



**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

State Employees Association of New Hampshire, \*  
Local 1984, for Strafford County Corrections \*  
Employees \*

Complainant \*

v. \*

Strafford County Commissioners \*

Respondent \*

Case No. M-0537-22

Decision No. 2001-063

APPEARANCES

For State Employees Association of New Hampshire:

Bill McCann, Field Representative

For Strafford County Commissioners:

Gary W. Wulf, Consultant

Also appearing:

- David Funk, Strafford County
- Linda A. Lee, Strafford County
- Owen Weisgarber, Strafford County
- Rodney Woodill, Strafford County
- Dennis T. Martino, SEIU Local 1984

BACKGROUND

The State Employees Association of New Hampshire (SEA), Local 1984, on behalf of the Strafford County Correctional Employees (Union) filed unfair labor practice (ULP) charges on February 7, 2001 alleging violations of RSA 273-A:5 I (c), (e) and (h) resulting from breach of contract and failure to bargain in good faith by unilaterally creating and filling newly-authorized corporal positions and refusing to bargain about the placement of these employees in the certified bargaining unit. The Strafford County Commissioners (County) filed their answer on February

26, 2001. A pre-hearing conference was scheduled for March 14, 2001, and continued at the request of the County to the mutually acceptable date of May 16, 2001. That pre-hearing conference on May 16, 2001 is memorialized in Decision No. 2001-037 of the same date. This matter was then heard by the PELRB on June 26, 2001 after which the record was closed.

### FINDINGS OF FACT

1. Strafford County operates the Strafford County House of Corrections, employs personnel to operate this facility and, thus, 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., AFL-CIO, is the duly certified bargaining agent for personnel employed by Strafford County at its Riverside Rest Home and its Department of Corrections, more specifically referenced in Decision No. 90-124 dated November 20, 1990.
3. The County and the Union were, at all times pertinent to these proceedings, parties to a collective bargaining agreement (CBA) for the period April 1, 2000 through March 31, 2001 (Union Ex. No. 1). Article 1.1 of that document contains the "Recognition Clause" which reads as follows:

The Employer hereby recognizes the Union as the sole and exclusive bargaining representative pursuant to provision of New Hampshire Revised Statutes Annotated Section 273-A, for all members of the bargaining unit.

The Employer recognizes the Union as the sole and exclusive bargaining representative to all full-time and regular part-time employees, as hereinafter defined, of the Employer in the following collective bargaining unit; correctional officers, corrections programs directors, registered nurses, head nurses, licensed practical nurses, nurses aides, nursing transportation aides, nursing supply clerks, unit clerks, bookkeepers, custodians, maintenance I, maintenance II, maintenance III, housekeepers, dietary stockroom clerk, dishwashers, dietary aides, physical therapy assistants, physical therapy aides, senior activity aides, activity aides, personal clothing attendants, washer/dryer operators, ward clerks, transportation aides, couriers, switchboard operator I, and switchboard operator II. The bargaining unit shall exclude all supervisory, management, probationary (initial)\* and on-call personnel.

\*handwritten on Union Exhibit No. 1.

4. Prior to the expiration of their CBA, the parties began negotiations for a successor agreement. This is more particularly recognized by exchange of proposals on

August 7, 2000 (memo, G. Wulf to M. Jones, purporting to be ready for signing and without any reference to corporals, also identified as Union Ex. No. 3), on October 23, 2000 (Union Exhibit No. 4a) which referenced pay for corrections officers and corporals to be effective on April 1, 2000, and on December 6, 2000, in the form of "Union Package Proposal," item 7 of which was "new proposal for Corrections wages attached." See Union Ex. Nos. 4b and 4c.

5. On August 7, 2000 Superintendent David Funk issued a memo to Betsy Trundy which read, "Please drop the following Officers from the Union Rolls as they are now classified as Floor Supervisors, and have been promoted." Listed were five corporals who had been promoted between February, 2000 and August, 2000, namely, Danny Baud, Donna Roy, Gwen Weisgarber, Laura Noseworthy and Linda Lee. (Union Ex. No. 5) Funk testified that he issued the memo when one of the five newly promoted corporals inquired of him whether it was still necessary to pay union dues once that promotion had been finalized. Funk said it was not his intent to harm the union organization or to discourage membership. There was no evidence offered that this was the case or the result of the memo, except for the financial consequences of its having been implemented.
6. There is no job description for corporals or for sergeants. Supt. Funk described both titles, both of which appear in the organizational chart (County Ex. No. 2), as pay grades which perform duties as a "Floor Supervisor," for which there is a job description (County Ex. No. 1). Conversely, "Floor Supervisors" are not on the organizational chart. The ascending chain of command or responsibility goes from correctional officer, to floor supervisor (usually filled by a corporal or sergeant), to shift supervisors (usually filled by a lieutenant, or by a sergeant or corporal on a fill-in basis), to the security captain, a single incumbent position.
7. The undated job description for "Floor Supervisor" (County Ex. No. 1) provides under "Supervision Exercised," that "In the absence of the Superintendent, Captain and Shift Supervisor [the floor supervisors] control over all other Correctional personnel, including responsibility to initiate disciplinary action." One of the responsibilities cited for floor supervisors is to "supervise and give instruction to Correctional personnel." There are numerous occasions, which appear to occur as frequently as weekly, when the Superintendent, Captain and regular Shift Supervisor are all absent from the facility and it is under the control of a corporal who is required to rotate into a shift supervisor vacancy, per the testimony of Supt. Funk and Cpl. Weisgarber.
8. Corporal Gwen Weisgarber testified that she has disciplinary authority and takes a role in the evaluation of subordinates, e.g., makes recommendations to the Shift Supervisor for Correctional Officer evaluations (County Ex. No. 1, Item 6) and participates in the hiring process for Correctional officers when possible (County Ex. No. 1, Item 9). She has disciplinary authority to use counseling sheets, "write ups" or send home authority subject to review by the Superintendent. She does not have authority to suspend but may make recommendations.

9. Corporal Linda Lee was promoted to her present rank in August of 2000. She testified that she, too, evaluates subordinates and has the authority to impose discipline such as verbal warnings. She said that the sergeant and lieutenant must approve any corrective actions before they are put into an employee's personnel file. She identified the Captain as being the first step in the contract grievance procedure.

### DECISION AND ORDER

The Union has asserted three separate violations in its complaint. The first allegation claimed a violation of RSA 273-A:5 I (c) when the County "created new positions unilaterally for the purpose of discouraging membership in the union" [and] "promoted these employees... for the purpose of taking them out of the [bargaining] unit." We dismiss this charge for two reasons. First, it is well settled [e.g., Appeal of New Hampshire Troopers Association, slip. op. (October 5, 2000)] that a public employer may reorganize its organizational structure. RSA 273-A:1 XI specifically defines "managerial policy within the exclusive prerogative of the public employer" as "including the use of technology, the *public employer's organizational structure*, and the selection, direction and number of its personnel, so as to continue public control of governmental functions." (Emphasis added.)

Elsewhere in the statute, one of several forms of unfair labor practice is defined as occurring when a public employer discriminates "in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization." This brings us to the second reason for dismissing the alleged violation of RSA 273-A:5 I (c), namely, because there was no evidence offered that any employees were encouraged or discouraged within the meaning of the statutory provision. For that matter, no employees offered any testimony about the impact of their being promoted to corporal, i.e., whether that promotion encouraged or discouraged their union membership or that of their subordinates. The extent of the record presented to this Board was that inquiry was made of the Superintendent whether corporals were required to pay union dues. We consider that to have been a reasonable inquiry and we find that the Union did not meet its obligation to prevail in this assertion by a "preponderance of the evidence" as required by Rule PUB 201.06 (c). In so finding, we do not intend to suggest that RSA 273-A:5 I (c) is necessarily subservient to RSA 273-A:1 XI. Both are important provisions of the law. The Union simply failed in its burden under RSA 273-A:5 I (c).

Before moving to the subsequent charges, the Superintendent's memo of August 7, 2000 (Union Ex. No. 5) "dropping" certain officers "from the Union Rolls" warrants comment. As pointed out at hearing, there is no agency fee agreement as part of the union security provisions of Article V of the CBA, such as was examined in detail in Nashua Teachers Union, 142 N.H. 683 (1998). Instead, the parties' relationships vis-à-vis union membership are controlled by Article V. This being the case and in accordance with Article 5.3 requiring written authorization from employees for dues deduction, opting-in and opting-out of union membership status should remain a prerogative of the individual employees. It is well settled that "dealing directly with employees is generally forbidden... because it seriously compromises the negotiating process and

frustrates the purposes of the statute.” Appeal of Franklin Educ. Assn., 136 N.H. 332, 335 (1992). An employee’s membership in an employee organization is an issue separate and distinct from one’s job being included in a bargaining unit. Aside from this commentary, we direct no further remedy concerning Union Exhibit No. 5.

The Union next asserts that the County violated RSA 273-A:5 I (e) by refusing to negotiate about the placement of the newly created corporal positions in the bargaining unit. The County, by way of the opening remarks of its representative at hearing, claims there is no obligation to bargain because the Union has not sought to include corporals through the filing of a modification petition. The County has inappropriately relied upon this position which is contrary both to practice and administrative rules, namely, PUB 302.05.

It is common for parties to discuss the inclusion or exclusion of job titles in a bargaining unit. Likewise, this practice is recognized in PUB 302.05 (b) which speaks to those times when there is an attempt to “modify the composition of a bargaining unit negotiated by the parties and the circumstances...actually changed prior to negotiations on the collective bargaining agreement presently in force.” (Emphasis added.) In essence, this is a bar to “double-dipping” on modification issues if they have been raised in negotiations and bargained away as *quid pro quo* for another benefit or language. Thus, the administrative rules contemplate that modification issues be negotiated, although there is no requirement to reach agreement either under the rules or the statute, i.e., RSA 273-A:3. The County was wrong in refusing to negotiate or discuss the matter although it was under no obligation to agree or to make a concession. It must cease and desist from such refusals to negotiate; however, it may now be more expeditious, after the fact, for the Union merely to file a modification petition if it continues in its belief that corporals have a community of interest under RSA 273-A:8 and PUB 302.02 with existing job titles contained in the bargaining unit.

Finally, the Union has asserted a violation of RSA 273-A:5 I (h) as a breach of the CBA by the County’s actions relative to the corporals. We assume that this “breach” refers to an intrusion into the certification document (Union Ex. No. 2) and/or the recognition clause (Union Ex. No. 1) by failing to include corporals, and thus their benefits, under the CBA. If this be the case, we dismiss this charge pursuant to our disposition of the RSA 273-A:5 I (c) violation discussed on page 4, above. If this is not the intent of the Union’s RSA 273-A:5 I (h) charge, we dismiss for failure to state a claim and for lack of specificity as to what particular contract provision has been breached.

We take no action with respect to the alleged violation of “RSA 273:I:h” for creating corporals which “effectively invalidated the CBA...by invalidating the recognition clause” because there is no such citation, because, if the citation was intended to read “RSA 273-A:5 I (i),” then there is no evidence that the County adopted any “Administrative procedure” which invalidated the CBA, and because any such rule or procedure, if adopted, would only have extended to the four corners of the CBA which historically has not and does not currently extend to corporals.

We find that the County refused to bargain in violation of RSA 273-A:5 I (c) when it refused to talk about or respond to the Union’s attempt to raise and resolve the issue concerning

the placement of corporals in the existing bargaining unit. All other alleged violations of RSA 273-A:5 I are dismissed. By way of remedy, we direct the County to CEASE and DESIST from refusing to meet, discuss or negotiate unit placement issues when requested to do so before either party has requested adjudication of that same issue by the filing of a modification petition with the PELRB. Because there is evident confusion about the difference between job descriptions versus ranks assigned to employees and between the certification document (Union Ex. No. 2) and the recognition clause appearing in the CBA (Union Ex. No. 1), we direct the parties to meet and confer within 30 days of the receipt of this decision on the proposition of agreeing on a new comprehensive description of the bargaining unit. If success in this endeavor is not reported to the PELRB within 40 days from the date of this decision, the parties will be called to a hearing at the PELRB offices to resolve these discrepancies.

So ordered.

Signed this 16th day of July 2001.

  
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JACK BUCKLEY  
Chairman

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