STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Council 93, Local 1386, Portsmouth City Employees

v.

City of Portsmouth

Case No. G-0030-22

Decision No. 2011-090

Appearances: Karen E. Clemens, Esq., AFSCME Council 93, Boston, Massachusetts for the Complainant

Thomas J. Flygare, Esq., Jackson Lewis LLC, Portsmouth, New Hampshire for the Respondent

Background:

On October 22, 2010 the AFSCME Council 93, Local 1386, Portsmouth City Employees (Union) filed an unfair labor practice complaint based upon the City's conduct in arbitration proceedings which began in June, 2010 and have since concluded with a December 7, 2010 award. The arbitration followed earlier proceedings at the PELRB in Case No. G-0030-17 in which the Union's complaint was dismissed for lack of jurisdiction. *See AFSCME, Council 93, Local 1386, Portsmouth City Employees v. City of Portsmouth*, PELRB Decision No. 2009-225, appeal declined, Supreme Court No. 2009-0931 (Feb 3, 2010). The Union now accuses the City of misconduct in these earlier PELRB proceedings based upon the City's position in the arbitration. According to the Union, the City made misrepresentations to and deceived the Board in the earlier PELRB proceedings and thereby improperly obtained dismissal of the Union's

complaint. The Union contends the City's actions violate RSA 273-A:5, I (a), (b), (e), and (g). As relief, the Union requests, among other things, that the PELRB hear the merits of the previously dismissed complaint or that the City be ordered to arbitrate the subject of the previously dismissed complaint.

The City denies the Union's charges and strongly objects to the Union's characterization of events. The City asserts that it acted properly at all times, that the Union's argument is not supported by the content of the Board's prior decision, that the parties agreed and allowed the arbitrator to resolve the parties' dispute about the scope of the arbitration, that the arbitrator's award in effects moots any issues about mandatory emergency overtime for public works employees, and that the Union's claims are otherwise barred by res judicata and the limitations period set forth in RSA 273-A:6, VII.

The undersigned conducted a hearing on the complaint on December 21, 2010 at the PELRB's offices in Concord at which time the case was submitted for decision based upon exhibits, argument of counsel, and post-hearing briefs filed on February 1, 2011.

Findings of Fact

1. The Union is the certified exclusive representative of certain employees, including maintenance workers in the public works department, who work for the City.

2. The City is a public employer within the meaning of RSA 273-A:1, IX.

3. This complaints relates to proceedings before arbitrator Nancy Peace between June 9, 2010 and December 7, 2010 and earlier PELRB proceedings in Case No. G-0030-17.

4. The earlier PELRB proceedings resulted in Decision No. 2009-225, in which the Union's complaint against the City was dismissed for lack of jurisdiction.

5. The gist of the Union's current complaint is that the City somehow deceived the PELRB into making its dismissal order in Case No. G-0030-17. *See* PELRB Decision No. 2009-255.

6. At arbitration the Union characterized the PELRB proceedings in part as follows:

> The union and the city went before the PELRB on an unfair labor practice and during that process the city told the PELRB that the issues brought up in the unfair labor practice were the same issues brought up in this particular grievance. And the PELRB took them at their word and dismissed the unfair labor practice *because the city agreed that this was covered in the grievance.* (emphasis added).

See Union Exhibit K at 3-4.

7. At arbitration the Union described the questions before the arbitrator as follows:

> So the question - - there's two questions before you. One would be: Did the city violate the collective bargaining agreement and past practice by the conditions set forth in its December 10th, 2008 memo and its July 17th, 2009...Agreement and past practice by....the conditions set forth in its December 10th, 2008 memo....and its July 17th 2009 policy.
>
> And the other question is: Did the employer have just cause to suspend Bill Faulkner for three days....on December 30th, 2008.

See Union Exhibit K at 4-5.

8. At arbitration the City objected to the Union's description of the questions as follows:

> The city still has objection to the union's description of the issues. Number one, the issues - - both of the issues that they articulate fall outside the grievance that was filed here. The grievance cites three sections of the contract: Article I, Section 21.3 and Section 29.9 a, b and c. None of these sections encompasses the issues that have been raised here.
>
> The grievance fails to raise the just cause section of the contract. The just cause section of the contract, I believe, was 21.1. They do not raise that other grievance. *So to raise it here today, of course, is to add an issue that was never litigated below in this grievance* (emphasis added).
>
> Secondly, with respect to the PELRB, simply because the PELRB dismissed their case does not expand this grievance.
> .....

The grievance is the grievance. We'll introduce the grievance. You'll see what the issues are, but there's nothing that's happened here, nothing that expands the issues in the grievance. This PELRB did not – this PELRB and certainly the supreme court did not give AFSCME any authority to expand the grievance, the issues in the grievance presented by Mr. Faulkner.

See Union Exhibit K at 5-6, 8.

9. After the parties indicated their lack of agreement on the issues the arbitrator addressed the situation as follows:

In order to allow us to move forward since the parties can't stipulate to a framing of the issues, I will just, you know, see both - - have both issues before me, hear the evidence in the case and the arbitrator will determine the issue. I don't know what else we can do at this point unless you want to go back to court and get an agreement on the issue....And so the parties are going to present and I'm going to decide what are the issues in this case, and that's all that will be decided on this first part. So the parties will be trying to deliver briefs by what date....

See Union Exhibit K at 9, 29-30.

10. The Arbitrator issued a written decision dated August 11, 2010 addressing and resolving the parties' dispute as to the issues to be determined in arbitration. *See* Union Exhibit M. The Arbitrator's decision summarizes the Union's arguments, including the following:

The Union further contends that the City will not be harmed by the Arbitrator's adoption of the Union's framing of the questions in this matter because up until the first day of the arbitration hearing on June 9, 2010, the City maintained "that the grievance currently awaiting final and binding arbitration raises precisely the same issue raised by the unfair labor practice." It is important to note, the Union asserts, that during the motion to dismiss hearing and all written submissions, the City did not simply argue that the Union chose the wrong forum and should have filed a grievance instead of an unfair labor practice. Rather, it argued that "AFSCME has filed a grievance on these precise same issues" as the grievance in this case. It is the City that filed a Motion to Dismiss and it is clear that that motion was granted based upon the above assertions. It is unethical for the City to now retreat from this assertion after it has effectively orchestrated the dismissal of the Union's unfair labor practice (quotations in original).

11. The Arbitrator's August 11, 2010 decision also included the following:

It is well established in labor arbitration practice that when the parties cannot agree to the framing of the issues, they will ask the arbitrator to do so. That is what the parties have done in the instant case. It is also well established in labor arbitration practice that the

arbitrator will look to the initial filing of the grievance, the parties' discussions at the lower steps of the grievance procedure, and the demand for arbitration to ascertain the nature and scope of the issue to be decided.
As required in Section 20.2, F of the parties' Agreement, the Union submitted a demand for arbitration...The requested remedy constitutes a claim that the City did not have just cause to suspend him and suspension without just cause is a contract violation....As a result, I have rejected the City's proposed framing because it does not incorporate Article 21.4 or the concept of just cause....

I have likewise rejected the Union's first framed issue. As noted in Elkouri and Elkouri, an arbitrator may entertain some deviation from what was stated or occurred during the pre-arbitration grievance process, so long as it "does not amount to the addition of new issues, but merely involves a modified line of argument, an additional element closely related to the original issue, the refinement or correction of an ineptly stated grievance, or the introduction of new evidence." (citation omitted) The first issue proposed by the Union would constitute, at least in part, a new issue and not merely an issue closely related to the original grievance. The grievance was filed on December 30, 2008 and the demand for arbitration was filed on June 25, 2009. The July 17, 2009 policy that the Union seeks to incorporate into this arbitration was not promulgated until approximately seven months after the grievance was filed and three weeks after the demand for arbitration was filed. Thus, while the December 10, 2008 memo may be relevant to the grievance as I have framed it below, the July 17, 2009 policy is not relevant, as it did not exist when the City suspended Mr. Faulkner or when the Union filed the grievance or arbitration demand...

Decision and Order

Decision Summary:

The Union's complaint that the City committed an unfair labor practice during the course of the earlier PELRB proceedings or during the arbitration is denied. The City did not make misrepresentations during the course of the earlier PELRB proceedings which caused or resulted in an improper dismissal of Case No. G-0030-17, and the City's legal position during the arbitration proceedings was within acceptable parameters. The Union's complaint is dismissed.

Jurisdiction:

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

Decision:

The Union argues the City's position in the arbitration proceedings was improper given its legal position in the prior PELRB proceedings (Case No. G-0030-17) and that the City's conduct in arbitration shows the City deceived the PELRB and thereby caused an improper dismissal order. As a result, the Union claims it is now entitled, among other things, to have the PELRB decide the previously dismissed case on the merits or have the disputed issue concerning the City's December 10, 2008 memo and its July 17, 2009 policy addressed in arbitration.

The Union's claims are not persuasive for several reasons. First, the City's legal position in Case No. G-0030-17 did not include an undertaking or agreement by the City to submit disputes actually arising out of the December 10, 2008 memo and its July 17, 2009 policy to arbitration, and PELRB Decision No. 2009-255 does not impose such an obligation. PELRB Decision No. 2009-255 resolves a question about the PELRB's subject matter jurisdiction given the substance of the Union's complaint and the fact that the parties' collective bargaining agreement includes a grievance procedure that concludes in final and binding arbitration. The decision provides, in part, as follows:

> The City seeks dismissal, claiming the PELRB lacks jurisdiction because this dispute is subject to the parties' grievance process, which includes final and binding arbitration. The board finds that the resolution of the Union's claims in this matter depend (sic) in large part, if not entirely, upon the parties' respective rights and obligations under the CBA, and potentially past practice, in areas such as direction of the workforce, hours of work, call outs, and overtime. Notwithstanding the Union's assertions that the City's conduct violated RSA 273-A:5, I (a), (b), (c), (e), (g), (h) and (i) the board cannot determine with positive assurance that the parties' CBA "is not susceptible of an interpretation that covers the dispute" in this case. *See Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998). Accordingly, as the parties were informed on the record at the October 8, 2009 hearing, the City's Motion to Dismiss is granted.

The decision is based upon a finding that the complaint depends, for resolution, "upon the parties' respective rights and obligations under the CBA, and potentially past practice, in areas

such as direction of the workforce, hours of work, call outs, and overtime." It is also based upon a finding that "the board cannot determine with positive assurance that the parties' CBA 'is not susceptible of an interpretation that covers the dispute' in this case." While the decision cites the City's point that the dispute is subject to the grievance procedure the decision does not reflect any representation or agreement by the City that the dispute covered by the PELRB complaint will in fact be submitted to and heard in grievance arbitration proceedings, and the decision did prevent or bar the City from defending against the Union's arbitration claims as it did.

The City was entitled to support its lack of jurisdiction argument to the PELRB in Case No. G-0030-17 with references to the similarity of the issues raised in the Faulkner grievance and in the PERLB complaint. However, making such argument is not the equivalent of an agreement to submit a dispute based upon the July 17, 2009 policy and the December 10, 2008 memo to arbitration or a waiver of any available procedural defenses such as those the City presented to the arbitrator.

Moreover, as reflected in the hearing exhibits which relate to the arbitration proceedings, the parties submitted their dispute over the issues to be arbitrated to the arbitrator. The parties presented their respective positions, the Union acquainted the arbitrator with the particulars of the prior PELRB proceeding, and the arbitrator issued a written decision which settled the matter.

The Union's claims are denied and the complaint is dismissed.

So ordered.

March 30, 2011

Douglas L. Ingersoll, Esq.
Executive Director/Presiding Officer

Distribution:
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