State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

UNITED STEELWORKERS, LOCAL 8938/MANCHESTER WATER WORKS

COMPLAINANT

v.

CASE NO. G-0058-5
DECISION NO. 2008-265

CITY OF MANCHESTER

RESPONDENT

APPEARANCES

Representing: United Steelworkers, Local 8938/Manchester Water Works
Vincent A. Wenners, Jr., Esq., Manchester, New Hampshire

Representing: City of Manchester
Thomas I. Arnold, III, Esq., Deputy City Solicitor, Manchester, New Hampshire

BACKGROUND

The United Steelworkers, Local 8938/Manchester Water Works ("Union") filed an unfair labor practice complaint against the City of Manchester ("City") on June 30, 2008. On August 29, 2008, pursuant to an Assented to Motion to Amend, the Union filed an amended complaint alleging that the City of Manchester committed an unfair labor practice in violation of RSA 273-A:5, I (a), (b), (c), (e), and (h) by refusing to apply an agreed-upon drug/alcohol testing policy.

More specifically, the Union claims that during the parties' negotiations of a Collective Bargaining Agreement ("CBA") for the period from July 1, 2007 through June 30, 2010, the parties agreed to adopt and implement a drug/alcohol testing policy covering all members of the bargaining unit so long as the City applied the same policy to all employees of the Manchester Water Works, including non-bargaining unit management personnel. The Union also alleges that the parties agreed to negotiate the details of the substance, implementation, and applicability of a policy to non-safety sensitive positions, as defined by federal statute, in the bargaining unit after ratification of the CBA. The Union further alleges that the parties have not signed the CBA because the City has refused to apply the policy to employees who are not members of the bargaining unit and has refused to discuss the details of the policy.

The Union requests that the Public Employee Labor Relations Board ("PELRB") enforce the agreement, order negotiations to continue, order the City to apply the drug/alcohol testing policy either to all employees of the Manchester Water Works or to no employees, and order both parties to sign the CBA upon such understanding and agreement.

The City filed its answer to the complaint on July 14, 2008. The City denies the charges and claims that it did not agree to apply the drug/alcohol testing policy to any non-bargaining unit employees. The City contends that both parties ratified the contract in November, 2007 and that the City is willing to sign the contract which has been in possession of the Union since December, 2007. The City further contends that the ratified contract is binding upon the Union and that the Union has no authority to bargain the terms and conditions of employment of non-bargaining unit employees.

The City requests that the PELRB deny and dismiss the Union's complaint with prejudice, order the Union to sign the CBA, and order the Union to pay all costs and expenses the City incurred in defending this action.

On September 12, 2008, the City moved to dismiss the Union's complaint on the ground that the PELRB lacks jurisdiction to interpret the CBA where the CBA provides for final and binding arbitration. The Union filed its opposition to the City's motion to dismiss claiming that the complaint does not require an interpretation of a CBA provision but rather it requires the PELRB to determine whether or not a CBA exists and if so, what are its provisions.

The PELRB held an evidentiary hearing on December 4, 2008 at the PELRB offices in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The City moved to dismiss the complaint prior to the hearing on the merits. The PELRB took the motion under advisement and the hearing proceeded. Following the conclusion of the evidence, the record was closed.

After considering all filings and evidence, including testimony and exhibits, offered by the parties, and giving appropriate weight to all exhibits and testimonial credibility, the PELRB finds as follows:

FINDINGS OF FACT

1. The City of Manchester, New Hampshire, is a public employer within the meaning of RSA 273-A:1, X.

2. The United Steelworkers, Local 8938/Manchester Water Works is the board certified exclusive bargaining representative of certain employees of the Manchester Water Works.

3. November 8, 2007 was the last day of the parties' negotiations as to the CBA for the period from July 1, 2007 through June 30, 2010. At the negotiations on November 8, 2007, the

Union negotiations team was represented by George Magnan (chief negotiator), Michael Roche and Michael Olmstead. The City team was represented by David Hodgen, (chief negotiator, presently retired), and Thomas Bowen.

4. On November 8, 2007, the parties discussed, inter alia, the term of the tentative CBA concerning drug testing. The Union proposed that its agreement with the City regarding drug testing should mirror the drug testing agreement the City made with AFSCME, Local 298, AFL-CIO ("AFSCME").

5. The Union believed that the "deal" the City made with AFSCME required all employees, not only bargaining unit members, to "be subject to random drug and alcohol testing, including all field and office personnel under the Highway Department umbrella." (Union Exhibit 1.)

6. The City believed that it accepted the Union's proposal that the drug testing agreement mirror the drug testing agreement between the City and AFSCME.

7. The City also believed that its agreement with AFSCME did not require the City to apply drug testing to all employees.

8. The City believed that it never agreed to implement a policy of testing all employees, including field and office personnel, proposed by the Union.

9. The Master Agreement between the City and AFSCME for years 2007-2010 contains section 28.6 which provides as follows:

> Effective on July 1, 2008, all bargaining union members who do not hold CDL licenses shall be subject to the same drug and alcohol testing as CDL employees. Results related to these tests shall be compiled and recorded separately from CDL records required by federal regulations.

(City Exhibit 3.)

10. The Memorandum of Understanding was signed by both parties on November 14, 2007. The Union's representatives who signed the Memorandum of Understanding were Michael Roche, Michael Olsmtead and Maurice Croteau. From the City's side, the Memorandum of Understanding was signed by David Hodgen, Thomas Bowen and Robert Beaurivage.

11. Section 27.7 of the Memorandum of Understanding is entitled Drug and Alcohol Testing and contains the exact language as that contained in the AFSCME's Master Agreement. (See Findings of Fact No. 9; see also City Exhibits 1 & 3.)

12. The Union ratified the CBA on November 15, 2007.

13. The Union ratified the CBA on the condition that the verbal "deal", which the Union understood had been agreed to by the City, would be performed by the City.

14. On November 20, 2007, David Hodgen sent a confidential memorandum to the Manchester Board of Mayor and Aldermen to which he attached a Memorandum of Understanding memorializing the agreement between the City and the Union. In the confidential memorandum, David Hodgen stated that the agreement memorialized in the attached Memorandum of Understanding is not a tentative agreement and that the Water Commissioners voted to ratify the agreement on November 14. (City Exhibit 1.)

15. The City ratified the CBA on November 20, 2007.

16. Neither party has signed the CBA.

17. The City sent the final draft of the CBA to the Union on December 17, 2007. Article 27.7 of the final draft of the CBA is entitled "Drug and Alcohol Testing" and contains the exact language as that contained in the Memorandum of Understanding. (See City Exhibit 4.)

18. The Union refused to sign the CBA on the grounds that City was refusing to apply the allegedly agreed-upon drug testing policy to non-affiliated employees, and that Article 36, Section 36.2 of the final draft of the CBA, contained a "merger" clause, which made it clear to the Union that the verbal "deal" regarding the drug testing was not made part of the CBA. Article 36, Section 36.2 of the final draft of the CBA provides as follows: "This agreement represents the entire Agreement between the parties hereto and may not be modified in whole or in part except by an instrument in writing duly executed by both parties." (City Exhibit 4.)

DECISION AND ORDER

DECISION SUMMARY

The City's motion to dismiss is denied. Because there was no meeting of the minds between the parties, the contract does not exist, and therefore, this matter is not arbitrable, and the PELRB has jurisdiction over the matter. The Union's complaint is denied because there is insufficient evidence that the City refused to negotiate in good faith in violation of RSA 273-A:5, I (e) or breached the parties' CBA in violation of RSA 273-A:5 (h). The Union failed to provide any evidence that the City violated RSA 273-A:5, I (a), (b), and (c).

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. See RSA 273-A:6, I. The PELRB jurisdiction is proper in this case as the Union has alleged violations of RSA 273-A:5, I (a), (b), (c), (e), and (h), subject to a decision on the City's motion to dismiss.

DISCUSSION

The first consideration in this case is whether the PELRB has jurisdiction to hear the matter. "While the PELRB has primary jurisdiction of all ULP claims alleging violations of RSA 273-A:5, see RSA 273-A:6, I, it does not generally have jurisdiction to interpret the CBA when

the CBA provides for final binding arbitration. . . . Absent specific language to the contrary in the CBA, however, the PELRB is empowered to determine as a threshold matter whether a specific dispute falls within the scope of the CBA. . . . Thus, as a threshold matter, the PELRB is empowered to interpret the CBA to the extent necessary to determine whether a dispute is arbitrable." *Appeal of the City of Manchester*, 153 N.H. 289, 293; 893 A.2d 695 (2006) (quotations and citations omitted).

The City seeks dismissal of the complaint, contending that, because the parties ratified the CBA, which contains a grievance procedure providing for final and binding arbitration, and because the issue in dispute presents a question of contract interpretation, the issue should be resolved through arbitration. The Union counters that the complaint does not require interpretation of a CBA provision but, rather, requires the PELRB to determine whether or not a CBA exits and, if so, what are its provisions.

"Collective bargaining agreements are construed in the same manner as other contracts, subject to the law controlling at the time of their execution. . . . In order for a contract to be formed there must be a meeting of the minds as to the terms thereof. . . . For such a meeting of the minds to take place, each party must have the same understanding as to the terms of the agreement." *Appeal of the Sanborn Regional School Board*, 133 N.H. 513, 518; 579 A.2d 282 (1990) (quotations and citations omitted). See also *Simonds v. City of Manchester*, 141 N.H. 742, 746, 693 A.2d 69, 72 (1997) (no employment contract existed where there was no meeting of the minds on its essential terms).

In the present case, the parties have been negotiating a CBA for the period from July 1, 2007 through June 30, 2010. Review of the evidence offered by the parties demonstrates that the drug testing provision was one of the essential terms of the CBA. The fact that neither party

signed the CBA, although both parties ratified it, is evidence that the parties never agreed on the drug testing term of the CBA. The Union ratified the CBA believing that the agreement included a verbal "deal" pursuant to which the City would require all employees of Manchester Water Works, not only union-affiliated employees, to be subject to random drug and alcohol testing. The City, on the other hand, believed that it never agreed, despite the Union's demands, to apply the drug testing requirement to all employees. Furthermore, when the Union received a draft of the CBA ratified by the City, it refused to sign it on the grounds that the City was refusing to apply the allegedly agreed-upon drug testing policy to non-affiliated employees, and that the final draft of the CBA, Article 36, section 36.2., contained a "merger" clause. (See Findings of Fact No. 18.)

These facts demonstrate that there was never a meeting of the minds between the City and the Union as to the drug testing term of the CBA. Accordingly, the PELRB finds that the parties never formed an agreement and did not sign a mutually binding CBA. As there is no contract between the City and the Union, the present matter does not involve questions of contract interpretation and is, therefore, not arbitrable. For the foregoing reasons, the City's motion to dismiss is denied.

The remaining issues are whether the City committed an unfair labor practice by violating RSA 273-A:5, I (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter); (b)(to dominate or to interfere in the formation or administration of any employee organization); (c)(to discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization); (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit . . .); and (h) (to breach a CBA).

The PELRB finds that the Union failed to offer any evidence or legal argument to show that the City violated RSA 273-A:5, I (a), (b) or (c). Furthermore, in view of the PELRB's finding that there is no contract between the parties, the Union's allegation that the City violated RSA 273-A:5, I (h) by breaching parties' contract is without merit. Therefore, the only issue before the PELRB is whether the City violated RSA 273-A:5, I (e) by refusing to negotiate in good faith.

273-A:3, I provides as follows:

> It 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, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.

Additionally, RSA 273-A:5, I provides in relevant part that "[i]t shall be a prohibited practice for any public employer . . . (e) [t]o refuse 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."

In the present case, the Union did not meet its burden to prove, by preponderance of the evidence, that the City acted in bad faith during contract negotiations. The Union offered no evidence as to whether the Manchester Board of Mayor and Aldermen was aware of the alleged verbal "deal" on drug testing between the parties when it ratified the CBA. Moreover, as the PELRB found, there was no meeting of the minds as to the drug testing provision of the CBA. The Union believed that the CBA included the verbal "deal" between the parties that mirrored the agreement the City had with AFSCME regarding the drug testing. The City believed that it did agree to include in its contract with the Union the same drug testing terms it reached with

AFSCME. The City also believed that the drug testing terms of its contract with AFSCME did not require the City to test all employees. The Union failed to provide sufficient evidence to show that the City deliberately misrepresented to the Union the terms of the CBA concerning the drug testing or otherwise failed to bargain in good faith. In accordance with the foregoing, the Union's complaint is denied.

We also take this opportunity to remind the parties that the Public Employee Labor Relations Act (RSA 273-A), while providing the authority to award costs under certain circumstances, does not presently contain an express provision that permits the PELRB to award legal fees or expenses to either party to a proceeding before the agency. While a court may have such inherent authority, see *Emerson v. Town of Stratford*, 139 N.H. 629, 631, 660 A.2d 1118 (1995), the same is not true for a quasi-judicial administrative body. The remedial authority of such a body is expressly limited by statute. See *Appeal of Somersworth School Dist.*, 142 N.H. 837, 841, 731 A.2d 386 (1998). Accordingly, no costs or expenses are awarded.

So ordered.

Signed this 30th day of December, 2008

Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding. Board Members Kevin E. Cash and Sanford Roberts, Esq. present and voting.

Distribution:

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