State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, LOCAL 3657 for the Hillsborough County Corrections Employees	*	
Complainant	*	**CASE NO. A-0428:203**
	*	**DECISION NO. 2000-104**
HILLSBOROUGH COUNTY, DEPARTMENT OF CORRECTIONS	*	
Respondent	*	

REPRESENTATIVES

For the AFSCME , Local 3657 Hillsborough County Corrections Employees:
Vincent A. Wenners, Esq., Associate General Counsel

For the Hillsborough County Department of Corrections:
Carolyn M. Kirby, Esq., Assistant County Attorney

BACKGROUND

On March 31, 2000, AFSCME, Local 3657 for the Hillsborough County Corrections Employees (Complainant), filed an improper labor practice charge on March 31, 2000 pursuant to RSA 273-A:1 XI; RSA 273-A: 3; and RSA 273-A:5 I (e), (g), (h), and (i) alleging that actions of the Hillsborough County Department of Corrections, (Respondent) and its agents by inaccurately calculating back wages owed to reinstated employees pursuant to a settlement agreement reached by the Complainant and Respondent during contract negotiations were violative of the statute and constituted a breach of the parties' collective Bargaining Agreement (CBA).

On April 17, 2000 the Hillsborough County Department of Corrections filed its answer wherein it denied the allegations raised by the Complainant and asserted that the Complainant had failed to articulate any errors in computation of the amounts paid to certain reinstated employees. A hearing originally scheduled for July 20, 2000 was

continued upon motion submitted by the Respondent and consented to by the Complainant. The hearing was convened on August 8, 2000. At the outset of the hearing, the claim of the union on behalf of one of the five subject individuals was dismissed by agreement and the hearing went forward with the four remaining subject individuals. The record was left open for the submission of certain financial information as indicated by the Board's Interim Order dated August 15, 2000 and the parties were to submit their respective memorandum of law in support of their position.

The primary relief sought by the Complainant is the issuance of additional checks payable to these employees. The primary relief requested by the Respondent is the dismissal of the alleged improper practice complaint.

FINDINGS OF FACT

1. AFSCME, Local 3657 of the Hillsborough County Corrections Employees is the duly certified bargaining agent for certain employees including those in the positions of Correctional Officer I and Correctional Officer II who are employed by the Hillsborough Department of Corrections.

2. The Hillsborough County Department of Corrections operates a public correctional facility and, in the course of so doing, is a "public employer" within the meaning of RSA 273-A:1 X.

3. The Department of Corrections and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 1995 – June 30, 2002.

4. At approximately the same time as the Union was trying to get the subject employees reinstated through a settlement agreement, the parties were also trying to finalize a new Collective Bargaining Agreement.

5. Superintendent James M. O'Mara, Jr. ("O'Mara") and AFSCME Regional Representative Andy Rourke ("Rourke") undertook separate efforts to resolve both issues during the period of August-September 1999.

6. Each of the subject employee's previous grievance action (Joint Exhibits 1a, 1b, 1d, and 1e) was withdrawn, *inter alia*, pursuant to the terms of the Settlement Agreement.

7. Each of the member employees also executed a "Waiver", dated October 7, 1999, (Exhibit Union #2 a-d) drafted by and presented to them by the Union which, by its terms, provided that they waived their right to arbitration of their grievance related to their termination and withdrew their grievance related to said termination. The Waiver also contains a statement of their understanding of the terms of the settlement for which they were waiving these rights. The Department is not a signatory to these

Waivers and the Waivers are not a condition of the settlement between the Department and the Union or its member employees.

8. The Union presented a table of calculations (Union Exhibit #1) in or about January 2000 to the Department purporting to show the amounts it believed should have been paid to the reinstated employees. Prior to the date of hearing, the Department did not reply to the Union regarding the discrepancy between the Union's calculations and the amount of the actual amounts paid by the Department to the reinstated employees.

9. The original grievance of the terminated employees included a request that the grievants be "made whole". The terms "make whole" or "made whole" do not appear on the face of the material settlement documents entitled "General Release and Settlement Agreement" or the document entitled "Settlement Agreement". Except for the phrase "for and in consideration of valuable consideration, receipt of which is acknowledged," there is no reference in either document that the amount of the payment to each employee would include so-called "premium pay".

10. O'Mara has been the Department's Superintendent of the House of Corrections since April 1991.

11. O'Mara testified that, following the Department's impasse declaration regarding the grievance of the subject employees, he met alone on two occasions with Rourke and that the two of them negotiated the resolution of the grievances and CBA.

12. O'Mara testified that he and Rourke then met on a third occasion with the Department's negotiator to review their tentative agreement as O'Mara desired to assure himself that management rights would not be adversely affected by the settlement which was proposed.

13. O'Mara testified that at no time in any of his discussions with Rourke did they discuss premium pay, i.e. holiday; shift differential and hazardous duty pay, being included in the calculation of the subject employees' reinstatement payment.

14. The Department provided draft copies of the proposed release and agreement documents to the Union for review on or about September 24, 1999.(Joint Exhibit #2)

15. Representatives of the Department and the Union and the subject employees met on October 7, 1999 and executed certain documents to effectuate their negotiated agreement. O'Mara testified that there was no discussion regarding premium pay or rate of reimbursement at this meeting. Those Union representatives present included: Donna Lacerte (former Chapter Chairperson), Jim Anderson (AFSCME), Andy Rourke (AFSCME), Joe Macarone (President) and Joe Pinkham (Stewart).

16. The subject employees received paychecks for the period of reinstatement in an amount equal to the number of weeks each had been initially suspended less one week of agreed unpaid suspension multiplied by their respective base hourly pay rate. These reinstatement checks did not include any amount attributable to hazardous duty, holiday and shift differential pay.

17. Some time after receiving his check, one of the subject employees inquired of the Department as to how the amount of his check had been calculated and apparently was informed that it was calculated using his base pay rate. He informed the Union and reference to the requested calculation appears in the Union's letter to O'Mara dated November 13, 1999.

18. Thereafter and without any response from the Department to its inquiry regarding the method of calculation of the reinstatement checks, in an around January 2000, the Union sent its own calculation to the Department demonstrating that by their method of calculation additional funds were due to the subject employees.

19. The parties apparently agree upon the period of time used to calculate the payment due to the subject employees and the amount of each employee's base pay rate.

20. The parties apparently agree upon the premium pay rates assigned to each employee. (See post hearing submissions of both parties)

21. The difference between the amount paid to each employee and the amount the Union claims should have been paid is due to the Department not including any premium pay in its calculations.

22. A review of all documents in evidence and relevant testimony reveals that no provision was made to include "premium pay" computations into the reinstatement checks issued to the suspended employees.

DECISION AND ORDER

The legislature has delegated to the Public Employee Labor Relations Board the authority to determine whether or not a public employer or an exclusive representative of a public employee organization has committed an improper labor practice. RSA 273 A-5. The Union asserts that the Department of Corrections committed an unfair labor practice for failing to adhere to the terms of a settlement agreement negotiated between the parties to resolve the issue of certain terminated employees and executed, in part, to achieve final agreement as to the terms of a new CBA. In this as in other such complaints, the Union, as the moving party, bears the burden of proving its allegations by a preponderance of the evidence. N.H. Administrative Rules Pub 201.06(c).

The parties are essentially in agreement as to all relevant facts leading up to the execution of the parties' settlement agreement. In brief, they agree that certain member employees filed grievances over their termination from employment and that prospects of a new CBA being signed were not good until and unless these terminations were addressed. They further agree that the "deal" that led to the eventual resolution of both the reinstatement of the employees and the signing of the CBA was brokered through a series of meetings between Superintendent O'Mara and Union Regional Representative Andrew Rourke separate from the normal negotiations between management and labor teams. They agree that the draft language for the settlement agreement was circulated by the Department to the Union in advance of its proposed execution. Also, the parties' evidence clearly shows that the parties' Settlement Agreement and General Release and Settlement Agreement were to stand alone and were not part of any other collateral agreement. The parties agree as to the period of suspension for each employee and that the Department allowed some flexibility in return dates to the employees.

The parties disagree as to whether or not, under the terms of their settlement, the reinstated employees' are entitled to additional back pay comprised of so-called "premium pay" supplements to their base pay. This is the issue upon which the Union carries the aforementioned burden of proof. We do not find that it has met that burden. The Union's single direct documentary evidence is the individual employee's request to be made whole within the relief portion of the initial grievance. Little beyond that helps carry its burden. Ms. Lecerte's testimony in the main consists of "beliefs" of what others said they said or what others said they did. For her direct part, she calculated a payment method which was at variance with that utilized by the Department. At the hearing, it was determined that the version that she previously presented to the Department had been calculated incorrectly. It was latter corrected. Without contravening testimony by Mr. Rourke or others directly involved in the settlement process to that given by Mr. O'Mara that such premium payments were not discussed as part of the settlement, without adding express language in the operative settlement document addressing the inclusion of premium payments, and without incorporation by reference of any relevant ancillary agreements to support its proposition, we cannot find a sufficient evidentiary basis to conclude that the employees, under the circumstances presented in this case, could expect other than their base. This is particularly so when such payment was not for actual service to the county, but rather as a result of a mutual monetary settlement through which they regained their jobs.

In making our decision, we need not reach the issue of past practice and do not render an opinion as to the existence or non-existence of a past practice relating to any "fixed" manner of calculation in the instance of reinstatement awards. Where parties have voluntarily and mutually negotiated a settlement of their differences, the Board is reluctant, though not prohibited in appropriate circumstances, to look behind the parties' settlement agreement. Other circumstances may require such action, but those presented by this case do not. Despite the commendable efforts of counsel, the Union's evidentiary burden cannot be met simply by its bare assertion that it had expected certain premium

pay supplements to be included in the calculation of reinstatement pay in the final settlement.

The Board finds that there is insufficient evidence to support the Union's complaint, and therefore it is hereby DENIED.

So Ordered.

Signed this 2nd day of October 2000.

BRUCE K. JOHNSON
Alternate Chairman

By unanimous vote. Alternate Chairman Bruce K. Johnson presiding. Members Seymour Osman and E. Vincent Hall present and voting.