STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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

CASE NO. G-0115-2

v.

DECISION NO. 2010-047

STATE OF NEW HAMPSHIRE,

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 charge complaining about the State's distribution to department heads of a memorandum with an opinion-editorial letter written by the State's negotiating team. The letter was published in State media outlets, highlighted some aspects of the recently negotiated tentative collective bargaining agreement, and advocated that SEA members approve a negotiated tentative collective bargaining agreement. The SEA acknowledges that there was nothing improper about the original publication of the opinion-editorial in local newspapers.

However, the SEA claims the State did commit statutory violations when the opinion-editorial was distributed by department heads to some state employees.

The SEA contends these department head communications to state employees constituted coercion or interference with employee rights, an interference with the administration of an employee organization, and a refusal to bargain in good faith with the SEA, in violation of RSA 273-A:5, I (a), (b) and (e). The SEA requests that the PELRB issue a cease and desist order, require the State to acknowledge a statutory violation, award the SEA its costs, and grant further relief as appropriate.

The State denies the charges and has moved to dismiss, arguing that neither the content of the disputed opinion-editorial nor its distribution to some state employees can serve as the basis for a violation of RSA 273-A:5, I in the circumstances of this case.

The parties agreed to submit this matter for decision on stipulated facts, exhibits and briefs. 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 certain State classified employees.

2. The State of New Hampshire is a public employer as defined in RSA 273-A:1, X.

3. The SEA and the State are parties to a Collective Bargaining Agreement with an expiration date of June 30, 2009 ("CBA"). The parties agree the CBA remains in effect under an evergreen clause until a successor agreement is reached.

4. The parties have engaged in negotiations since December of 2008 and reached a tentative agreement on or about September 18, 2009.

5. On or about September 24, 2009 the SEA distributed ballots to its members along with information related to a possible resolution of the agreement for the period 2009 through 2011. This communication included the following content:

> The SEA Bargaining Senate has referred the tentative agreement to a ratification vote by the general membership with a recommendation that members should reject it.
>
> _____
>
> Voting on your contract is one of the ultimate benefits of union membership. The SEA Bargaining Senate voted to send these contract changes to you with a recommendation to reject the changes because it provides limited job security protections, contains approximately $50,000,000 in lost wages, and because it unequally impacts state employees and therefore may divide the workforce and union membership in the future. Despite the Senate's concerns, the Senate overwhelmingly indicated the importance of members' right to review the proposed changes and vote on whether to accept or reject the changes.

6. On or about September 23, 2009 the State negotiating committee wrote and caused the publication of an opinion-editorial letter in a number of media outlets in the State. The opinion-editorial letter identifies the State negotiating team as the authors and lists them by name and position. The letter summarizes parts of the tentative agreement and advocates approval of the tentative agreement by members of the SEA.

7. The SEA acknowledges that the State's preparation and publication of the opinion-editorial letter in various state media outlets was not improper.

8. The opinion-editorial letter included the following content:

> The governor instructed the state negotiating team to work toward a well-structured furlough plan. It was, and is, Gov. Lynch's preference to achieve the mandated savings ($25 million in personnel-related reductions) through furloughs rather than layoffs. Unlike layoffs, furloughs can only take place upon agreement with the union.
>
> _____
>
> The union's leadership has agreed to put the contract before its membership for a vote, yet the leadership has recommended members reject this contract and instead allow layoffs to proceed. Without a contract, hundreds of layoffs will be completed by the end of October.
>
> _____

> Like those of us who have spent the last 10 months negotiating this agreement, it is time for state employees to weigh the alternatives. We hope state employees – as we have done for the last 10 months – will choose to preserve jobs. We believe the final contract is one that is fair to employees. It recognizes the difficult times we are in, but above all, it saves jobs.

9. On September 23, 2009 the Governor's executive assistant forwarded, by e-mail, the opinion-editorial letter to department heads and included the following transmittal:

> Dear Department Heads:
>
> The members of the negotiating team have sent this op-ed about the proposed contract to newspapers. I thought it might be of interest to you.
>
> As always, feel free to be in touch with my office if you have questions.
>
> Sincerely,
>
> John Lynch.

10. Some department heads ultimately forwarded the opinion-editorial letter, without request, to department employees.

11. On or about September 25, 2009 Governor John Lynch caused a memorandum to be distributed to the heads of each State Department urging them to make available and/or distribute the opinion-editorial letter authored by the State Negotiating Committee to their staff members who may seek further information.

DECISION AND ORDER

DECISION SUMMARY

The board finds that the SEA has not proven that the State violated any provisions of RSA 273-A:5, I based upon the record submitted in this case. In reaching its decision the board relies upon the content of the opinion-editorial letter, the identity of its authors, the fact that negotiations had concluded, the general obligation of the State negotiation team to support the tentative agreement, the fact that in the opinion-editorial letter the State negotiation team was

promoting an agreement negotiated and approved by the SEA negotiation team, and the SEA Bargaining Senate's recommendation against SEA membership approval of the tentative agreement. All of the SEA's claims and requests for relief are denied.

JURISDICTION:

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

DISCUSSION:

In the ordinary course negotiating teams are obligated to support tentative agreements, as reviewed in *Hampton Police HPA, Inc. v. Town of Hampton*, PELRB Decision No. 2009-128:

> In *Governor Wentworth Education Association, NEA-New Hampshire v Governor Wentworth Regional School Board*, PELRB Decision No. 83-60, the PELRB concluded that school board representatives on the negotiating team had a duty to support the tentative agreement as it proceeded through the school board's ratification process. In that case the PELRB found that the employer engaged in bad faith bargaining when one member of the school board negotiating team opposed the tentative agreement and another negotiating team member abstained from voting during the school board ratification process, resulting in a tie vote and the school board's failure to ratify the tentative agreement. In *Stratford Teachers Association, NEA-New Hampshire v. Stratford School District et al*, PELRB Decision No. 85-85, one of the school board members opposed a tentative agreement and spoke against it at the annual school district meeting. Two other school board members who were present "remained silent" as the third school board member criticized the agreement. The board concluded that the employer had not met its good faith bargaining obligation in these circumstances imposed by the statute and by express language in the tentative agreement.

In this case the State is being challenged, in substance, for promoting a tentative agreement, action that is generally considered to be consistent with good faith bargaining obligations, because the disputed opinion-editorial letter was delivered to some state employees. The SEA claims that this action violated several statutory provisions, including 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); and (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 evaluates the sufficiency of the SEA's improper direct dealing claims with due consideration of *Appeal of Franklin Education Assoc.*, 136 N.H. 332, 333-34 (1992), a case discussed and relied upon by the SEA in its brief, and *American Association of University Professors UNH Chapter v. University System of New Hampshire*, PELRB Decision No. 2007-039, a prior PELRB decision enumerating a number of factors to take into account in direct dealing cases.

As to the record submitted by the parties the board first finds that most of the content of the disputed opinion-editorial letter was nothing more than a summary of a tentative agreement reached by the parties after approximately ten months of bargaining. It also does nothing more than recite what is already known, and what any employee considering the tentative agreement would understand, which is that the State negotiating team that wrote the letter and negotiated the tentative agreement supported the tentative agreement, believed it was a good and fair result for all involved parties, and should be approved by the SEA membership. There would be no tentative agreement if this were not the case. The letter does not contain any threats of retaliation if the agreement is not approved, nor does it set forth any promises or inducements to employees to approve the tentative agreement. The board does not equate support for a duly negotiated tentative agreement with an improper threat of adverse job action or an improper promise of a benefit. If it is anything it is a promise to fulfill the terms of a properly negotiated agreement, and the board cannot find fault in the circumstances of this case with such a commitment.

In terms of the timing of the disputed communication and the manner in which it was delivered the board notes that the email communication to department heads from Governor Lynch enclosing the opinion-editorial letter was made after the bargaining process was complete. Further, it is evident that there was a legitimate purpose for the communication, which was to make department heads aware of an opinion-editorial letter which the SEA acknowledges was a proper public communication and which was about to appear in some State media outlets. Although in their stipulated facts the parties have characterized the Governor's actions as "urging" department heads to provide the opinion-editorial letter to employees, the actual September 23, 2009 email transmittal does not support this characterization, and the record submitted for the board's consideration does not disclose whether there was some other activity which served as the basis for this characterization. The board's ability to assess the nature and extent of the State's "urging" is therefore limited, but the board does note that the September 23, 2009 email does not request or call upon department heads to forward the material to state employees in general, or SEA members in particular.

The board also takes into account that the reason the opinion-editorial letter conflicted with the SEA's official position is because the SEA had changed its position and no longer endorsed the tentative agreement the parties had reached approximately one week earlier following ten months of negotiations. However, the record does not disclose what changed during this seven day period which necessitated the SEA's change of position. The board finds these circumstances to be somewhat unusual and potentially in conflict with the SEA's general obligation to support a duly negotiated tentative collective bargaining agreement during any ratification process. The State does complain and assert in its filings that the SEA violated RSA 273-A:5, II (d). However, the State did not formally file an unfair labor practice charge against

the SEA, and the board will not treat the discussions and references contained in the State's filings as legally sufficient to bring the issue before the board for decision.

The board finds there is insufficient evidence given the record submitted in this case to prove that the State's distribution of the negotiating team's opinion-editorial letter to department heads, and its subsequent circulation to some state employees, constituted an unfair labor practice in violation RSA 273-A:5, I (a), (b) by the coercion or interference with the rights of employees or interference with an employee organization. The evidence is also insufficient to prove improper direct dealing in violation of RSA 273-A:5, I (e). Accordingly, all of the SEA's claims and requests for relief are denied.

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.