telephone that he would not place the item on the Executive Council's agenda.

9. The SEA contends that this act violates the rules established under RSA 273-A.

10. SEA filed an unfair labor practice charge against the State for refusing to submit the Fact Finder's Report to the Governor and Executive Council.

11. At the pre-hearing conference the parties agreed to ask for a declaratory judgment by the Board since this would be the first time this issue would be the subject of adjudication since the law was amended.

DECISION AND ORDER

The first issued to be addressed by the Board is a procedural one. The State's answer to the SEA's ULP complaint, dated May 25, 2000 contains a request for relief in Paragraph (b) of the Relief section that the PELRB "Find the complainant guilty of an Unfair Labor Practice." This request follows some conclusory language in the declarative section of the State's answer. It appears that it may have been the intention of the State to raise a counter complaint against the SEA as part of its answer to the initial ULP. However, as no reference is made to a statutory violation of any sub-section of RSA 273-A:5 II as required under Pub 201.02 (b) (4), the Board would have to engage in guesswork to reach the relief requested by the State to have the SEA found to have committed an unfair labor practice based upon the record before the Board. The State has not amended its answer to date and the Board does not guess. Therefore, to the extent that the State has alleged that the SEA has participated in an unfair labor practice, that complaint is denied.

The parties have stipulated to the Board that their dispute can be resolved by the Board answering the question, "Does RSA 273-A:9 prevent issues of 'lateral transfers' and 'labor management committees' contained within the Fact Finder's Report, dated August 30, 1999, from being submitted to the Governor and Executive Council because they are not so-called 'unit based'?"

At the outset, it must be noted that it is basic in labor relations law that a failure to bargain in good faith by either a public employer or an exclusive representative of a bargaining unit is a statutory violation. RSA 273-A:3 I(e). It is evident that the obligation to bargain in good faith extends to cooperating in the mediation and fact-finding process. *Id.* Under our own statutory scheme governing labor relations in the public sector, RSA 273-A:12, II instructs negotiating parties as to what is to be done with a fact-finder's report in the event either negotiating team rejects the fact-finder's report. That report "shall be submitted to the full membership of the employee organization and to the board of the public employer." In the instant matter, the parties agree that they each participated in fact finding before a neutral and that she issued her report. (Stipulated Facts #2 and #3). Thereafter, the State negotiator indicated that the State Team did not accept the report of the fact-finder. (Stipulated Fact #5). After an apparent delay of a number of months, the State's negotiator informed the SEA that "he would not place the item (report) on the Executive Council's agenda."(Stipulated Fact #8).

For the State to refuse to submit the fact finder's report to the Executive Council, acting as the "board of the public employer," is not conduct anticipated nor countenanced by the legislature as expressed in RSA 273-A:12, II. Indeed, to do so would void the subsequent mandatory submission called for in RSA 273-A:12, III. Appeal of Derry Education Association, 138 N.H. 69, 71 (1993). Good faith bargaining extends to the parties' actions throughout the negotiations process, a process that includes fact finding as required by RSA 273-A:3,I. Again under our statutory scheme governing labor relations that does not require binding arbitration nor allow public employee strikes, the obligation of good faith continues *ad infinitum* until a collective bargaining agreement is achieved. The PELRB need not wait that long to make its decision. The State has, through its continued refusal to present the fact-finder's report, failed to bargain in good faith and therefore has committed an unfair labor practice pursuant to RSA 273-A:5, I (e) and (g).

At the request of the parties, we take this opportunity as well to consider the instant matters of negotiating lateral transfers and creating a joint labor-management committee at the New Hampshire Hospital ("NHH") in light of the concept of so-called coalition bargaining embodied in RSA 273-A:9, I. The relevant portion of that statute reads as follows:

> "All cost items and terms and conditions of employment affecting state employees in the classified system generally shall be negotiated by the state, represented by the governor as chief executive, with a single employee bargaining committee comprised of exclusive representatives of all interested bargaining units. Negotiations regarding terms and conditions of employment unique to individual bargaining units shall be negotiated individually with the representatives of those units by the governor."

The parties differ as to whether lateral transfers of employees within the New Hampshire Hospital are appropriately subject to sub-unit bargaining. Given the history of the parties, in the broader sense, we believe the topic of lateral transfers, as presented, is bargainable, either at the sub-unit level or at the coalition level, as may be, or has been, requested by either of the parties.

We believe this conclusion is supported both in practice and by law. First, as the fact finder points out in her report, "at least two other sub-units have transfer language," (Fact Finder's Report, p. 20) pertaining to lateral transfers in their contracts thus establishing that the administration of such provisions is not only theoretically possible but presently exists in reality at the sub-unit level. To borrow language from a statutory community of interest concept, bargaining of lateral transfers has "a history of workable and acceptable collective negotiations," RSA 273-A:8, I (b). Put more directly to the facts of this case, the experience of the State and the SEA has proven that the parties have been able to live and work within the parameters of lateral transfer contractual language without impairing "public control of governmental functions." RSA 273-A:1, XI. Because it was a proposal effecting only unit employees of the New Hampshire Hospital, the SEA bargaining position of lateral transfers does not effect the State's "classified service generally" within the meaning of RSA 273-A:9, I.

Second, and even more persuasive, the SEA's proposal (Fact Finder's Report, p. 20) called for a five day posting period, selection by seniority from among the applicants, failing selection by strict seniority, the passed-over more senior employee(s) were to be given specific reasons for their non-selection in writing, and the non-selection written notice was to begin within ten working days. This proposal bears great similarity to the transfer proposal examined in Appeal of State of New Hampshire, 138 N.H. 716, 727 (1994) which involved posting of vacancies, content of the posting, filling of vacancies by seniority and other criteria, notification of selection or non-selection in writing, and subsequent posting outside the department if no departmental employee is selected.

After reviewing the SEA proposal in Appeal of State, *Ibid.* at 728, the Supreme Court reasoned, of the language which required posting of notices and notification about selection or non-selection, that:

> "The proposals offer important information to employees for job advancement and enhance employees' opportunities to apply for advancement, both of which are closely connected to the terms and conditions of employment. The proposals merely provide procedures, part of the implementation of the employer's policy, to promote and transfer employees. The provisions, therefore, primarily affect the terms and

conditions of employment and have no significant effect on managerial policy." *Id.*

Similarly, the SEA's subject proposal for lateral transfers also has no serious effect on public control of governmental policy.

The Supreme Court found the SEA transfer proposal in Appeal of State to be a mandatory subject of bargaining. We believe the same result applies to the instant case. The fact that one party believes the pending proposal to be suitable only for statewide coalition bargaining does not permit it to interpose its belief to exclude the SEA's ability to bargain lateral transfers at the sub-unit level.

The same result applies to the issue of a labor-management committee at the sub-unit level. The subject matter, implicitly because it involves only a consultative function, is more akin to terms and conditions of employment than to broad managerial policy. Additionally, because the function of such a joint labor-management committee is consultative, there is no infringement on maintaining governmental functions as contemplated under RSA 273-A:1. We are mindful of the fact finder's observations that such a committee at the sub-unit level might be helpful to the overall negotiations process "given the number and nature of issues raised during bargaining for this sub-unit." (Fact Finder's Report, p. 25)

By way of remedy we direct the State to present the Fact Finder's Report to the Executive Council and hereafter to bargain both the issue of lateral transfers affecting unit members at the New Hampshire Hospital and the issue of joint labor-management committees at the sub-unit level when requested to do so. We find that RSA-A:9 does not prevent such sub-unit bargaining on these two issues and therefore answer the declaratory inquiry of the parties in the negative.

So ordered.

Signed this 15th day of SEPTEMBER, 2000.

JACK BUCKLEY
Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.