STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

SEA, SEIU Local 1984 Complainant v. State of New Hampshire Respondent	*	Case No: S-0428-4 Decision No. 2008-122

APPEARANCES

Representing the Complainant:

Glenn R. Milner, Esquire, Cook & Molan, P.A., Concord

Representing the Respondent:

Michael K. Brown, Senior Assistant Attorney General, Department of Justice

BACKGROUND

On January 4, 2008, the State Employees Association of New Hampshire, SEIU, Local 1984 ("Union") filed a complaint alleging that the State violated RSA 273-A:5, I (e) and (h) by failing to properly apply an agreed upon across-the-board wage increase of fifty-one cents ($.51) per hour, effective July 6, 2007, to certain law enforcement employees of the bargaining unit. As remedies, the Union requests that the PELRB order the State to cease and desist from its inaccurate calculation of these employees' wage and make the affected employees whole for any losses they may have sustained as a result of the alleged improper action.

The State filed its answer denying the charges on January 24, 2008. The State contends that the Union has misconstrued the State's obligations under the parties' collective bargaining agreement with respect to the compensation of the certain law enforcement officers at issue. Accordingly, the State requests that the PELRB dismiss the complaint.

A pre-hearing conference was conducted at the PELRB office in Concord on February 5, 2008. Following the granting of an assented to continuance of the originally scheduled February 28, 2008 hearing requested by the State, the final evidentiary hearing was rescheduled and conducted on April 15, 2008. On April 7, 2008 the State filed a motion to "Dismiss the Office of Governor as a Party." At the evidentiary hearing a week later, both parties were present, represented by counsel, presented witnesses and exhibits and had the opportunity to cross-examine witnesses. The parties each submitted a pre-hearing memorandum which the Board accepted. At the outset of the hearing, the Board considered the State's dismissal motion and granted it without argument or objection by the Union. Also, the parties agreed that the facts appearing in Exhibits #1-#12 as submitted by the Union were undisputed and could be admitted into evidence. The parties further agreed that the Union could present its case by offer of proof based upon the exhibits and that the testimony would be restricted to that of Mr. Thomas Manning, chief negotiator for the State, subject to cross-examination. The Union reserved the right to present testimony of their chief negotiator, Diane Lacy, and another individual employed by the Union, Dennis Kinnan, in rebuttal and also subject to cross-examination. Only Mr. Manning and Ms. Lacy testified. Before the record was closed, the Union moved to amend its original complaint to conform to the evidence offered that future wage increases would also constitute improper labor practice by the State. Following the closing of the record, the Board

later convened, reviewed all filings submitted by the parties, considered and weighed the credibility of all witnesses and of all relevant evidence and determined the following:

FINDINGS OF FACT

1. The State of New Hampshire, ("State") is a public employer within the meaning of RSA 273-A: 1, X.

2. The State Employees' Association, SEIU Local 1984 ("Union") is an employee organization that represents employees in several state departments and divisions, including some of whom are classified as law enforcement personnel, for purposes of collective bargaining and grievance representation pursuant to RSA 273-A.

3. The parties engaged in collective bargaining for a successor agreement with the goal of achieving an agreement in 2007 and participated in several sessions over a period of five months prior to reaching agreement.

4. The parties agreed on the following language in Article XIX, Wages and Benefits, of their current collective bargaining agreement ("CBA") which provides, in relevant part,

¶ 19.2.4 All salaries for classified employees shall increase fifty one (51) cents per hour on July 6, 2007 and shall be paid in accordance with the salary schedule contained in Appendix A.

¶ 19.2.5. All salaries for classified bargaining unit employees shall increase by three and one half (3.5) percent on January 4, 2008 and shall be paid in accordance with the salary schedule contained in Appendix A.

¶ 19.2.6. All salaries for classified bargaining unit employees shall increase by five and one half (5.5) percent on January 2, 2009 and shall be paid in accordance with the salary schedule contained in Appendix A.

5. The parties agreed on the following language in Article VIII, Overtime for Law Enforcement and Fire Protection Employees, which provides, in relevant part,

¶ 8.1. Overtime Rates: Law enforcement employees and fire protection employees, in recognition of their off-duty availability, shall receive wages equal to the wages listed for their respective position in Appendix A plus ten percent (10%) or twenty percent (20%) as indicated in Appendix C. The 10% and 20% additions to wages are in lieu of any compensation for recall status and the Parties agree that employees covered by this provision are expected to be available for return to duty during off-duty hours when notified of the expectation.

6. The current CBA negotiated by the parties is the first such agreement to require an employee contribution to the cost of health insurance premiums for coverage provided to the employees under Article XIX, Health Insurance, which provides in relevant part, "¶ 19.8.1.a.1 Effective with the pay period beginning July 6, 2007, all employees who subscribe in either the Network or the POS plan shall pay $25.00 per pay period."

7. The State's Negotiator testified that he understood from the series of negotiation sessions with the Union negotiators that the $.51 hourly increase was to be a one-time increase in equal amount to all state employees in exchange for the employees accepting an obligation to make a contribution to the costs of health insurance coverage and that said increase was not to be compounded or enhanced by application of the CBA.

8. Article 8.1 of the CBA regarding the overtime or "plus rates" of 10% and 20%, was not specifically negotiated by the parties to exclude the $.51 increase.

9. Mr. Manning testified that it was an early and continuing negotiating position of the Union that, given that there were three separate unions at the bargaining table with the State, that "[the State] can't do for others what you don't do for us, so early on the State made a promise that it wouldn't."

10. Article XXI, Duration and Reopening, provides

> ¶21.5 In the event that the Employer agrees to grant a general wage increase greater than that provided for in this Agreement to any other bargaining unit during the term of this Agreement, the Parties shall reopen wage negotiations within thirty (30) days after the Association makes a written demand upon the Employer to exercise this reopener.

11. On or about July 19, 2007 the parties executed their current CBA; and, on or about July 20, 2007 the Union initiated its concern that wage increases were not being calculated properly by the State.

12. At least since 1995, the parties have provided in the relevant article of their CBA's that "salaries for classified employees shall be paid in accordance with the salary schedule contained in Appendix A."

13. At least since 2001 the parties have provided a specific salary schedule as an appendix to their CBA to explicitly express law enforcement and fire prevention employees' wage rates.

14. The current salary schedules appear as Schedules X208, and X416 within Appendix A of the current CBA.

15. The salary schedules referenced in Finding of Fact #10 were generated by the State.

16. Historically, the salary schedules display the actual mathematical calculation of the effect of any changes to employees' wages resulting from the language bargained for in the negotiated CBA.

17. Historically, the salary schedules to be appended to the CBA have been calculated after the parties have signed the CBA.

18. Historically, the so-called "trailer bill" spread sheet considered by the General Court as part of its budgetary approval process contains the calculations expressing the wage amounts to be paid under the terms of the proposed CBA between the State and the Union and as later appear in Appendix A. Such a "trailer bill" accompanied the budget presentation to the General Court and the information contained therein was available to the Union prior to the signing of their CBA.

19. The Union did not challenge the computations appearing in the State's calculations prior to the signing of the CBA.

20. Following the signing, and after the salary schedules comprising Appendices A and C and the parties' CBA had been distributed, a dispute arose between the parties upon the allegation of the Union that the contract language relating to wage adjustments was not accurately reflected in the amounts appearing on the salary schedule.

21. The State calculated the new wage rates for law enforcement and fire prevention personnel falling under Schedules X208 and X416 in a manner such that the wage rate paid prior to July 1, 2007 was increased by either 10% (Schedule X208) or 20% (Schedule X416) as required by Article 8.1 and to that result an hourly increase of $.51 was added.

22. The parties' agreed language explicitly expressed by the terms appearing in the parties' agreed CBA if applied as expressed would result in a calculation of an hourly wage rate increase arrived at in a manner such that to the wage rate paid to law enforcement and fire prevention personnel falling under Schedules X208 and X416 prior to July 1, 2007 the amount of $.51 would be added and then 10% of that resulting combined figure or 20% of that resulting combined figure would be added to achieve the total amount required by the terms of the CBA.

23. During the approximate period of July 20, 2007 through July 25, 2007 the parties exchanged e-mails revealing the Union's disagreement with the method of computation used by the State.

24. On or about October 27, 2007 the Union's legal counsel wrote to the State's Negotiator implying that the two had discussed [the different computation methodologies] on several occasions and seeking again to have the State review the matter "as quickly as possible."

25. On or about December 11, 2007 The State's Negotiator responded by letter to the Union's counsel indicating that the State did not agree with the method of calculation advanced by the Union.

26. Appendices A and C to the parties collective bargaining agreements represent mathematical charts displaying specific wage rates for general employees (Appendix A) and certain law enforcement and fire prevention employees (Appendix C) that result from the application of the written terms of the parties CBA.

DECISION and ORDER

DECISION SUMMARY

The parties negotiated a new collective bargaining agreement which contained express written provisions providing for intermittent wage increases over the two year term of their agreement. The State understood that a wage increase would be calculated in a manner other than that called for by the express terms of the agreement and since July 6, 2007 modified employee wages in a manner consistent with its understanding instead of consistent with the written terms appearing in the agreement. It failed to negotiate contract language reflecting its understanding. Such an action constitutes a breach of the collective bargaining agreement in violation of RSA 273-A: 5,I. The State must recalculate the wage increases affected by its miscalculation and

otherwise place the affected employees at wage rates consistent with its written agreement with the Union.

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 Union has complained that the State's actions related to the calculation and payment of wages to employees following implementation of a successor collective bargaining agreement (CBA) constitute improper labor practices and violate provisions of RSA 273-A:5,I namely ¶(e) refusing to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations; and ¶(h) breaching a collective bargaining agreement. The PELRB has sole original jurisdiction to adjudicate claims of improper labor practices committed by a public employer or an exclusive bargaining representative certified under RSA 273-A:8 through the application of RSA 273-A:6. By reason of the alleged violations of the statute, we therefore assume jurisdiction of the Union's complaint.

DISCUSSION

These parties have negotiated many CBA's since the inception of the Public Employees Labor Relations Act in 1975 and at least since 1987 the parties have provided for so called "plus rates" for certain law enforcement employees. These plus rates related to an additional increase in wages of either 10% or 20% to these employees The current CBA was negotiated over a period of approximately five months in early 2007 with the predecessor agreement due to expire on June 30, 2007. The State was simultaneously negotiating with three separate unions representing three employee bargaining units during this time period. The parties are in substantial agreement as to the chronology and existence of certain written documents related to these negotiations. In essence, the Union alleges that the State agreed to contract language that would employ a method of computation of a scheduled wage increase that would result in a higher increase for some of their unit members, but that the State applied a method of calculation not provided for in the CBA and not understood by the Union's negotiating team to have been the basis of any agreement with them that would modify the application of the plus rate multipliers.

The court has determined that when the Board considers collective bargaining agreements (CBA) it is to construe them in the same manner as other contracts. Applying that tenet in this matter makes our analysis quite basic. At its essence, the Union claims that the State negotiated and agreed to terms that were reduced to writing and the CBA executed. Thereafter, the Union claims the State violated the written terms of the CBA. Our first focus then is upon the terms of the CBA to see if they call for conduct not performed by the State.

The parties have historically, and in the CBA at issue, computed certain employee wage increases through the application of two contract clauses, namely Article XIX Wages and Benefits and Article VIII Overtime Rates. In the CBA at issue, the relevant wage provision addressing the wage increase reads as follows:

> ¶ 19.2.4 All salaries for classified employees shall increase fifty one (51) cents per hour on July 6, 2007 and shall be paid in accordance with the salary schedule contained in Appendix A.

The relevant companion clause incorporating the "plus rates" reads as follows:

> ¶ 8.1. Overtime Rates: Law enforcement employees and fire protection employees, in recognition of their off-duty availability, shall receive wages equal to the wages listed for their respective position in Appendix A plus ten percent (10%) or twenty percent (20%) as indicated in Appendix C. The 10% and 20% additions to wages are in lieu of any compensation for recall status and the Parties agree that employees covered by this provision are expected to be available for return to duty during off-duty hours when notified of the expectation.

We find no ambiguity in these two contract provisions, which provide that the wage increase effective July 6, 2007 will be fifty-one cents ($.51) added to the employees wage rate in effect at that time. For certain law enforcement employees and fire protection employees they would receive wages provided to other employee positions, covered by Appendix A "plus 10% and 20% additions."

A reasonable person reading these two clauses would compute the total wage increase for the law enforcement and fire prevention employees on July 6, 2007 as follows:

Y + $ .51 X (multiplied by) either 10% or 20% as appropriate = new hourly rate

This is the mathematical formula advanced by the Union. The State, when it computed and printed Appendix C, apparently used a formula that could be depicted as follows:

Y X (multiplied by) either 10% or 20% as appropriate + $.51 = new hourly rate

[where "Y" = represents an employee's wage computed from the parties' prior CBA]

Testimony offered by the State mostly centered on the negotiation process and what the State's negotiators understood to be the real intent of the parties when the $.51 increase was discussed, and especially how the State had contemplated that the wage increases would be computed. However, it is likewise a basic tenet that such testimonial parole or extrinsic evidence will be given weight to clarify ambiguous contract terms but not to vary or contradict unambiguous written terms of a contract as we have before us. Since we have found that there is no ambiguity contained in the written terms of the CBA, we can not consider the oral testimony of the State.

As we pointed out at the outset these parties, indeed some of the same negotiators, have bargained several previous CBA's covering these employees. While a course of dealings may have developed between them, indeed maybe even a mutual respect and trust, it is still the responsibility of both parties to assure that what the parties have agreed to is reduced to writing. If the State had planned to treat the initial $.51 hourly wage increase in a fashion that would place it outside the historic method of computation, a statement to that effect could have been added to the parties CBA before it was executed. *See Appeal of Merrimack 142* N.H. 768, 772 (1998) (The one-time nature of a "catch-up" step increase would be a unique, substantial, and material change to any prior agreement between the parties, requiring specific contract language.) It did not and by altering the method of calculation we find that the State committed

an unfair labor practice by breaching the written terms of the parties CBA in violation of RSA 273-A:5, I (e) and (h).

As relief, the State is to recalculate the wage increase using the formula advanced above wherein the $.51 increase is added prior to the "plus rate" multiplication for those employees who it is contemplated by the parties are covered by to the salary scheme expressed in Appendix C of the CBA. Additionally, the future percentage calculations for increases called for in the current CBA are to be made consistent with this finding.

So Ordered.

This 17th day of June, 2008

Doris M. Desautel, Chair

By unanimous decision. Chair Doris M. Desautel. Members E. Vincent Hall and Carol M. Granfield present and voting

Distribution:

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