



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Rochester Communications Union, NEPBA, Local 123

v.

City of Rochester

Case No. G-0123-2
Decision No. 2010-139

Appearances:

Kevin E. Buck, Esq. and Peter J. Perroni, Esq., Nolan Perroni Harrington LLP, Lowell Massachusetts for the Rochester Communications Union, NEPBA, Local 123

Daniel P. Schwarz, Esq., Flygare, Schwarz & Closson, Exeter, New Hampshire for the City of Rochester

Background:

The Rochester Communications Union, NEPBA, Local 123 (NEPBA) filed an unfair labor practice complaint dated November 24, 2009 against the City of Rochester. The complaint was deemed filed with the PELRB on December 1, 2009, the date by which the complaint and payment had been received at the PELRB. The NEPBA complains that the City attempted to improperly influence the outcome of a representation election in decertification proceedings, engaged in improper direct dealing with bargaining unit employees, and has not negotiated in good faith. The NEPBA contends that as a result the City has violated RSA 273-A:5, I (a), (b), (c), (e), and (g). As relief the NEPBA requests that the PELRB order the City to cease and

desist, award NEPBA costs, and set aside the results of the decertification election in Case No. G-0123-1. The NEPBA withdrew a post-election objection filed in Case No. G-0123-1 and elected to have its charges about the City's conduct heard and addressed in this case.

The City denies the charges and requests dismissal of the complaint.

The Board held a hearing on April 1, 2010 at the offices of the PELRB in Concord at which time the parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The parties have filed post-hearing briefs and the record is closed.

Findings of Fact

1. The City of Rochester is a public employer within the meaning of RSA 273-A:1 et. seq.

2. Prior to a November 30, 2009 decertification election, PELRB Case No. G-0123-1, the NEPBA was the exclusive bargaining representative for the Rochester Communications Bargaining Unit pursuant to PELRB Decision No. 2008-126. Based upon the results of the election the NEPBA was decertified as the exclusive representative pursuant to PELRB Decision No. 2010-035.

3. The City and the NEPBA began contract negotiations on November 26, 2008. Subsequent negotiations occurred on December 15, 2008; January 5 and 22, 2009; February 2 and 17, 2009; March 26, 2009; April 4 and 22, 2009; May 4, 2009; July 20, 2009; August 19, 2009; September 10, 2009; October 15, 2009; and November 13, 2009. A negotiation session was scheduled for November 30, 2009 but was cancelled by agreement of the parties as the decertification election was scheduled to take place earlier that same day.

4. Ron Scaccia, a NEPBA representative, attended the January 5, 2009 negotiation session. Steve Arnold, another NEPBA representative, attended all sessions beginning August 19, 2009. Bargaining unit employees attended and conducted all other negotiation sessions.

5. Mr. Arnold's participation in negotiations was helpful but the parties had not reached agreement as of November 30, 2009, the date of the decertification election.

6. Mr. Arnold retired from the Portsmouth police department in the summer of 2009 after nearly 23 years of service, including 21 years as a union leader. He then began employment as a representative of the NEPBA and became involved in the ongoing contract negotiations with the City.

7. Mr. Arnold wrote a letter to the bargaining unit dated October 29, 2009 in which he reviewed his experience and credentials, the process of collective bargaining, the pending decertification election, the status of pending contract negotiations, including his belief that "we are very close to bringing a contract before the body for ratification," and he urged bargaining unit employees to support the NEPBA in the upcoming decertification election. See Joint Exhibit B. Mr. Arnold did not address or send the letter to the Rochester Chief of Police.

8. Mr. Arnold's letter included the following content:

I urge you all to speak to your police officers, ask about me and my reputation as a labor leader and benevolent protector of our public safety professionals. Speak to Chief DuBois, Allen, Dumas, Burke, Munday, and Magnum, to name a few of the many I know within your organization. I assure you they will tell you the real deal about me and my commitment to you and or Union.

9. At some point between October 29 and November 24, 2009 the Rochester Chief of Police received a copy of Mr. Arnold's October 29, 2009 letter, and he wrote a memo and delivered a memo to all bargaining unit employees on November 24, 2009.

10. The Chief's memo included the following content:

I have seen a letter from Mr. Steve Arnold of the NEPBA addressed to Rochester Dispatchers regarding this election. While the presence of Mr. Arnold has been very helpful in the last several negotiating sessions, this Union went for over a year without any professional assistance from the NEPBA at the bargaining table. The City finally urged the Union to seek some professional assistance in order to move this process along with greater speed. Unfortunately, because of the long period during which the Union had no assistance from the NEPBA, the parties are still a long way from settling a contract. As Mr. Arnold pointed out, the ground rules do not allow me to be more specific, but I simply do not share Mr. Arnold's view that the Union is "...very close to bringing a contract before the body for ratification." There are still a number of critical issues to resolve, and no one can predict how long it will take to reach a settlement, especially in these economic times.

Decision and Order

Decision Summary:

The City committed an unfair labor practice and violated the provisions of RSA 273-A:5, I (a), (b) and (e) on account of the content of the November 24, 2009 memo to bargaining unit employees provided during the pendency of decertification election proceedings and ongoing collective bargaining. The City shall post this decision in the workplace and shall cease and desist from such activity in the future. Within fifteen business days of the date of this decision the NEPBA shall notify the Board whether it requests a new election. Upon receiving such a request the results of the November 30, 2009 decertification election shall be set aside and a new election scheduled. In the absence of such a request the November 30, 2009 election results shall be final.

Jurisdiction:

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

Discussion:

This case involves a decertification proceeding in which an existing and duly certified exclusive representative's future status was to be determined through the secret ballot election process. Additionally, the decertification proceeding took place at a time when collective bargaining had been underway for a year without success. The parties negotiated on November 13, 2009 and were scheduled to meet for further negotiations on November 30, 2009, the same date as the decertification election. This negotiation session was ultimately cancelled by agreement of the parties to accommodate the decertification election proceedings.

During this time the NEPBA had the right to "represent employees in collective bargaining negotiations" and the right to "represent the bargaining unit exclusively." See RSA 273-A:11, I (a) and (b). The City was required to negotiate in good faith with the NEPBA and was not allowed to "deal directly" with bargaining unit employees about matters reserved for collective bargaining. The City was also required to avoid dominating or interfering with the administration of the NEPBA and to refrain from coercing or interfering with bargaining unit employees in the exercise of their statutory rights. See RSA 273-A:5, I (a), (b) and (e).

The scope of permissible employer conduct in election proceedings was reviewed to some extent in *Appeal of AFSCME, AFL-CIO Local 298*, 121 N.H. 944 (1981). Referring to RSA 273-A:5, the court stated that:

The statute does not expressly forbid communications between a public employer and its employees concerning matters pertaining to employee organizational efforts. Indeed, the federal counterpart to RSA ch. 273-A specifically authorizes an employer to express "any views, arguments or opinion..." on such organizational activities provided that such an "expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. §158(c). We also must be cognizant of the constitutional provisions that raise the freedom to communicate one's views to the highest level of protection that can be provided.

Id. (citations omitted).

The Chief's memo disparages the representation provided by the NEPBA and opines that "that parties are still a long way from settling a contract" and states that "no one can predict how long it will take to reach a settlement, especially in these economic times." The general point and theme of these comments is that the collective bargaining process has not been successful to date and will most likely continue to be unsuccessful, that the City is not committed in good faith to the collective bargaining process, and that the NEPBA has not been properly representing the interests of bargaining unit employees at the bargaining table.

While the Chief does have the right to offer his view on the status of negotiations in a manner that is consistent with the City's obligations to participate in ongoing collective bargaining in good faith, in the context of this case his commentary was improper. His memo was provided to bargaining unit employees shortly before a decertification representation election and in the midst of unsuccessful but ongoing negotiations. He predicts that a contract is unlikely at any point in the near future. This is not an idle or inconsequential statement given the pendency of the decertification election proceedings. So long as employees hold positions covered by a bargaining unit represented by a Board certified exclusive representative the only way most of their terms and conditions of employment (including, for example, wages and benefits) can change is through collective bargaining. The disputed memo is an appeal to bargaining unit employees to abandon the to date fruitless collective bargaining process and instead address and obtain changes in existing terms and conditions of employment outside of the statutory collective bargaining process. The memo is tantamount to a threat that should the affected employees choose to continue in collective bargaining with a certified exclusive representative they will be unable to negotiate an agreement on terms and conditions of employment with the City.

The solution to difficult contract negotiations is further good faith efforts at the bargaining table and use of statutory procedures designed to address impasse, like mediation and fact finding pursuant to RSA 273-A:12. The solution to difficult contract negotiations is not a decertification election in which an employer denigrates the efforts of the certified exclusive representative in ongoing collective bargaining, marginalizes and undermines the collective bargaining process, and in effect promotes decertification of the exclusive representative as a viable alternative to the statutory collective bargaining process which the employer and the certified exclusive representative are required to follow in good faith. This is not to say that bargaining unit employees, acting on their own, and without improper contact or interference from the employer, cannot request and participate in a decertification election in such circumstances, but these are not the facts of this case.

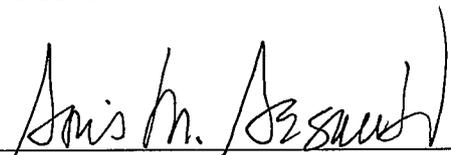
For the foregoing reasons the Board concludes that the City has committed an unfair labor practice in violation of RSA 273-A:5, I. (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter restrain); (b)(to dominate or to interfere in the 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 City shall post this decision for thirty days in a conspicuous location where it can be seen and reviewed by employees of the bargaining unit at issue. The City shall cease and desist from engaging in such conduct in the future. The results of the November 30, 2009 election shall be vacated and another representation election conducted if the NEPBA files a

request for the conduct of such an election in this case within fifteen business days of this decision. In the absence of such a request the results of the election shall be deemed final.

So Ordered.

Date: August 3rd, 2010.


Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Members Kevin E. Cash and James M. O'Mara, Jr., also voting.

Distribution:

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