State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Teamsters Local 633 of Manchester Public Library Employees	*	
Petitioner	*	
v.	*	Case No. M-0786-1
City of Manchester, Public Library	*	Decision No. 2003-032
Respondent	*	(Rehearing)

APPEARANCES

Representing Teamsters Local 633 of New Hampshire:

John D. Burke, Esq.

Representing City of Manchester:

Daniel D. Muller, Jr., Esq.

BACKGROUND

Teamsters Local Union No. 633 of New Hampshire (Union) filed unfair labor practice (ULP) charges against the City of Manchester, Public Library (City) on August 9, 2002 alleging violations of RSA 273-A: 5 I (e) for refusing to bargain in good faith after having been ordered to negotiate on April 4, 2002. (See Decision No. 2002-040) The City filed its answer and motion to dismiss on August 23, 2002. The Union filed objections thereto on August 30, 2002, which prompted the City to file a "replication" to the Union's objection on September 5, 2002. The Union filed an objection to the City's replication on September 11, 2002. This matter then went to a pre-hearing conference on September 20, 2002, as memorialized in Decision No. 2002-110. Thereafter, on September 30, 2002, the City filed an amended motion to dismiss and to clarify the pre-hearing order. That clarification was forthcoming in a "corrected copy" version of Decision No. 2002-110 dated October 3, 2002. The Union filed an objection to the City's amended motion to dismiss and cross motion for summary judgment on October 9, 2002, which prompted an objection thereto filed by the City on October 24, 2002. This case was heard by the PELRB on October 24, 2002. At the close of those proceedings, the parties agreed to file post-hearing briefs on or before November 15, 2002. Both briefs were timely filed on that date.

The PELRB issued its decision (Decision No. 2002-157) in this matter on December 31, 2002, which found a "technical violation" of RSA 273-A: 5 I (e) but, due to the circumstances,

directed no further remedy. Thereafter, the City filed a motion for rehearing on January 30, 2003 and the Union filed objections thereto on February 18, 2003. The PELRB granted rehearing in Decision No. 2003-014, dated February 25, 2003, which provided for additional oral arguments based on the assertions in the motion for rehearing and the objections thereto. After a requested continuance to accommodate an attorney scheduling conflict, the PELRB heard the parties' additional oral arguments on April 1, 2003. No post-hearing submittals were sought or received, whereupon the record was closed on April 1, 2003.

FINDINGS OF FACT

1. Findings of fact No's. 1, 2, 3, 4, 5, 7 and 8 of Decision No. 2002-157 are reviewed, affirmed and incorporated here by reference.

2. Finding No. 6 of Decision No. 2002-157 is redacted and omitted herefrom because of the characterization attributed to it in paragraphs 3, 4, 5, 6 and 7 of the city's motion for rehearing, because it appeared merely as a chronological linkage between the events referenced in the pleadings and in the pre-hearing conference Memorandum and Order (Decision No. 2002-110) and because it was not an essential finding or pivotal in the course of the PELRB's finding a technical violation of RSA 273-A: 5 I (e) in Decision No. 2002-157. The PELRB's conclusion relating to a "technical violation" would have been the same whether Finding No. 6 appeared, or did not appear, in Decision No. 2002-157 because the complained of refusal to bargain occurred within the facts enumerated in Finding No's. 1 through 5, inclusive.

3. The act for which the PELRB found the City to have committed a "technical violation," contrary to the provisions of RSA 273-A: 5 I (e), occurred on or about July 8, 2002, prior to the date of any of the acts recited in Finding No. 6 of Decision No. 2002-157.

DECISION AND ORDER

The City articulated three particular areas in its oral argument before the PELRB. For purposes of analysis, we will consider them separately, namely, as jurisdiction, reliance and mootness, in that order.

The City would have us find that, because it filed an appeal of the bargaining agent election and the PELRB's order to negotiate, as found in Decision No. 2002-053, with the Supreme Court on or about June 5, 2002, and because that appeal also included a request to stay the PELRB's order to negotiate, we were thus incapacitated, or lacked jurisdiction, to determine if an after-occurring refusal to bargain was a violation of RSA 273-A: 5 I (e). Relevant to the circumstances of this situation are two dates: the Union's request to negotiate on or about July 3, 2002 (Finding No. 5, Decision No. 2002-157) and the court's denial of the city's motion to stay on August 19, 2002. In its response to the Union's demand of July 3, 2002, the City articulated on July 8, 2002, that "...negotiations are not appropriate at this time, pending the action of the Court on the City's Motion to Stay." (Union Ex. No. 6 to Decision No. 2002-157)

In support of the foregoing position, the City relies upon Appeal of the University System of N.H., 120 N.H. 853, 856 (1980). In pertinent part, it said:

> [T]he refusal of the [PELRB] to stay negotiations pending an appeal on the question of *unit determination* was unreasonable. Although elections *usually are not stayed* pending an appeal of *unit determination*..., the public employer should not be forced to bargain while it has a good faith appeal pending. In the absence of irreparable harm to the employees, it is better to maintain the status quo pending appeal....(Emphasis added.)

We believe the City's reliance on University System is misplaced. First, that was a case appealing a unit determination and the PELRB's order to negotiate. Second, and unlike the instant case, the University System had filed a separate proceeding with the PELRB seeking to stay its order to negotiate. After the PELRB denied the request to stay, both proceedings were consolidated on appeal to the Supreme Court.

When these circumstances are compared to the case at hand, we find no issue of unit composition being challenged at the Manchester Library. The City's appeal document dated June 5, 2002 presented a single and very succinct issue: "Was the PELRB's decision to entertain the Teamster's petition for certification unlawful, unreasonable and/or unjust under N.H. Administrative Rule Pub 301.01 (6) and the PELRB's interpretation of that rule?"[1] Essentially, then, the Manchester Library case is totally divorced from a unit composition issue and involves a question not of whether the parties must negotiate, but *when* they must start those negotiations. Failure to commence negotiations in a timely manner may create the "irreparable harm" of University System because of timing requirements to fund collective agreements, although that timing is less crucial in cities with continuing, as apposed to annual, funding capabilities. Thus, if and as applicable, we believe we have fulfilled the "reasonable" standard of University System.[2] One must note that the Union's demand to negotiate on July 3, 2002[3] was not its first demand to do so. It was, however, its first demand to do so after the completion of the election review process referenced in Decision No. 2002-053, which concluded on May 6, 2002.[4] Finally, as for subject matter jurisdiction, the issues in this case fit precisely within the mandate to the PELRB found in RSA 273-A.

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[1] The Pub 301.01 (6) issue was both a narrow and a technical one involving filings of certification petitions 150 days prior to the budget submission date, holding a bargaining agent election 120 days prior to that budget date, preserving this 120 day notice period under RSA 273-A: 3 II, the applicability or lack thereof of the contract bar rule, and resolving, if the 120 day limit is a minimum, if there then is any maximum. These issues were addressed in Appeal of the City of Manchester, N.H. , (Slip op., April 5, 2003). See also Union brief, p. 6.

[2] The Union's brief, p. 5, notes that Appeal of Seacoast Anti-Pollution League, 125 N.H. 708 (1985) chronologically followed University System and upheld commission orders where an "appeal is properly filed with and granted by [the Supreme Court]."

[3] Absent the applicability of the circumstances and resulting standards of University System, we believe the more general "not stayed by an appeal" of RSA 541:18 is the standard to be applied here to the facts of this case as of July 3, 2002, nearly a month after the appeal was filed, during which time a stay could have been ordered by the Supreme Court.

[4] The record shows the Union made earlier demands to bargain on March 26, 2002 and April 12, 2002, both prior to Decision No. 2002-053 on May 6, 2002, but, in the latter instance, after the certification and order to negotiate in Decision No. 2002-040 dated April 4, 2002. See also Union brief, p. 5.

The City next asserts that we placed undue, inappropriate and unjust reliance on Finding No. 6 as it appeared in Decision No. 2002-157. Our findings (No. 2, above) explain the limited purpose for which No. 6 was included in Decision No. 2002-157 and show (No. 3, above) that the act complained of occurred on a date prior to any of the chronology of dates referenced in No. 6. Union counsel (Brief, p. 2) summarized Finding No. 6 as follows:

> [I]n making Finding No. 6, [the Board] did not attach any significance to the disputed conversation, nor did it make any credibility determination or decide which version of the disputed event was accurate. Further, the Board simply noted there was a dispute. The Board did not rely on the substance of the disputed conversations in making its decision.

The City's last concern was that, when the PELRB first heard the case (Decision No. 2002-157) on October 24, 2002, it should have granted the City's motion to dismiss on grounds of mootness. The theory was, since the parties had resumed bargaining as per Hodgen's letter to Noonan (City Ex. No. 4, dated August 29, 2002 in Decision No. 2002-157) as of and not later than September 24, 2002 (Finding No. 8 in Decision No. 2002-157), the Union no longer had cause to complain that the City had refused to bargain. We disagree and think the City missed the point.

One may relate to the parable of the two boys at the elementary school who engaged in a fight at recess. During the fight, one boy threw a stone at the other, missed and broke a classroom window. Fearing this would catch the attention of the teacher, the boys quickly settled their differences by themselves and went back into the building. When the teacher found out about the scuffle, she commended the boys for finding a way to resolve their differences and end their fighting. When she learned which boy threw the rock, however, she still sent him to the principal's office. Self-help and self-initiative to stop the fight still did not erase the damage caused to the broken window, or, in the context of this case, to the obligation to bargain.

RSA 273-A: 3 creates a clear and unequivocal obligation to bargain and to do so in good faith. At the time of the July 3, 2002 demand to bargain, the City had filed its appeal and request for a stay. The Court had yet to act on the request for a stay even as of the date the Union filed its ULP on August 9, 2002. That was not to happen until ten days later. Thus, the Union's ULP was not moot when it was filed on August 9, 2002, any more than it was moot on the date complained of, July 3, 2002.

To the extent this case presents an issue of whether a *per se* refusal to bargain can be remedied by the alleged violator subsequently agreeing to and then participating in the process, the answer has to be "No." The perpetrator cannot have the benefit of engaging in prohibited conduct or prohibited acts for a period of time and then be able to absolve itself from charges pertaining to those acts merely by subsequently complying with the law, RSA 273-A in this case.

It is apparent to us that the triggering mechanism, which caused the City to agree to bargain, was the Court's rejection of the request to stay negotiations on August 19, 2002. This was clear from Hodgen's letter to Noonan on August 29, 2002 (City Ex. No. 4 in Decision No. 2002-157). Regardless of the City's characterization of its behavior, such a delay has the

potential for the "irreparable harm" discussed in University System.[5] Whether intended or not, delaying the negotiating (RSA 273-A: 3) and/or impasse resolution (RSA 273-A: 12) processes into another funding period may deprive bargaining unit members of benefits which have been bargained. Worse still, such undue delay can deteriorate the parties' confidence in the bargaining process and compliance with the "harmonious labor relations" purposes of the act.

If we were to accept the City's position about self-correcting remedies by those who commit violations of RSA 273-A, whether intentionally or not, at anytime before the matter comes to hearing before the PELRB, we would be sanctioning chaos relative to compliance with Chapter 273-A and with the timelines contemplated therein.

One who does malfeasance should not profit from it. Refusal to bargain is one such manifestation. The obligation to bargain is paramount even when "the going gets rough." In the private sector, that obligation may continue even during strikes. When it does, management cannot refuse to bargain as long as the strike lasts, go to the bargaining table after the strike stops and then absolve itself from "failure to bargain" charges by doing so.[6] The same principles are applicable here. One side cannot refuse to bargain contrary to RSA 273-A: 5 I (e), have the benefit of delay that it has caused and then remedy its conduct by agreeing to go to the bargaining table after the ULP has been filed and the damage done.

Having concluded this analysis after rehearing sought by the City, we AFFIRM our finding in Decision No. 2002-157 that the City committed a technical violation of RSA 273-A: 5 I (e) by the manner in which it refused to bargaining after receiving demand to do so, after receiving a PELRB order directing it to do so and then not securing an order from the PELRB or the Court to permit it to do otherwise. No other remedies are directed.

So ordered.

Signed this 8th day of May , 2003.

BRUCE K JOHNSON
ALTERNATE CHAIRMAN

By unanimous decision. Alternate Chairman Bruce K. Johnson presiding. Members E. Vincent Hall and Carol Granfield present and voting.

[5] University System suggests that "irreparable harm" can be worked on either party, depending on the circumstances.

[6] See, for example, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, 221 NLRB 876, 1975 NLRB Lexis 1158, Case 12-CA-6376 (November 26, 1975) which also explains the usage of "technical violations," a process known to the collective bargaining process since 1975 and before, notwithstanding the City's position the PELRB must either issue a cease and desist order or issue no order. We believe the authority for remedies we may order is found in RSA 273-A: 6 VI and that a "technical violation" falls within that scope of authority.