



State of New Hampshire  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Erika Randmere, Appeal Tribunal Chair, NHES	*	
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Complainant	*	Case No. S-0306-7
v.	*	
	*	Decision No. 2008-101
State of New Hampshire & SEA/SEIU Local 1984	*	
	*	
Respondents	*	
	*	

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APPEARANCES

Representing Erika Randmere, Appeal Tribunal Chair, NHES:

Erika Randmere, pro se

Representing State of New Hampshire:

Michael Brown, Esq.  
Senior Assistant Attorney General  
NH Office of the Attorney General

Representing SEA/SEIU Local 1984:

Glenn Milner, Esq.  
Cook & Molan, P.A.

BACKGROUND

This case relates to the SEA's calculation and collection of an agency fee. An arbitration proceeding concerning the computation of the agency fee resulted in an initial arbitrator's award on October 16, 2007 and a final award on December 20, 2007. Ms. Randmere filed her complaint on December 6, 2007 claiming, in substance, that State employees have not been reimbursed for excessive agency fee deductions, that the State has never notified agency fee payers of the basis for the reduction in the amount of the agency fee deduction, and the State has

improperly failed to respond to her grievance. Ms. Randmere does not contest the SEA's right to collect an agency fee. Ms. Randmere asserts that these circumstances constitute a violation of RSA 273-A:5, I (h)(to breach a collective bargaining agreement) and II (f)(to breach a collective bargaining agreement).

As remedies Ms. Randmere requests that: 1) the State of New Hampshire and/or the State Employee's Association of New Hampshire, Inc. provide(s) written notification to all agency fee payers regarding the miscalculation of the agency fee; 2) the State of New Hampshire and/or the State Employee's Association of New Hampshire, Inc. reimburse all money deducted erroneously from wages due to the miscalculation of the agency fee; and 3) the State of New Hampshire immediately cease the deduction of the agency fee from the wages of agency fee payers until the SEA accurately calculates the agency fee.

The SEA filed its answer denying the charges on December 21, 2007. After obtaining an extension of time to answer, the State filed its answer on January 8, 2008. Both the SEA and the State contend that they have abided by all contractual, legal and constitutional requirements concerning the deduction of the agency fee at issue and that the PELRB lacks jurisdiction over this complaint because the matter is properly before an arbitrator. Consequently, the SEA and the State maintain that the PELRB lacks the authority to grant any of the requested remedies. Finally, the SEA and the State assert that the Complainant has failed to allege any unfair labor practice in violation of RSA 273-A:5, II.

At the January 23, 2008 pre-hearing conference the parties anticipated that at least some issues raised in Ms. Randmere's complaint might be resolved by certain activity and undertakings of the parties. Accordingly, an April 1, 2008 hearing was scheduled, with a further pre-hearing to be held on March 26, 2008. In accordance with the pre-hearing order issued after the March 26, 2008 pre-hearing conference, the SEA and the State filed motions to dismiss. The board conducted a hearing on Ms. Randmere's complaint on April 1, 2008 at which time the parties addressed the pending motions to dismiss and the issues raised in Ms. Randmere's complaint through offers of proof and argument.

As exhibits, the board received from Ms. Randmere the 2005-2007 collective bargaining agreement between the SEA and the State as required by Pub 201.02 (d)(1) and 12 additional exhibits. The State and the SEA submitted their exhibits as attachments to their motions to dismiss, the State's being labeled as Exhibits 1-7, and the SEA's consisting of the following:

- SEA Ex. 1: Summary of Erika Randmere fair share payroll deductions
- SEA Ex. 2: Copy of 1/31/08 fair share reimbursement check to Erika Randmere
- SEA Ex. 3: March 31, 2008 Affidavit of Kathy Desjardin
- SEA Ex. 4: December 20, 2007 Final Arbitration Award
- SEA Ex. 5: January 14, 2008 Fee Payer letter from Gary Smith, SEA President

At the end of the hearing the board provided Ms. Randmere with the opportunity to submit a written opposition to the pending motions to dismiss and she declined, stating that she believed her argument was sufficient. Ms. Randmere also confirmed that she did not have any other evidence to submit in support of her claims beyond what had been offered in the parties' respective offers of proof. Accordingly, the board closed the record.

#### FINDINGS OF FACT

1. The SEA/SEIU Local 1984 ("SEA") is a certified bargaining representative of certain state employees, including Erika Randmere.
2. The State of New Hampshire is a public employer as that term is defined pursuant to RSA 273-A.
3. On May 5, 2006 the SEA issued a "Hudson" letter<sup>1</sup> to non-union bargaining unit employees providing notice of the implementation of an agency fee in an amount consistent with an outside auditor's examination. The involved employees were also informed of their right to examine and challenge the results of the audit. See Complainant Exhibit 12. The amount of the agency fee in this case is expressed in terms of a percentage of 1.35% of base pay subject to a cap that is not relevant here.
4. Ms. Randmere and 52 other state employees exercised their right to examine and challenge the audit results and the matter was heard by an arbitrator, whose final decision issued on December 20, 2007. See Complainant Exhibit 11 and State Exhibit 6.
5. The arbitration included four days of hearing, beginning in December, 2006 and ending in June, 2007. On March 8, 2007, during the pendency of the arbitration proceedings, the SEA sent a letter to Ms. Randmere and other agency fee objectors advising that the SEA agreed with some of the objections concerning the chargeability of administrative time raised on December 19, 2006, the first day of the arbitration proceeding. The SEA agreed that upon examination there was an error and its recalculation lowered the agency fee from 62% to 59%. See Complainant Exhibit 3 and State Exhibit 3.
6. Sometime between March 8, 2007 and May 2, 2007 the SEA informed the State by letter of its error and the State confirmed that it would reduce the agency fee to 57% of the 1.35% of base pay beginning with paychecks dated May 25, 2007, and this in fact occurred. The SEA charges an agency fee that includes a "buffer" of 2%, such that it charges an agency fee 57% if the fee determined through the audit process is 59%. See Complainant Exhibit 3 and State Exhibit 4.
7. The arbitration resulted in an agency fee of 53%. See SEA Exhibit 1.
8. By letter of January 10, 2008 the SEA informed the State's payroll manager that the

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<sup>1</sup> See *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986)(concerning the process of agency fee implementation, including the right of an employee to have agency fee disputes resolved by a neutral third party).

arbitrator's decision required a reimbursement to agency fee payers for the difference of 6% from September, 2006 and the difference of 3% from May 2007 to January 3, 2008. See State Exhibit 7.

9. On January 14, 2008 the SEA issued another "amended" Hudson letter to fee payers reporting the reduction of the agency fee to 53% and enclosing a copy of the 2003-04 amended audit which served as the basis for the fee.
10. According to Kathy Desjardins, the SEA's business manager, the 53% agency fee was never implemented because a further fiscal year audit concerning agency fees resulted in a fee of 56%, which was implemented by the State on January 18, 2008. See SEA Exhibit 1.
11. Ms. Randmere has received reimbursements from the SEA for the agency fee overcharges through the time period referenced in the SEA's January 10, 2008 letter to the State's payroll manager. She does not contend that these reimbursements are incorrect except during the period from March 8, 2007 to May 24, 2007, when she contends she should have received a reimbursement equivalent to 100% of the agency fee deducted from her paycheck.
12. The SEA informed the board at the hearing that it will complete a reimbursement to all state agency fee payers of the agency fee overcharge by April 15, 2008.

13. Neither Article 5.8.1 (Agency Fee) nor Article 14 (Grievance Procedure) of the 2005-2007 CBA excludes agency fee disputes from the grievance procedure.
14. Article 14 of the 2005-2007 CBA contains the grievance procedure, including the following provisions:

**14.1. Purpose:** The purpose of this Article is to provide a mutually acceptable procedure for adjusting grievances and disputes arising with respect to interpretation or application of any provision of this Agreement.

**14.1.5. Non-Intervention:** Nothing in this Article shall be construed as an abrogation of the right of any full-time or regularly scheduled part-time employee to present a grievance without the intervention of the exclusive representative in accordance with RSA 273-A:11(a).

**14.2. Grievance Procedure - STEP I - Employee and Immediate Supervisor**

**14.2.1.** The employee and/or his/her Steward, shall present to his/her supervisor all the facts pertaining to the dispute.

**14.2.2.** The immediate supervisor shall resolve the dispute at once or notify the employee or his/her representative of the decision within five (5) working days from the day the problem was presented to him/her.

**14.3. Grievance Procedure - STEP II - Employee and Intermediate Supervisor**

**14.3.1.** If, subsequent to the immediate supervisor's decision, the employee and/or his/her Steward feels further review is justified, notification to that effect and a statement of all the facts pertaining to the problem, specifying the Article(s) and Section(s) which have been allegedly violated shall be made in writing to the intermediate supervisor, as well as the immediate supervisor, within five (5) working days from the day the employee was informed of the immediate supervisor's decision.

#### **14.5. Grievance Procedure - *STEP IV – ARBITRATION***

**14.5.1.** If subsequent to the agency head's decision the Association feels that further review is justified a petition may be submitted to the Labor Management Committee for the appointment of an arbitrator as provided in 14.5.4. or for the Labor Management Committee to schedule a meeting to review the petition. Said petition shall be submitted within fifteen (15) working days from the date the employee or Steward was notified of the decision. A copy of the petition must be sent to the Employer at the same time.

15. Between June 13, 2007 and September 18, 2007 Ms. Randmere filed Step I-IV grievances concerning changes to the agency fee, lack of explanations concerning the changes, and reimbursement for excessive agency fee deduction. The State denied Ms. Randmere's Step I-III grievances and did not respond to her Step IV grievance. *See* Complainant Exhibits 5-10.

### DECISION AND ORDER

#### JURISDICTION:

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. RSA 273-A:6, I. Subject to a ruling on the State and SEA's motion to dismiss, PELRB jurisdiction is proper in this case as Ms. Randmere has alleged violations of RSA 273-A:5, I (h)(to breach a collective bargaining agreement) and II (f)(to breach a collective bargaining agreement).

#### DISCUSSION:

The State and the SEA argue that the board lacks jurisdiction since this matter is already before an arbitrator. The State also argues that Ms. Randmere lacks standing to file a grievance under the CBA "without the assistance and support of the SEA and must seek redress in other forums, if any." The State adds that the "grievance process as articulated in the CBA is specifically written as a way for the union to resolve issues or problems with management. It is not a general-purpose grievance procedure for all state employees." (emphasis in original). Ms. Randmere argued that the arbitration only addressed the amount of the agency fee, whereas her complaint concerns explanations to employees about changes in the amount of the agency fee deduction and reimbursement for excessive agency fee deduction. Ms. Randmere also argues that the 2005-2007 CBA does not exclude such matters from the contract grievance process, and that she is entitled to raise these issues with the board via an unfair labor practice complaint if she is prevented from prosecuting a Step IV grievance (arbitration).

The board presumes the State's argument concerning Ms. Randmere's ability to prosecute a grievance is directed to the fourth step of the grievance process, set forth in Article 14.5.1. The board makes this presumption because all bargaining unit employees are covered by the 2005-2007 CBA, including non-union bargaining unit employees, and as such they are eligible to pursue a grievance through the first three steps on their own without the sponsorship or endorsement of the SEA. Compare Article 14.5.1 with Articles 14.2.1, 14.3.1, and 14.4.1. It is doubtful whether the grievance procedure would qualify as "workable" under RSA 273-A:4 if this were not the case.

The State correctly points out that individual employees cannot, on their own, prosecute a grievance to arbitration under Step IV. See Article 14.5.1. However, although Ms. Randmere may not enjoy the right to have a neutral third party in the person of an arbitrator determine the merits of her grievance, she can bring an unfair labor practice complaint under RSA 273-A:5, I (h)(to breach a collective bargaining agreement) and/or II (f)(to breach a collective bargaining agreement). It is the failure of the State to resolve her grievances to her satisfaction through the first three steps of the grievance process that gives rise to her unfair labor practice complaint.<sup>2</sup> Further, the arbitration proceeding concerning the amount of the agency fee does not divest this board of jurisdiction to hear Ms. Randmere's unfair labor practice complaint since the issues she has raised in her unfair labor practice complaint are not the subject of the arbitration proceeding.

The SEA's actions moot Ms. Randmere's request that she and other similarly situated state employees receive a reimbursement for the agency fee overcharge. The SEA's business manager represented to the board that all agency fee payers will be reimbursed for the agency fee overcharge by April 15, 2008. The board agrees that this is the appropriate course of action since the administration of the agency fee, including agency fee deductions and reimbursements, should be applied uniformly to all affected employees. Ms. Randmere's argument that the agency fee deduction should have been entirely suspended between March 8, 2007 and May 24, 2007 and all agency fee payers given a 100% reimbursement for this time period is without merit. Although the related arbitration proceedings had not yet concluded, by March 8, 2007 the SEA had notified the State that the agency fee should be reduced from 62% to 59% (57% when the 2% buffer is taken into account). See Complainant Exhibit 1, State Exhibits 2-5, and SEA Exhibit 3. Nothing in the parties' 2005-2007 CBA requires a suspension of agency fee collection while a slight downward adjustment in the amount of the agency fee collected is implemented, and there was no issue raised during this time period as to the SEA's general entitlement to collect an agency fee. Further, any excessive agency fee collection occasioned by this relatively minor adjustment could be and has been addressed through the reimbursement process.

Ms. Randmere also requests that the State furnish an explanation to employees concerning the changes in the agency fee amount implemented in May, 2007. The board finds that the SEA's written notification to agency fee payers (State Exhibit 3) was sufficient in this regard, even though it was apparently only sent to the 53 agency fee objectors. The State does

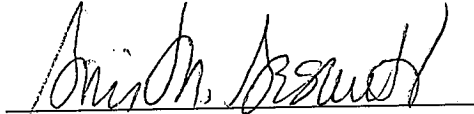
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<sup>2</sup> The State also raises the timeliness of Ms. Randmere's complaint in its motion to dismiss filed the day before the hearing. Assuming the State has raised this defense in a timely manner, the board finds that Ms. Randmere's unfair labor practice complaint is timely since the State's last action on her step III grievance occurred within 6 months of the filing of her complaint, and therefore her complaint was properly filed under RSA 273-A:6, VII.

not have an independent and additional obligation to inform agency fee payers of the status of agency fee deductions as this obligation and burden is properly the responsibility of the SEA. In the future, anytime there is an upward or downward change in the amount of the agency fee deduction, whether on account of a fiscal year audit or for other reasons, the SEA shall notify all agency fee payers via a Hudson notice or other equivalent communication and inform agency fee payers of the relevant facts and circumstances giving rise to the change in a timely and informative manner.

It is so ordered.

Signed this <sup>7<sup>th</sup></sup> day of May, 2008.

  
Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Members Kevin E. Cash and Carol M. Granfield also voting.

Distribution:

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