



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**STATE EMPLOYEES' ASSOCIATION OF NH,
SEIU LOCAL 1984**

v.

CASE NO. G-0115-1

DECISION NO. 2010-046

**STATE OF NEW HAMPSHIRE,
GOVERNOR JOHN LYNCH**

APPEARANCES

Representing: State Employees Association of New Hampshire, SEIU Local 1983
Glenn Milner, Esq., Molan, Milner and Krupski, PLLC
Concord, New Hampshire

Representing: State of New Hampshire, Governor John Lynch
Rosemary Wiant, Esq. and Michael Brown, Esq.,
New Hampshire Office of the Attorney General
Concord, New Hampshire

BACKGROUND

The State Employees' Association of New Hampshire, SEIU Local 1984 (SEA) filed an unfair labor practice complaint claiming that the State violated RSA 273-A:5, I (e) on account of Governor Lynch's public statements concerning ongoing collective bargaining. The SEA contends this conduct violated negotiation ground rules and constituted improper direct dealing with bargaining unit employees. As relief the SEA requests that the PELRB: 1) order the State

to cease and desist from further violating the ground rules of negotiations; 2) order the State to issue an apology to the Union; and 3) order the State to pay the Union's costs.

The State denies the charges. The State contends the disputed ground rule did not apply to the Governor; the Governor's statements only contained information that was otherwise publicly available; as Chief Executive the Governor was entitled to issue public statements about his layoff plans; and the Governor's statements did not cause any harm since the parties reached a tentative agreement the day after the Governor's statements.

The parties agreed to submit this matter for decision on stipulated facts, exhibits and briefs. The record material includes SEA Exhibits A and B, the Affidavit of Thomas Manning, and documents appended to the State's opening brief, now collectively marked as State Exhibit One for the record. The parties' record material is reflected in part in the Findings of Fact set forth below. The board's decision is as follows.

FINDINGS OF FACT

1. The SEA is the exclusive bargaining representative of a number of bargaining units comprised of certain classified employees.
2. The State of New Hampshire is a public employer as defined in RSA 273-A:1, X.
3. Governor John Lynch is the Chief Executive of the State of New Hampshire and is charged with negotiating terms and conditions of employment with state employees in the classified system per RSA 273-A:9, I. Pursuant to RSA 273-A:9, III the Governor has appointed a committee to represent him in negotiations with the SEA. That committee is chaired by Thomas F. Manning, Assistant Secretary of State.

4. The SEA and the State Negotiating Committee are parties to ongoing collective bargaining negotiations to secure a successor contract to one which has an expiration date of June 30, 2009.

5. The parties, unable to reach agreement, appointed two mediators to assist them in negotiations.

6. On or about July 16, 2009 the mediators instructed the negotiating team members who were present to refrain from discussing the particulars of the negotiations publicly.

7. Mr. Manning characterizes the ground rules for negotiations as including an instruction to refrain from publicly commenting on the details of the negotiations.

8. In June and early July, 2009, as reflected in State Exhibit One, both parties made public statements concerning ongoing contract negotiations which were reported by various news outlets, including newspapers and radio. The statements included comment about the Governor's efforts to find approximately \$25 million in personnel savings to help balance the budget, and in particular about the subject of layoffs and a negotiated furlough program, two alternatives means by which savings in personnel costs might be realized.

9. On July 22, 2009, following the implementation of the ground rule restricting public comment about the specifics of the ongoing negotiations, Governor Lynch made public statements reported in various news outlets, including newspapers and radio. See SEA Exhibits A and B and State Exhibit One.

10. Governor Lynch's July 22, 2009 statements referenced subjects similar to those discussed in the parties' public statements which preceded the disputed ground rule. These statements continued to reflect his position that a negotiated furlough program was preferable to layoffs, but that layoffs would have to be planned for and likely implemented in the absence of a

negotiated alternative that addressed the need to find approximately \$25 million of savings in personnel costs. The news outlets reported some of Governor Lynch's public statements as follows:

"If we end up laying off state employees - which is not my preference - layoffs would begin after Labor Day and end by mid - to late October. My goal in all of this has been not only to achieve budget savings, but to save jobs. My strong preference is a well structured furlough program as opposed to layoffs. [U]nion leadership does not appear to want to adopt this approach..." State Exhibit One (Concord Monitor, July 23, 2009).

"We have no choice but to go forward with plans to lay off 750 (state workers)...We can't wait, and we have to go forward with these plans, if in fact, they don't want to support a furlough program." State Exhibit One (Nashua Telegraph, July 23, 2009).

25. According to reports in local news outlets, the parties had reached a tentative agreement as of July 24, 2009, two days after the Governor's statements about which the SEA complains. State Exhibit One (Concord Monitor, July 24, 2009 and New Hampshire Public Radio, July 24, 2009).

DECISION AND ORDER

DECISION SUMMARY

The references to the parties' respective positions in ongoing collective bargaining negotiations contained in the Governor's July 22, 2009 public statements violated the ground rule which required the parties to refrain from such public comment. This is true even though these statements had a minimal negative impact on the negotiation process. The board therefore finds that the State committed an unfair labor practice and violated RSA 273-A:5, I (e)(to 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). The board

concludes the evidence is otherwise insufficient to establish that the disputed statements constituted improper direct dealing and such charges are resolved in the State's favor.

JURISDICTION:

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I.

DISCUSSION:

In order to prevail on its claim that due to the Governor's statements the State committed an unfair labor practice and violated RSA 273-A:5, I (e) the SEA must establish that: 1) a ground rule was in place; 2) the ground rule was binding upon the Governor; 3) the ground rule required the Governor to refrain from public comment about pending collective bargaining negotiations; and 4) the Governor's public statements violated the ground rule. The board finds the evidence relied upon by the SEA is sufficient to prove all of these and the State did violate RSA 273-A:5, I (e).

As a preliminary matter the board emphasizes that ground rules like the one at issue in this matter play an important role in the collective bargaining process, and their value and utility should not be overlooked. They serve to promote and enhance the potential for a tentative agreement by confining the collective bargaining negotiations to the bargaining table, a setting where parties are more likely to engage with each other on a candid and reasoned basis than is the case when the parties make and exchange statements about negotiations through media outlets.

The ground rule at issue here is reflected in the parties' stipulated facts and is also referenced in the affidavit of Thomas Manning, the State's negotiator. The board concludes the ground rule was plainly intended to prevent public discussion about the ongoing negotiations,

which the record reflects were difficult and, at least as of the June through early July, 2009 time period, beginning to stall. The State's argument that the ground rule was not binding upon the Governor or that he was nevertheless entitled, by virtue of his status as Chief Executive, to offer commentary about pending collective bargaining agreement negotiations, is not persuasive.

It is true that the instruction about the ground rule was given to the parties actually in attendance at the negotiations, but the board finds that the record is insufficient to show that the parties expressly agreed to exempt certain employer representatives, like the Governor, from the ground rule. The State's argument that employer representatives who were not present at the time the ground rule was established were free to serve as an outlet for employer commentary about the ongoing negotiations renders the ground rule into an illusory and meaningless commitment. The board does not believe this was the parties' intent.

The board finds that the Governor's July 22, 2009 public statements constituted a mixture of permissible communications about plans relative to employee layoffs necessary to accomplish \$25 million in personnel savings, which did not violate the ground rule, and references to the ongoing negotiations, including the subject of a negotiated furlough program which would avoid the need for employee layoffs, which were impermissible because they were made in violation of the ground rule. The Governor should have refrained from including in his public statement such comments about the ongoing negotiations and the parties' respective positions at the bargaining table. The fact that the Governor combined the impermissible comment with permissible statements does not alter the fact that a violation of an important bargaining ground rule has occurred. Nor are his comments excused to the extent they were a reiteration of prior public statements, although this circumstance certainly mitigated the impact of his statements.

The SEA also claims that the Governor's July 22, 2009 public statements constituted improper direct dealing with bargaining unit employees. The board first observes that the fact that the State violated a ground rule and thereby violated RSA 273-5, I (e), as previously discussed, does not necessarily mean that the State also engaged in improper direct dealing. An example of improper direct dealing is described in *Appeal of Franklin Education Assoc.*, 136 N.H. 332, 333-34 (1992). In that case the employer engaged in improper direct dealing because the local school board commenced the collective bargaining process and simultaneously sent new employment contracts to teachers proposing lower wages. The case is a clear illustration of a situation where an employer negotiated directly with bargaining unit employees in derogation of its statutory obligation to negotiate solely with the duly certified and exclusive representative of the bargaining unit.

The board identified a number of considerations to take into account in evaluating claims of improper direct dealing in *American Association of University Professors UNH Chapter v. University System of New Hampshire*, PELRB Decision No. 2007-039:

When evaluating allegations of "direct dealing" we examine the facts to determine the nature of the alleged direct communication and the extent of alleged dealing that would equate with a breach of the party's obligation to bargain in good faith. As to the communication, we look to a combination of factors to guide us, including but not limited to (1) the medium used; (2) the frequency of communication; (3) the timing of the communication; and, (4) the intent of the party generating the communication, to the extent it can be ascertained.

As to the matter of "dealing" aspect, we also look to a combination of factors including but not limited to (1) the contents of the communication; (2) the audience to whom the communication is directed; (3) the extent to which the contents express an intent to interfere with the representative's right to exclusively represent the bargaining unit members; and (4) the effect of the communication upon members of the bargaining unit. To those general factors, since this case presents a situation involving negotiations between the parties, we also have examined the extent to which the parties' negotiations are affected.

In the case now under consideration the Governor discussed his plans to proceed with layoffs to address the need to save \$25 million in personnel costs and he did reference the ongoing collective bargaining. The record also reflects that the statements were issued only on one day, were made to the public in general, described and referred to matters that had already been to some extent the subject of previous public statements by both parties, did not solicit or result in any specific additional communications between the employer and bargaining unit employees on the subject, and did not have any particular impact on the SEA's ongoing service as the exclusive representative of bargaining unit employees at the bargaining table. The board finds that even though a portion of the Governor's statements violated an applicable ground rule, the evidence is insufficient to prove that the statements were improper direct dealing with bargaining unit employees or were anything other than an explanation of the Governor's legitimate plans to accomplish the necessary \$25 million savings in personnel costs.

The board concludes by noting that the negotiations at issue did result in a tentative agreement, and the board is not aware of the existence and substance of ground rules applicable to any current negotiations. However, the board strongly encourages the parties to reduce any current or future ground rules to a signed writing and further orders the State to take necessary steps to ensure that State representatives, including those like the Governor who are involved in the collective bargaining process but who may not personally attend bargaining sessions, are duly informed about existing ground rules and understand their responsibilities and obligations thereunder as outlined in this decision.

It is so ordered this 4th day of March, 2010.

/s/ Jack Buckley

Jack Buckley, Chair

By unanimous vote. Chair Jack Buckley presiding with Board Members J. David McLean and Carol M. Granfield also voting.

Distribution:

Glenn Milner, Esq.

Rosemary Wiant, Esq.

Michael K. Brown, Esq.