



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Local 2715, Hillsborough County	*	
Nursing Home Employees	*	
	*	
Complainant	*	Case No: A-0426-68
	*	
v.	*	
	*	Decision No. 2006-006
Hillsborough County	*	
	*	
Respondent	*	

APPEARANCES

For the Complainant

Erin L Goodwin, Esq., Associate General Counsel, AFSCME, AFL-CIO

For the County

Carolyn M. Kirby, Esq., Counsel to Hillsborough County

BACKGROUND

AFSCME Local 2715, Hillsborough County Nursing Employees (hereinafter referred to as the "Union") filed an unfair labor practice complaint on June 13, 2005 alleging that the Hillsborough County Nursing Home (hereinafter referred to as the "County") committed an unfair labor practice in violation of RSA 273-A:5 I (a), (b), (c), (e), (g), (h) and (i). The County filed its answer to the Union's charge on June 28, 2005 denying that its actions in connection with the negotiations for a new CBA constitute any violation of the law. The Union bases its complaint on alleged actions by the County related to the parties' negotiations for a new collective bargaining agreement (hereinafter referred to as "CBA"). The Union alleges that after the Union membership rejected a tentative agreement that the parties had reached, the parties eventually returned to negotiations. At these subsequent negotiations, the Union alleges that the County violated

the parties' ground rules by proposing new issues to be bargained that were untimely offered and constituted regressive bargaining.

A pre-hearing conference was conducted on September 16, 2005 at PELRB offices in Concord, New Hampshire. During the conference, the Union withdrew its' claims under RSA 273-A:5 I (c) and (h). On December 8, 2005 an evidentiary hearing was conducted at which both parties appeared and were represented by counsel. Prior to the evidentiary hearing, the parties submitted an agreed stipulation of facts that were accepted by the PELRB and appear below as Findings of Fact #1 through #8. Each party had the opportunity to present witness testimony and to undertake cross-examination as well as the opportunity to offer exhibits. The PELRB did not request any issue to be briefed by the parties following the hearing. It requested and received closing arguments from counsel for both parties after which it closed the record. The PELRB reviewed all pleadings filed in connection with this matter, considered all of the evidence presented to it, and weighed the credibility of that evidence. It finds as follows:

FINDINGS OF FACT

1. Hillsborough County is a public employer under RSA 273-A.
2. AFSCME Council 93, Local 2715 is currently the certified exclusive representative of certain employees of the Hillsborough County Nursing Home.
3. A Bargaining Unit Certification dated June 25, 2003 identifies AFSCME Local 2715 as the certified representative for certain positions at the Hillsborough County Nursing Home.
4. The Union and the County are parties to an expired collective bargaining agreement dated July 1, 2003 through June 30, 2004. The parties are currently operating under the status quo doctrine.
5. The parties commenced negotiations on a successor agreement to the July 1, 2003 through June 30, 2004 expired collective bargaining agreement and signed "ground rules" for negotiations on September 30, 2003.
6. Negotiations proposals were exchanged and, on or about April 5, 2004, a tentative agreement was reached.
7. The Union membership failed to ratify the April 2004 tentative agreement.
8. The parties met to resume negotiations in April and May 2004.

9. Neither of the parties ever declared that the negotiations were at impasse at any time.
10. Bryan Lamirande is a Staff Representative for AFSCME was the chief negotiator at all times relevant to these proceedings and had negotiated the prior CBA between these parties.
11. Gary Wulf was a labor relations consultant to the County at the outset of these negotiations until his retirement in September 2004.
12. Lamirande and Wulf were the signatories to the ground rules governing the parties' negotiation process that were executed on September 30, 2003. (Joint Exhibit #4)
13.) The parties' ground rules provide, in Paragraph #6 that,

"Both parties may submit issues for negotiation until the end of the third (3rd) negotiating session."

And, in paragraph #11 that,

"If a Tentative Agreement is reached and either party fails to ratify or accept the draft Agreement for signatures within a thirty (30) day period following tentative agreement all tentatively agreed to issues are open for negotiations."

And, in paragraph #12 that,

"In the event that an impasse is reached in negotiations, as determined by either side with notice to the other ... No additional items may be added, unless by mutual agreement, to those to be considered by the mediator or factfinder."

14. The Tentative Agreement, reached by the parties on April 5, 2004, included all current issues covered by the articles in the existing CBA and modifications regarding some issues related to: promotions and transfers; personal leave days; insurance; wage rates and increment wage scales; and employee clothing.

15. After the Union membership's rejection of the Tentative Agreement, the Union made a proposal on April 30, 2004 to the County that included the issues of wages and increment wage scales; employee performance evaluations; and hiring employees and to which the County responded on May 7, 2004.
16. The parties did not participate in any negotiations for approximately one year following the Union's rejection of the Tentative Agreement and the exchange of post rejection proposals in April and May of 2004.
17. On or about April 20, 2005, the County submitted some "proposed items for AFSCME Negotiations" to the Union to re-establish negotiations between the parties. This document was communicated to the Union by a different chief negotiator, Attorney Thomas Flygare, because the original chief negotiator for the County had retired in or about September 2004. (Joint Exhibit #6)
18. The items listed in that document related to issues covered by the parties existing CBA, including those upon which detailed discussion between the parties had transpired prior to the Union membership's rejection of the Tentative Agreement.
19. When the parties returned to negotiations, the Union refused to discuss the items proposed by the County, adjourned, and decided to file this unfair labor practice complaint.

DECISION AND ORDER

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate claims between the duly elected "exclusive representative" of a certified bargaining unit comprised of public employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I).

In this case, the Association has complained that actions of the County constitute violations of RSA 273-A:5,I (a) interfering with employees in the exercise of due rights; (b) interfering in the administration of any organization; (e) failing to negotiate in good faith, (g) failing to comply with RSA 273-A or any rules promulgated under that statute; and, (h) breaching the collective bargaining agreement ("CBA"). Therefore, PELRB jurisdiction in this matter is appropriate pursuant to RSA 273-A:6, I.

DISCUSSION

The Union, which is the certified exclusive representative for this bargaining unit, and the County, which is the public employer of individuals within the bargaining unit, are parties to a collective bargaining agreement (CBA). That particular CBA, by its terms, expired on June 30, 2004. With the joint intent of negotiating a successor agreement to the expired CBA, the parties entered into negotiations initially executing an agreement establishing negotiation "guidelines." This is not an uncommon practice in New Hampshire public sector labor relations. It puts into place an agreement between the parties as to mutual rights and obligations that, while executed outside of the parties CBA, are nonetheless binding upon the parties. Failure to execute such a document does not constitute an improper labor practice under RSA 273-A:5, I or RSA 273-A:5,II. The execution of such a document may be considered as evidence of a party's intent to bargain in good faith with the other party in furtherance of the obligations required by RSA 273-A: 3, that provides in part that:

[i]t is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. 'Good faith' negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment . . .

In this case, on September 30, 2003 the parties executed an agreement as to the ground rules that would govern their conduct as they negotiated for the successor CBA. (Joint Exhibit #4). Following their agreement to be bound by these ground rules, the parties exchanged proposals and counter proposals from that date through April of 2004. On or about April 5, 2004 the parties reached a tentative agreement as to wages, benefits, and terms and conditions of work that would constitute the provisions of the successor CBA, providing that each party's ratifying body agreed with the terms of the proposed successor CBA.

On or about April 6, 2004 the union's membership rejected the tentative agreement. That rejection triggered the operation of Paragraph #11 of the parties' ground rules which provides:

If a Tentative Agreement is reached and either party fails to ratify or accept the draft Agreement for signatures within a thirty (30) day period following tentative agreement all tentatively agreed to issues are open for negotiations. (underlined emphasis in the original)

Following this rejection by the Union membership, the Union made a proposal on April 30, 2004 that included specific reference to the issues of wages and incremental wage

scales; employee evaluations; and hiring employees. The parties then resumed negotiation sessions exchanging proposals in April and May of 2004. These sessions did not produce any written agreement and the parties apparently took a mutual hiatus from the process for approximately a year. Despite their inability to reach an agreement and the length of time that passed, neither party declared negotiations at an impasse.

Approximately a year later, on or about April 20, 2005 the County submitted some "proposed items for AFSCME Negotiations" to the Union in an attempt to reach agreement on a successor CBA. The parties agree that proposals that were made at that time involved issues that were embodied in certain Articles of the expired CBA, but that certain aspects of these issues were not part of the specific subsections. The Union strongly asserts that some of these proposals should be considered "new" because they were expressed in language that characterized specific subsections of the more general issues labeled by the entitled Articles. As such, the Union took the position that the County had violated the parties' ground rules that prohibited the submission of issues for negotiation after the "end of the third (3rd) negotiating session." (Joint Exhibit #4, Paragraph #3). The third negotiating session had occurred in or about October or 2003, approximately nineteen months prior to the County's 2005 proposal and after the parties had avoided the negotiations table for approximately one year. The Union also took the position that Paragraph #11 of the ground rules prohibited some of the proposals that were being presented to the Union for consideration. The Union caucused over the 2005 proposal and informed the County that it would not bargain over the proposals presented. It then filed the complaint now before us alleging that the County's conduct violated provisions of RSA 273-A:5, I emanating from a failure to bargain in good faith.

To determine whether a party has fulfilled its obligation to negotiate in good faith depends upon an examination of the facts of each case revealing the conduct of the parties at and away from the negotiations table. Our statute merely provides in part that, "Good faith negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment . . .". RSA 273-A:3, I. This provision of our statute is analogous to the National Labor Relations Act and when we are called upon to make a determination of good faith bargaining we apply the approach generally recognized in the labor relations community by evaluating "the totality of the circumstances" as discussed in Robert's Dictionary of Industrial Relations (3rd ed. 1996), p.594; (see also, *Id.* 3rd ed. Cumulative Supp 1997, pp.231-232). We, like the National Labor Relations Board and other state labor relations boards, "hold that an employer's refusal to accede to a particular demand or to counter with a specific proposal does not, by itself, constitute bad faith". *Id.* p246.

It is within this context that we find the Union's interpretation of the language in Paragraph #11 of the parties ground rules is too limiting. To attach the narrow construction that the Union would have us assign to this paragraph would ignore the comprehensive nature of negotiating CBA's. In this case the parties specifically provided for flexibility in negotiations that may follow a failure of one or the other to ratify a particular tentative agreement because they included emphatic language that "all

tentatively agreed to issues are open for negotiations.” While the parties may have assigned greater focus to some issues than others, there can be no question that both sides had the expectation that any agreement would be complete, *i.e.* all issues included in the existing CBA and, together with any new issues that may have been added in negotiations, would constitute their new CBA. An agreement comprised merely of several subsections of Articles that they may have addressed in their counter proposals would not be workable nor capable of being applied. We construe a tentative agreement submitted to a ratifying body to be a comprehensive agreement of pre-existing issues embodied in the previous CBA plus any issues modified by replacement or additional language. We interpret the parties ground rules to have purposely been designed to be prophylactic following a failure to ratify, thereby allowing the parties to pursue further negotiations with the ultimate aim of reaching an agreement. We understand “issue” to mean “a [subject under consideration] that is in dispute between two parties.” (Webster’s Ninth New Collegiate Dictionary, Merriam-Webster, 1991, 642,733). With the union membership’s failure to ratify the tentative agreement, “all issues” more appropriately then refers to the issues of wages, wage increment scales; performance evaluation; sick leave; etc. rather than specific subsections falling within one or the other issues.

It is also important to note that in so concluding, we also do not accept the County’s interpretation that upon either party’s failure to obtain ratification, “all bets are off” and that the parties “are starting over”. If that were the case, the orderly process established by ground rules could be eviscerated by a single action of a ratifying body, could easily frustrate the parties and the achievement of reaching a mutual agreement, and could create a seductive procedure for scuttling an end product that, upon later reflection, was deemed not sufficiently advantageous to one or the other party. If the parties had meant for a failure to ratify a tentative agreement to result in the termination or nullification of all prior negotiations and provide solely for negotiations to begin anew, the parties would have expressed this or equivalent language in their ground rules. They did not.

We find that the parties’ ground rules did not prevent the County from submitting its proposal of April 20, 2005 to the Union. We also find that, considering the totality of the circumstances that have existed over the long span of time during which these parties have been engaged in negotiations, the County has not violated its obligations to bargain in good faith. All parties to negotiations should be reminded of the concomitant statutory limitation placed on good faith bargaining which provides that “the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.” RSA 273-A:3, I. We further find insufficient evidence presented to establish that the County violated any other provision of RSA 273-A;5, I. The Union may desire to return to a previous negotiation position, or force the County to render a specific responsive counter, but the collective bargaining process is not static. It is dynamic and designed to encourage movement toward settlement of employment conditions at the bargaining table.

We also understand that the Union assigned certain meanings to statements of the County’s original negotiator that he would take certain items under advisement. We view

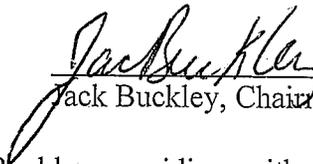
the phrase as exemplifying much lower level of commitment, much less assent, than the Union apparently did. While the instant case did not turn on whether or not an employee evaluation program was in place or not, we would, again, caution all negotiators as we did most recently in *International Brotherhood of Police Officers v. Town of Merrimack*, Decision #2004-182, p. 6 when the PELRB stated:

In the context of negotiations, opposing parties are free to attach such significance as they wish to comments made by the other side. One side may be said to imply and another side may be said to infer meaning where no such meaning can be legally ascribed. Indeed, a purpose of executing written ground rules is to insure that the banter, bluffing, and blustering often employed as a strategic or tactical move in the give and take of negotiations does not so cloud the parties' statutory and contractual obligations that they forget them. It appears to us that the union negotiating team took an inference from the conduct of the Town's negotiator ... While they were free to take such inference as they may from the ongoing proceeding, they did so with the same risk as any negotiator that elevates inference over the statutory obligations and written statements contained within a mutually agreed set of ground rules.

For the reasons stated herein, the Board finds that there has been no violation of the parties' ground rules for contract negotiations between the County and the Union nor failure of the County to bargain in good faith. It follows, therefore, that the County has not violated any of its statutory duties under RSA 273-A: 5, I as alleged by the Union and there are no grounds for granting any of the relief sought by the Union. The Union's complaint is denied. The parties are to return to the negotiations table forthwith.

It is so ordered.

Signed this 24TH day of January, 2006.



Jack Buckley, Chairman

By unanimous vote. Chairman Jack Buckley presiding with Board Members Carol Granfield and Richard E. Molan, Esq. also voting.

Distribution:

Erin Goodwin, Esq.

Carolyn M. Kirby, Esq.