

In regards to a meeting being scheduled to establish certain performance standards for the position of Certifying Officer III, the Union claims that an official on behalf of the Department, namely Diane Callahan, specifically wrote in an April 27, 2004 e-mail that the meeting as "not a Union meeting," and that because it is not a Union meeting, the team "can work together," and that "it is not necessary or warranted that the Union be involved in every business decision that is made at NHES." The Union states that such commentary by Ms. Callahan constitutes violations of RSA 273-A:5 I (a), (b) and (c). The Department's recent tracking of e-mail, as well as its prohibition against reading Union e-mails during work hours (as evidenced by Commissioner Ratoff's May 10, 2004 memorandum), also constitute violations of RSA 273-A:5 I (a), (b) and (c) as averred by the Union. Finally, the Union alleges that certain conduct by Supervisor Jeanette Danver on May 10, 2004, wherein she verbally reprimanded an employee for speaking with Ms. Huard despite being unaware of the purpose of the conversation, is evidence of reprisal against any employee who speaks with the Union steward. The Union maintains that this is a further violation of RSA 273-A:5 I (a), (b) and (c). Based upon all of the foregoing, the Union requests that the PELRB sustain the instant the Union's complaint, order the Department to cease and desist in its violation of RSA 273-A and that it be required to pay damages to the Union for all costs of this action, including the reasonable market value of representation and attorney's fees.

The Department filed its answer and counterclaim on May 28, 2004. First, as a preliminary matter, the Department argues that to the extent the Union is raising contract issues in its complaint, the Union has failed to pursue its administrative remedies and the PELRB does not have jurisdiction to hear such matters. As to the merits of the Union charge, the Department specifically denies that it or any of its' agents have engaged in any unfair labor practice in violation of RSA 273-A:5 I (a), (b) or (c) and that, in fact, the Union has itself engaged in conduct in violation of the parties' collective bargaining agreement ("CBA") and thereby violated RSA 273-A:5 II (f). In this regard, the Department's frames its' counterclaim as an unfair labor practice against the Union. The Department asserts that the Union, through its agents Ms. Huard and Tammy Clark, has engaged in a continuing course of conduct to intimidate employees of the Department, including supervisors who are themselves members of the Union.

While the Department does not dispute the fact that certain specified meetings took place, as set forth in the Union's charge, it states that it was the Union officials, and not agents of the Department, who carried out the acts of intimidation and hostility. As to the April 12, 2004 letter issued by Commissioner Ratoff regarding steward responsibilities, the Department contends that it speaks for itself and is written strictly in accordance with the terms of the CBA. Regarding this issue generally, the Department denies that it limits in any manner whatsoever the ability of employees to participate in union business at the Manchester BAU, except in accordance with the terms of the CBA and in consideration of the appropriate exercise of the supervisory function to accomplish the mission of the Department.

The Department specifically states that Ms. Callahan's actions were not a violation of RSA 273-A:5 I (a), (b) or (c), and that the e-mail she sent on April 27, 2004 speaks for itself. The Department denies as unreasonable and baseless the Union's characterization of certain portions therein as being "disturbing" and "chilling." As to the Union's allegations regarding the tracking of e-mail, the Department indicates that it has exercised its management prerogative to

supervise the appropriate use of e-mail for union activities in accordance with policy issued by the State Labor Management Committee under the CBA. Similarly, as to Commissioner Ratoff's May 10, 2004 memorandum, the Department avers that it also speaks for itself and is simply an exercise of management prerogative so that the Department may accomplish its mission. In reference to the Union's allegations concerning Supervisor Jeanette Danver's conduct on May 10, 2004, the Department also presents a denial based upon its assertion that it is a complete mischaracterization of the situation. Accordingly, it requests that the Union's unfair labor practice charge be dismissed as being totally without merit, that the Union be found to have committed multiple acts of interference with management prerogatives in violation of the parties' CBA and RSA 273-A:5 II (f), that a cease and desist order be issued against the Union, and that the Union be ordered to reimburse the Department for attorney fees.

Thereafter, on June 11, 2004, the Union's Reply to Department's Answer and Counterclaim and Union's Motion to Strike Counter Claim was filed with the PELRB. The Union asserts, *inter alia*, that the Department has itself failed to file a grievance and to exhaust all of its administrative remedies in this case. It also contends that the Department's counter claim against the Union must be stricken from the record because the PELRB lacks jurisdiction to adjudicate the claim and the claim has no legal basis in fact or law. The Union states that there is no section in the PELRB rules that provides that the Department or any other party may file a counter claim, but rather establishes that an original unfair labor practice must be filed. Since this has not occurred, the Union argues that the PELRB lacks jurisdiction to adjudicate the Department's claim and that it must be removed from the record in this case. Additionally, the Union asserts that facts raised in the counter claim occurred more than six (6) months prior to the date it was filed. Accordingly, as stated by the Union, it is also untimely. In response to the Department's allegations, the Union, among other things, denies that it has committed an unfair labor practice in violation of RSA 273-A:5 II (f).

On June 28, 2004, the Department filed (1) an Objection to Motion to Strike Defendant's Counterclaim and Motion to Dismiss SEA's ULP, (2) an Improper Practice Charge against the SEA, (3) a Motion to Consolidate, (4) a Motion to Amend Answer if Counterclaim is Dismissed, and (5) an Answer with attachments. As to the Objection to Motion to Strike Defendant's Counterclaim and Motion to Dismiss SEA's ULP, the Department states, among other things, that its counter claim is a responsive pleading as defined and required by Pub 101.01(b). As the statute of limitations issue raised by the Union, the Department asserts that the Union's conduct constitutes a continuing pattern of escalating behavior since December 2001. Accordingly, it claims that the statute of limitations is not applicable here. In the alternative, the Department argues that if the statute of limitations is applicable to the Department's counterclaim, it is also applicable to the Union's ULP because the incidents and occurrences arise from the same set of circumstances. The Department requests that the Union's motion to strike be denied or, alternatively, the Union's charge be dismissed for violation of the statute of limitations. The Department's unfair labor practice charge essentially reiterates the allegations it raised earlier in its counterclaim. In its Motion to Consolidate, the Department requests that its ULP and the Union's be heard together in the interests of justice and the economical use of administrative resources.

On July 8, 2004, the Union filed (1) a Reply to the Department's Unfair Labor Practice, (2) a Reply to the Motion to Consolidate, (3) a Reply to the Department's Reply to the Union's Motion to Strike Department's Counterclaim and Motion to Dismiss SEA's ULP, and (4) a Reply to the Motion to Amend Answer if Counterclaim dismissed and Answer with Attachments. The Union, among other things, denies that it has committed an unfair labor practice and objects to the Motion to Consolidate. It objects to consolidation on the basis that the ULP and the counterclaim are both submitted in violation of the administrative rules promulgated by the PELRB. On this basis, it requests that both pleadings be stricken from the record of these proceedings. In its Reply to the Motion to Amend Answer if Counterclaim Dismissed and Answer with Attachments, the Union states that it has not received a Motion outlining a request for the PELRB to receive this a new answer from the Department. The Union asks that if such Motion has been submitted, that it be dismissed with prejudice as the Department did not deliver said Motion to the Union in order to allow an appropriate opportunity to reply. Additionally, the Union opposes any motion to amend filed by the Department because it would have been submitted after the required fifteen (15) calendar day answer period.

On July 13, 2004, the Department filed a Reply to Union's Reply to Department's Motion to Amend Answer if Counterclaim Dismissed, wherein it states, inter alia, that a complete set of the Department's pleadings had been forwarded to the Union, although human oversight is always possible. The Department attached a copy of its Motion to Amend Answer if Counterclaim Dismissed and states the Union has suffered no prejudice as a result of this alleged oversight.

A pre-hearing conference was conducted at the offices of the PELRB on August 9, 2004 during which both parties were represented by counsel. Based upon the Union's desire to be heard on its Motion to Strike, it maintained its objection to the consolidation of Case No. S-0306-2 and Case No. S-0306-3. The Hearing Officer indicated that while noting the Union's position and reservation of rights in this regard, the matters would be combined for purposes of the issuance the Pre-hearing Decision and Order.

PARTICIPATING REPRESENTATIVES

For the Union: Lorri Hayes, Esquire

For the Department: Charles H. Bradley, III, Esq.

ISSUES FOR DETERMINATION BY THE BOARD

- (1) Does the PELRB have jurisdiction to hear the instant improper labor practice filed by the Union?
- (2) Does the PELRB have jurisdiction to hear the instant "counterclaim" and improper labor practice filed by the Department?
- (3) Are any portions of the Union's improper practice complaint barred by the six (6) month statute of limitations as provided in RSA 273-A:6, VII?

- (4) Are any portions of the Department's improper practice complaint barred by the six (6) month statute of limitations as provided in RSA 273-A:6, VII?
- (5) Has the Department committed improper labor practices, within the meaning of RSA 273-A:5 I (a), (b) and/or (c), as a result of any of the conduct alleged by the Union in its complaint?
- (6) Has the Union committed improper labor practices, within the meaning of RSA 273-A:5 II (f) and/or (g), as a result of any the conduct alleged by the Department in its complaint?

WITNESSES

For the Union:

1. Linda Huard, Certifying Officer III, SEA Steward
2. Tammy Clark, Certifying Officer III
3. Margo Steeves, Field Representative, SEA
4. All other witnesses called by the Department

For the Department:

1. Paul Stokes, President, SEA
2. Brad Ashbury, Organizer, SEA
3. Lorri Hayes, Esq., SEA Contract and Field Operations Administrator
4. Margo Steeves, Field Representative, SEA
5. Linda Huard, Certifying Officer III, SEA Steward
6. Tammy Clark, Certifying Officer III
7. Candy Symonds, Certifying Officer III
8. Alice Fowler, Certifying Officer III
9. Sara Willingham, Manager of Employee Relations, State of NH
10. Any witnesses listed by SEA
11. Commissioner John J. Ratoff
12. Deputy Commissioner Darrell L. Gates
13. Denise Roy-Inarelli, Assistant Director, UCB
14. Pamela Merkwan, Supervisor, BAU
15. Jeanette Denver, Supervisor, BAU
16. Michael Bourque, Certifying Officer III
17. Sally Still, Clerk
18. Diane Callahan, Director, UCB
19. Patrick Manion, Human Resources Administrator, NH DES
20. Randy Honeyman, Chairman, CBA Management Bargaining Team

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. It is understood that each party may rely on the representations of the other party that witnesses appearing on their respective list will be available at the hearing.

EXHIBITS

Joint Exhibits:

1. Parties' collective bargaining agreement, July 1, 2001 – June 30, 2003
2. Letter dated April 12, 2004 from Commissioner Ratoff to L. Huard and D. Roy-Innarelli.
3. Inter-department memorandum dated May 7, 2004 from Commissioner Ratoff to Directors, Supervisors and Local Office Managers.
4. SEIU Local 1984 Contract Campaign 2003.
5. E-mail dated May 20, 2004 from D. Callahan to C. Bradley, w/ attached e-mails dated April 23, 2004 from D. Callahan; dated April 26, 2004 from Linda Huard;

For the Union:

None other than those marked as "Joint."

For the Department:

1. Correspondence, documents and e-mails from December 2001 to date regarding various issues, including Christmas vacation, steward conduct, performance expectations and minimum qualifications for Certifying Officer III, union activity during work time, hiring of part-time certifying officer positions and creation of second shift, fair share, *Weingarten* and e-mail issues.

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. Copies of all exhibits are to be submitted to the presiding officer in accordance with Pub 203.02. It is understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

LENGTH OF HEARING

The time being set aside for this hearing is one (1) day. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least twenty (20) days prior to the date of the evidentiary hearing.

DECISION

1. At the outset of the pre-hearing conference, the PELRB Hearing Officer discussed with the parties' the prospects of settlement of these matters and particular incentives for them to reach a resolution. Counsel expressed a willingness on behalf of the parties to enter into formal settlement discussions. In this regard, the parties are encouraged to engage in such efforts as soon as possible and, in the event that they determine that the assistance of a mediator would enhance the probability of settlement, they shall jointly petition the PELRB for appointment of a mediator.
2. In the interim, in the event that a mutually acceptable resolution remains elusive, the parties' representatives shall meet, or otherwise confer, on or before **October 8, 2004** in order to compose a mutual statement of agreed facts. The parties' representatives shall memorialize those facts upon which they can so stipulate and file said document with the PELRB at least five (5) days prior to the date of the hearing, and specifically on or before **October 22, 2004**.
3. On or before **October 8, 2004**, the Department shall file with the PELRB and the Union its' supplemental Motion to Dismiss addressing the jurisdictional issue raised in its original answer. The Union shall file its' response to said motion with the PELRB within fifteen (15) days of its receipt of same.
4. As indicated above, the Department has indicated its intent to call the Union's counsel as a witness in this matter, to which Union counsel expressed her objection. In the event that the Department still wishes to call Union counsel as a witness, it shall file a motion on or before **October 8, 2004** with the PELRB, copying to the Union, requesting such witness testimony and the specific grounds therefore. As the PELRB will not accept narrative testimony from a party representative, the Union must be afforded sufficient time to designate an individual to conduct cross-examination in the event that Union counsel appears on the witness stand. In the interim, if such motion is filed by the Department and unless advised to the contrary, the Union is directed to identify for the PELRB and the Department as to whom will be available to conduct cross-examination of Union counsel no later than **October 22, 2004**.
5. Both parties' counsel shall file a final Witness and Exhibit list to the opposing counsel and to the PELRB no later than **October 22, 2004**. The party representatives shall meet, or otherwise arrange, to pre-mark any exhibits, for identification, prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.
6. The parties shall file any additional preliminary, procedural or dispositive motions no later than twenty (20) calendar days prior to the scheduled hearing date.

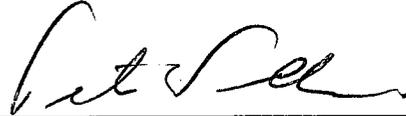
7. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an evidentiary hearing between the parties will be held on:

October 28, 2004 @ 9:30 AM

at the offices of the Public Employee Labor Relations Board, Concord, New Hampshire.

So ordered.

Signed this 19th day of August, 2004.



Peter C. Phillips, Esq.
Hearing Officer

Distribution:

Lorri Hayes, Esquire

Charles H. Bradley, III, Esq.