



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, Council 93, Local 3657/Hillsborough County Sheriff's Department

v.

Hillsborough County Sheriff's Department

Case No. G-0012-14
Decision No. 2011-077

Appearances:

Karen E. Clemens, Esq., Associate General Counsel, Boston, Massachusetts for the AFSCME, Council 93, Local 3657/Hillsborough County Sheriff's Department

Carolyn M. Kirby, Esq., Legal Counsel, Goffstown, New Hampshire for the Hillsborough County Sheriff's Department

Background:

The AFSCME Council 93, Local 3657/Hillsborough County Sheriff's Department (Union) filed an unfair labor practice complaint against the Hillsborough County Sheriff's Department (County) on September 22, 2010. The Union claims the parties' collective bargaining agreement which was signed on September 10, 2008 and expired on June 30, 2010 (CBA) was entered into after the July 15, 2008 effective date of RSA 273-A:12, VII and the Union is now entitled to the continuation of the pay plan in the now expired CBA by law. The Union asserts the County has improperly withheld wage increases bargaining unit employees are entitled to pursuant to the provisions of RSA 273-A:12, VII, all in violation of RSA 273-A:5, I (a), (e), (g), and (h). As relief, the Union requests that the Board find that the CBA is subject to

the provisions of RSA 273-A:12, VII, find that the County has bargained in bad faith, find that the County has coerced or otherwise interfered with bargaining unit employees in the exercise of rights conferred by RSA 273-A, find that the County has failed to comply with RSA 273-A:12, II on account of its failure to process merit raises following the expiration of the CBA and has violated the CBA, and order appropriate relief.

The County denies the charges. The County asserts that the now expired CBA was not subject to RSA 273-A:12, VII because the CBA was entered into prior to the statute's July 15, 2008 effective date. In support of its position, the County cites Union approval of the tentative agreement and County approvals completed by the end of June, 2008. The County requests that the PELRB deny the charges and dismiss the complaint.

The Board held a hearing on the complaint on December 7, 2010 at the offices of the PELRB in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties filed post-hearing briefs and the Board's decision is as follows.

Findings of Fact

1. The AFSCME Council 93, Local 3657/Hillsborough County Sheriff's Department is the certified exclusive representative of certain bargaining unit employees who work in the Hillsborough County Sheriff's Department.

2. The Hillsborough County Sheriff's Department is a public employer within the meaning of RSA 273-A:1, IX.

3. This case involves a collective bargaining agreement which expired on June 30, 2010. The parties have not entered into a successor collective bargaining agreement. The parties'

immediately previous collective bargaining agreement covered the time period from July 1, 2003 to June 30, 2005 (2003-2005 CBA).

4. In nearly 3 years of negotiations Deputy Sheriff Ernie Castle served on the Union's negotiation team and attorney Tom Flygare served on the County's negotiation team. By April of 2008 it appeared the parties had at last reached an agreement at the bargaining table, and both parties proceeded with the next phase of the collective bargaining process, including the review and approval process and the reduction of the tentative agreement to a mutually acceptable signature version of the contract.

5. Deputy Sheriff Castle prepared a written tentative agreement dated April 24, 2008 for Union membership review as well as notes for his reference during the Union meeting. Union Exhibits 3 and 4. The Union membership approved the tentative agreement and Union representatives so informed the County in a letter dated May 1, 2008, which was delivered to the County on or before May 19, 2008. County Exhibits 1 and 3; Union Exhibit 4; Joint Exhibit 2.

6. By April 30, 2008 the County's attorney had prepared a draft of the collective bargaining agreement and circulated it to members of the County negotiation team for review. This email (Union Exhibit 14) included the following statement:

One issue will probably come up in connection with the performance evaluation section in XX is the issue of the starting wage (sic). Ernie had a requirement in his proposal that all new hires will be brought in at the bottom of the pay range. We chose to ignore that and leave it out of our agreement. I expect that will get raised when the union sees this.¹

7. The County subsequently generated a written draft of the collective bargaining agreement dated May 15, 2008² and provided it to the Union. The Union noticed the absence of a provision encompassing its new hire wage proposal, and on May 20, 2008 the Union communicated this along with several other points to the County. Joint Exhibit 3.

¹ The Board understands the language "sees this" to refer to the County draft of the collective bargaining agreement.

² This draft agreement (and also subsequent draft agreements, see Union Exhibits 10 & 11) includes a copy of the signatures on the execution page of the 2003-2005 CBA (County Exhibit 13).

8. At some point Deputy Sheriff Castle found a copy of Union Exhibit 14 (see Finding of Fact 6) on a common printer in shared office space.

9. Despite the Union's May 20, 2008 notice, the County proceeded with its review and approval process of the agreement based upon the April 24, 2008 tentative agreement and the May 15, 2008 draft of the full written agreement. The County had completed its review and approved the costs of the negotiated agreement and other non-cost provisions (but not the Union's new hire wage proposal) by the end of June, 2008.

10. In early July, 2008 attorney Flygare received a list of "outstanding issues" based upon Deputy Sheriff Castle's review of the May 15, 2008 draft of the written collective bargaining agreement. This list was, in part, a restatement of matters the Union had raised in its May 20, 2008 communication, including its new hire wage proposal. In a July 3, 2008 email sent to County representatives attorney Flygare reacted to Deputy Sheriff Castle's list of outstanding issues, writing "[o]h boy, this looks like trouble. I will look at these later to (sic) today and get back to you." On July 9, 2008 he issued an item by item response, and with respect to the item "[n]ew hires start at bottom of pay range unless waived by union" he wrote "[t]here was no agreement on this issue." County Exhibit 16 (series of emails from July 2 to July 9, 2008 together with the list of Deputy Sheriff Castle's items and attorney Flygare's response).

11. Deputy Sheriff Castle added the highlighted language appearing at page 17 of the July 9, 2008 draft (Union Exhibit 11) which provides:

All new hires will be brought in at the bottom of the pay scale. The Union may waive this requirement if the new hire has significant experience and/or certifications. In no event shall a new hire rate of pay be higher than the bottom of the scale without a specific waiver from the union.

12. Deputy Sheriff Castle used attorney Flygare's earlier email (Union Exhibit 14, Finding of Fact 7) in his July, 2008 contacts with County representatives, and in particular with

Chief Deputy Sheriff Arthur Durette, to demonstrate that the County knew about Union's new hire wage proposal, understood it was at least an open item if not an agreed to item, and anticipated that Union would complain about its omission from the signature version of the contract. In contrast, he abandoned other items in his list of outstanding issues because he felt he could not substantiate that the items had been presented or preserved in the bargaining process.

13. On August 4, 2008 attorney Flygare notified Union representative Joe Maccarone that the Sheriff "has agreed to add the language about new-hires just to get this contract put to bed. Please review it and let me know if I should prepare a signature copy for execution." County Exhibit 17 (August 4, 2008 email) and Union Exhibit 12, page 17 (August 4, 2008 draft of written collective bargaining agreement.)

14. The CBA was eventually signed by the parties (Joint Exhibit 1) and dated September 10, 2008. Article 22 provides that:

This agreement shall be in full force and effect when executed and shall remain in full force through June 30, 2010 and shall continue from year to year, thereafter unless written notice of desire to modify, cancel or terminate this Agreement is served by either party upon the other at least one hundred twenty (120) days prior to the date of expiration, in which event this Agreement shall terminate on June 30, 2010.

Decision and Order

Decision Summary:

The parties' CBA which expired on June 30, 2010 constitutes a collective bargaining agreement "entered into" after the effective date of RSA 273-A:12, VII. Accordingly, the County has not complied with pay plan continuation requirement imposed by RSA 273-A:12, VII and 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) and (g)(to fail to comply with this chapter or any rule adopted under this chapter).

Jurisdiction:

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

Discussion:

The main issue in this case is whether the CBA which expired on June 30, 2010 was “entered into” after the July 15, 2008³ effective date of RSA 273-A:12, VII. This provision of RSA 273-A provides as follows:

For collective bargaining agreements entered into after the effective date of this section, if the impasse is not resolved at the time of the expiration of the parties' agreement, the terms of the collective bargaining agreement shall continue in force and effect, including but not limited to the continuation of any pay plan included in the agreement, until a new agreement shall be executed. Provided, however, that for the purposes of this paragraph, the terms shall not include cost of living increases and nothing in this paragraph shall require payments of cost of living increases during the time period between contracts.

If the disputed CBA was entered into after July 15, 2008 then the County has failed to comply with the pay plan continuation requirements imposed by this statute given the facts of this case. *See* Union Exhibit 1 and County Exhibit 15. A determination of when the disputed CBA was “entered into” requires an assessment of when it was formed, and our consideration of this question is guided by the following principles:

Collective bargaining agreements are construed in the same manner as other contracts, subject to the law controlling at the time of their execution. *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 279, 76 S.Ct. 349, 356, 100 L.Ed. 309 (1955). In order for a contract to be formed there must be a meeting of the minds as to the terms thereof. *Turcotte v. Griffin*, 120 N.H. 292, 294-95, 415 A.2d 668, 669 (1980). For such a meeting of the minds to take place, each party must have the same understanding as to the terms of the agreement. *Id.* In addition, before a contract can be formed each party must manifest an intention to be bound, 17 Am.Jur.2d Contracts § 1, at 333 (1964), supported by adequate consideration, *Lang v. Johnson*, 24 N.H. 302, 307 (1851). Every contract so formed “contains an implied covenant of good faith and fair dealing.” *Albee v. Wolfeboro Railroad Co.*, 126 N.H. 176, 179, 489 A.2d 148, 151 (1985).

Appeal of Sanborn, 133 N.H. 513, 518 (1990).

³ This law was recently repealed, effective March 1, 2011 (SB1).

The Board first observes that the Union's new hire wage proposal, included in the final version of the CBA which expired June 30, 2010 at the end of Article 18.1 (Joint Exhibit 1), constitutes a material and substantive provision of the agreement. It gives the Union a voice in the treatment of new hires by restricting such new hires to the bottom of the pay scale unless the Union provides a waiver. This could, for example, serve to deter potential new hires, particularly those with experience, from accepting employment, serve to ensure that new hires are not arbitrarily provided with higher wages than current bargaining unit employees, and also enhance the potential for current employees to obtain promotion to open positions. These protections and assurances are all meaningful and important to the Union's general interests in the treatment of bargaining unit employees.

The County understood throughout the relevant time period that its conduct at the bargaining table prior to May, 2008 likely led the Union to believe and expect that the Union's new hire wage proposal had been accepted and was going to be included in the signature version of the CBA. This is plainly reflected by attorney Flygare's comments in his email to County representatives. *See* Union Exhibit 14 ("Ernie had a requirement in his proposal that all new hires will be brought in at the bottom of the pay range. We chose to ignore that and leave it out of our agreement. I expect that will get raised when the union sees this.") This in fact proved to be the case, and the Union's new hire wage proposal remained an outstanding subject of negotiations which the parties did not resolve until after July 15, 2008. As a result, prior to July 15, 2008 the parties did not have the same understanding as to the material terms of their agreement and therefore they had not yet "entered into" a collective bargaining agreement within the meaning of RSA 273-A:12, VII.

The Board does not find that the County acted improperly in terms of how it participated in negotiations in general or engaged with the Union except with respect to its failure to acknowledge the application of the pay plan continuation requirements imposed by RSA 273-A:12, VII. This failure constitutes an unfair labor practice in violation of RSA 273-A:5, I (a) and (g). As relief the County is ordered, effective July 1, 2010, to comply with the pay plan of the expired CBA.

So ordered.

March 22, 2011.



Doris M. Desautel, Chair

By unanimous vote of Alternate Chair Doris M. Desautel, Board Member Richard J. Laughton, Jr. and Alternate Board Member Sanford Roberts, Esq.

Distribution:

Carolyn M. Kirby, Esq.

Karen E. Clemens, Esq.