



STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

State Employees' Association of NH, SEIU Local 1984

v.

State of New Hampshire, Department of Health & Human Services

Case No. G-0148-5
Decision No. 2016-172

Appearances:

For the Complainant:

Glenn R. Milner, Esq.
State Employees' Association, SEIU Local 1984
Concord, New Hampshire

For the Respondent:

Nancy Smith, Esq., Senior Assistant Attorney General
Mary Beth Misluk, Esq., Attorney
Attorney General's Office, Concord, New Hampshire

Background:

On March 1, 2016, the State Employees' Association of NH, SEIU Local 1984 (SEA) filed an unfair labor practice complaint against the State Department of Health & Human Services (State). This is the third case (Case Three) the SEA has recently filed relating to Sununu Youth Services Center (SYSC)¹ teacher compensation. The first case (Case One) resulted in PELRB Decision No. 2014-184 (July 31, 2014)(finding that the pay plan for specified SYSC employees included a salary enhancement for new hires and existing employees). The SEA filed the second case (Case Two) on June 10, 2015. The PELRB dismissed Case Two

¹ The SYSC is part of the State Department of Health & Human Services Division for Children, Youth and Families, Juvenile Justice Services.

when the SEA chose not to proceed with its complaint. See PELRB Decision No. 2015-228 (October 8, 2015) and 2016-008 (January 27, 2016). In this case, the SEA charges that the State 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); (h)(to breach a collective bargaining agreement); and (i)(to make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule). The SEA's complaint is based upon the State's posting of SYSC teaching positions without salary enhancements in December of 2015 and February of 2016. The SEA contends the omission of salary enhancements in these job postings violated PELRB Decision No. 2014-184. The SEA requests that the PELRB: 1) find that the State committed an unfair labor practice; 2) order the State to cease all plans to reduce the SYSC teaching personnel salary enhancements; 3) order the State to restore salary enhancements; and 4) order the State to bargain over wages.

The State denies that SYSC teacher postings without salary enhancements violate PELRB Decision No. 2014-184. According to the State, whether salary enhancements should be provided to new SYSC teacher hires is governed by RSA 99:8; and the provision of salary enhancements to new hires has not been justified under RSA 99:8 since July 1, 2002, when the State reached full compliance with the James O. consent decree.²

On March 7, 2016 the State filed a motion to dismiss, claiming the complaint was filed after the expiration of the six month limitation period set forth in RSA 273-A:6, VII. The State maintains that the six month limitation period should be computed based upon a February, 2015 letter issued by the State Manager of Employee Relations. This letter states that salary

² The James O. consent decree is discussed in PELRB Decision No. 2014-184.

enhancements will not be provided to new hires following the expiration of the current collective bargaining agreement and any evergreen period.³ The State also argues that the issue in this case (Case Three) is the same as in Case Two, and therefore the dismissal of Case Two is, in effect, a bar to the claims in Case Three.

The SEA has objected to the motion to dismiss. The SEA says Case Three was filed within six months of the December 2015 and February 2016 job postings and is therefore timely under RSA 273-A:6, VII. The SEA also states that it allowed Case Two to be dismissed because it reasonably believed the State was not going to post positions without the salary enhancement.

The parties appeared for hearing on April 12, 2016 and argued the motion to dismiss. They then waived further hearing and agreed to submit the case for decision, including the motion to dismiss, on stipulations and briefs. See PELRB Decision No. 2016-079 (April 12, 2016)(case to be assigned to a hearing officer or panel of board members for decision following submission of briefs and stipulations). Briefs and stipulations were duly filed, and the decision in this case is as follows.

Findings of Fact

1. The State is a public employer within the meaning of RSA 273-A.
2. The SEA is the certified exclusive representative of certain employees who work at the SYSC, including employees in the positions of Teacher I, Teacher II, Teacher III, and Principal (the SYSC employees).
3. Findings of Fact 3-7 in PELRB Decision 2014-184 (Case One) provided as follows:

A lawsuit was filed in the late 1980's in the United States District Court for the District of New Hampshire claiming that the named State Defendants "have failed to take adequate steps to ensure that students who are or may be educationally disabled and who are placed pursuant to New Hampshire RSA 169-B (Juvenile Delinquency), 169-C (Neglect and Abuse), or 169-D (Children in Need of Services) receive a free appropriate public

³ The parties' collective bargaining agreement has an evergreen clause which extends the contract after expiration through the date of a successor contract.

education and the procedural protections provided by Federal and State law.” Joint Exhibit 2 (August 21, 1991 “James O” Consent Decree). *Finding of Fact 3.*

Under the “James O” Consent Decree (consent decree), the State was legally bound to establish a written plan which, among other things:

Attracts and retains by December 31, 1992 sufficient numbers of appropriately certified personnel under the State Standards and State law required to implement IEPs of the residents of each facility. This part of the plan shall include a schedule of salary enhancements and comparative salary data for public systems in the geographic area of each of the facilities. *Finding of Fact 4.*

At the time the consent decree issued the SYSC employees were paid according to the collective bargaining agreement (CBA) salary scale 180 or 234, depending on whether they worked 180 days per year or year round. Under and pursuant to the consent decree the State put salary enhancements in place for the SYSC employees in 1993 and since that time has always paid the SYSC employees wages that are 15%, 20%, or 25% above the CBA 180 and 234 scales. The salary enhancements were not the result of an independent RSA 99:8 proceeding, but were the result of and evolved from the federal court consent decree. *Finding of Fact 5.*

The federal court retained jurisdiction and enforcement power over the consent decree through July 1, 2002. The State had reached full compliance as of that date. *Finding of Fact 6.*

The State told SYSC employees in 1993 that the salary enhancement was a permanent pay increase. SYSC employees were not told that the salary enhancement was subject to reduction or could be discontinued for budgetary or other reasons. New SYSC employee hires were simply provided with gross salary information which reflected and incorporated the salary enhancements. The State did not advise new hires that a portion of their pay was a salary enhancement or that a portion of their pay was temporary and subject to elimination and or renewal. The State also did not inform new hires that any portion of their pay required Governor and Council (G&C) approval every two years for its continuation. The same is true with respect to any notices advertising the SYSC positions and paperwork verifying wage information for third parties. See Union Exhibits 7-12. *Finding of Fact 7.*

4. The decision summary in PELRB Decision No. 2014-184 provides as follows:

The inclusion of a 15% to 25% salary enhancement of the CBA 180 and 234 wage scales for the SYSC employees is a binding past practice and is subject to mandatory negotiation and the State’s unilateral discontinuation of the 15% to 25% salary enhancement effective July 1, 2014 is an unfair labor practice. The State is ordered to restore the salary enhancements, make affected employees whole, allow any SYSC employee who retired on account of the July 1, 2014 wage change to return to State service, and to negotiate any changes to the existing salary enhanced wages for the SYSC employees.

5. PELRB Decision No. 2014-184 concludes with the following:

[W]e find that the State's unilateral reduction in SYSC employee wages effective July 1, 2014 is a violation of the State's obligation to negotiate wages, a term and condition of employment that is a mandatory subject of bargaining. Under RSA 273-A:5, I (e), it is an unfair labor practice for a public employer to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, which is what happened in this case when the State unilaterally implemented a wage reduction effective July 1, 2014. The State is ordered to restore the salary enhancements, make affected employees whole, allow any SYSC employee who retired on account of the July 1, 2014 wage change to return to State service, and to negotiate any changes to the existing salary enhanced wages for the SYSC employees. Given our finding of a violation under sub-section (e), which we conclude is the statutory provision applicable to this case, we dismiss the SEA claims under sub-sections (h) and (i).

6. On February 26, 2015 the State Manager of Employee Relations wrote a letter (the February 2015 letter) to the SEA president advising that salary enhancements for SYSC employees will be eliminated on a prospective basis on July 1, 2015 (following the expiration of the July 1, 2013 to June 30, 2015 collective bargaining agreement) or upon the effective date of a successor contract, which is later. The letter states current employees will not be affected.

7. On June 10, 2015 the SEA filed an unfair labor practice complaint (Case Two) based upon the February 2015 letter, claiming the State had violated PELRB Decision No. 2014-184 and its actions constituted an unfair labor practice under RSA 273-A:5, I (e), (h), and (i). Subsequently the SEA filed a motion to cancel the scheduled hearing to allow more time for the parties to complete settlement discussions. The SEA also asked the PELRB to dismiss the case after 90 days in the absence of a request for a hearing. When the SEA did not request a hearing within the prescribed time period the PELRB dismissed Case Two. See PELRB Decision No. 2016-008 (January 27, 2016).

8. The State posted SYSC teacher positions without salary enhancements in December of 2015 and in February of 2016. The SEA maintains that it did not learn about the December 2015 posting until February of 2016, after the dismissal of Case Two.

9. The State also posted an SYSC English teacher position in May of 2015 without a salary enhancement but the individual who was subsequently hired to fill the posted position received the salary enhancement.

10. Per the parties' stipulation, the State has not hired any new SYSC employees without providing the salary enhancement. See Restated and Final Joint Stipulations, filed May 6, 2016.

Decision and Order

Decision Summary:

The State's motion to dismiss is denied since the SEA's complaint was filed within six months of the disputed job postings. Although the job postings are inconsistent with the pay plan discussed in Decision No. 2014-184, pursuant to which new hires and existing employees receive a salary enhancement, the SEA's complaint is nevertheless dismissed since the State has not actually hired any new SYSC employees without providing the salary enhancement.

Jurisdiction:

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

Discussion:

RSA 273-A:6, VII provides that the "board shall summarily dismiss any complaint of an alleged violation of RSA 273-A:5 which occurred more than 6 months prior to the filing of the complaint with the body having original jurisdiction of that complaint." With respect to the State's motion to dismiss, we find that the December 2015 and February 2016 job postings about which the SEA complains in this case are distinguishable, both in time and substance, from the February 2015 Manager of Employee Relations letter at issue in Case Two. The complaint in this case was filed on March 1, 2016, within six months of the job postings, and therefore within the six month limitation period set forth in RSA 273-A:6, VII. Additionally, the dismissal of

Case Two does not require dismissal of the current complaint about the job postings. The fact that the SEA elected not to proceed with Case Two (and litigate whether the State's February 2015 letter violated sub-sections (e), (h), or (i) of RSA 273-A:5, I) does not mean the SEA is now barred from filing a complaint based upon the December 2015 and February 2016 job postings. Accordingly, the State's motion to dismiss is denied.

However, we conclude that this case should be dismissed for different reasons. In Case One the PELRB decided that the bargaining unit pay plan applicable to SYSC new hires and existing employees included a salary enhancement, all as detailed in PELRB Decision 2014-184. Among other things, the State was ordered "to negotiate any changes to the existing salary enhanced wages for the SYSC employees." The record in the present case reflects that State job postings in December of 2015 and February of 2016 were inconsistent with PELRB Decision 2014-184 in that they did not include the salary enhancements. However, there is no evidence that the State has actually applied a pay plan without salary enhancements to SYSC new hires or existing employees. Therefore, we cannot find that the State has violated PELRB Decision No. 2014-184. The SEA's complaint is dismissed.

So ordered.

Date: July 28, 2016

/s/ Andrew Eills

Andrew Eills, Esq., Chair

By unanimous vote of Alternate Board Member Andrew Eills, Esq., Board Member Carol M. Granfield, and Board Member Richard J. Laughton, Jr.

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