State of New Hampshire

Public Employee Labor Relations Board

AFSCME Council 93, Local 365,
Nashua Custodial/Janitorial Staff

v.

Nashua School District

Case No. E-0013-18
Decision No. 2016-177

Appearances:

Joseph L. DeLorey, Esq.,
AFSCME Council 93
Boston, Massachusetts for the Complainant

Thomas M. Closson, Esq.,
Jackson Lewis P.C.
Portsmouth, New Hampshire for the Respondent

Background:

On December 30, 2015, AFSCME Council 93, Local 365, Nashua Custodial/Janitorial Staff (Union) filed an unfair labor practice complaint under the Public Employee Labor Relations Act. The Union charges that the Nashua School District (District) is proceeding with plans to subcontract the bargaining unit work of custodial personnel, is improperly refusing to bargain with respect to custodial personnel, and is violating contractual provisions, including Articles I, II, IV, V, VI, X, XXV, XXVII, XXIX, Appendix A, and Appendix C. The Union contends that the District's actions constitute 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); (b)(to dominate or to interfere in the formation or administration of any employee organization); (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); (g)(to fail to comply with this chapter or any rule adopted under this chapter); and (h)(to breach a collective bargaining agreement).

The District denies the charges. The District states it is pursuing a complete reorganization and intends to have a third party provide all custodial services. According to the District, it is entitled to subcontract custodial personnel bargaining unit work at the expiration of the parties' collective bargaining agreement, it has given sufficient notice of its plan, and it has properly refrained from bargaining a successor contract with respect to these positions in order to preserve its claimed right to privatize and to avoid a claim that it has bargained in bad faith by simultaneously pursuing privatization and negotiation.

This case was scheduled for hearing on February 11, 2016. However, at the pre-hearing conference the parties agreed to file this case for decision on stipulations, exhibits and briefs and the hearing was cancelled. See Pre-Hearing Order, PELRB Decision No. 2016-007 (January 27, 2016). On February 3, 2016, in accordance with the pre-hearing order, the parties filed a stipulation providing that the Union was submitting its claim that the District has violated its bargaining obligations to the PELRB and its claim that the District has violated the parties' collective bargaining agreement to arbitration. The stipulation also provides that that the Union is withdrawing all other claims without prejudice. The parties submitted stipulations, exhibits, and briefs by the end of May, 2016, and the decision is as follows.

Findings of Fact

1. The District is a public employer within the meaning of RSA 273-A.

2. The Union is the exclusive representative of and bargaining agent for the following District bargaining unit:

Unit: All full-time and part-time Custodians to include Maintenance Personnel, Security Guard, Security Monitor and Delivery Person.

Exclusions: Director of Plant Operations, the Assistant Directors of Plant Operations, Office Manager, and Custodial Supervisor.

See PELRB Decision No. 2008-243 (December 4, 2008)(Exhibit A). This decision specifically orders that the District "shall negotiate collectively with the exclusive representative named herein on terms and conditions of employment for the members of the bargaining unit, as herein described..." The Public Employee Labor Relations Board (PELRB) has not issued any subsequent order changing or modifying the bargaining unit.

3. Per the stipulation of facts filed on May 4, 2016, the Union and the District are parties to a collective bargaining agreement with effective dates of July 1, 2013 to June 30, 2016 (2013-16) CBA.

4. Article 29 of the 2013-16 is titled "Duration of Agreement." It provides as follows:

> On June 30, 2016 and on each June 30th thereafter, this Agreement shall be deemed renewed and extended for the ensuing year, unless one hundred twenty (120) calendar days or more prior to such date, either party shall have delivered to the other, notice of its desire not to have the agreement in its then form renewed. Such notice shall be deemed delivered when mailed, postage prepaid, addressed to the last address of the addressee which is known to the sender of this notice. If such notice shall be sent and the parties shall negotiate for a new agreement or modification thereof, the terms hereof shall continue to apply until the new or modified agreement is executed.

5. Article 5 of the 2013-16 CBA is titled "Volunteering and Subcontracting." It includes the following language:

> Sub-section 5.2 A: The District agrees there will be no layoffs, demotions or involuntary transfers as a result of contracting out work.
>
> .....
>
> Sub-section 5.2 C: Should any work be contemplated to contract out, the District and the Union agree the following procedure shall occur prior to subcontracting:
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> 1. Step One – The Union will designate one Union member. The Director of Plant Operations will advise this member of the work it is contemplating contracting out. A discussion as to whether or not bargaining unit members can complete the work shall

occur. If an agreement cannot be reached and the District still desires to subcontract said work, the parties shall proceed to Step Two.

2. Step Two – The District shall bring the proposed work to the next scheduled joint labor-management committee meeting for discussion. If an agreement cannot be reached and the District still desires to subcontract said work, the parties shall proceed to Step Three.

3. Step Three – The parties shall mutually agree on an arbitrator to decide if the work is bargaining unit work or not. The basis for consideration shall be the job descriptions for all classifications, the scope of the bargaining unit work, as well as prior grievance decisions and/grievance settlements. Overtime shall not be a factor in considering if the work is bargaining unit work or not. The District may subcontract out the work prior to arbitration; however, the subcontracting of the work cannot be used as consideration for the arbitrator's decision and the District understands that an arbitrator's decision that the work should have been done in-house will require the District to pay bargaining unit members for work already performed.

4. The Arbitrator's decision shall be final and binding on the parties. The arbitration shall be in accordance with AAA rules. The cost of the arbitration shall be borne equally by the parties.

6. On September 16, 2015 the District Board of Education (BOE) voted to "terminate its collective bargaining agreement with the Nashua School Custodian Union as it relates to those positions identified as custodial…effective June 30, 2016 at 12:00 p.m." The BOE also voted to authorize the District administration to "issue a RFP for school cleaning services, including the provision of cleaning and supervisory personnel and cleaning supplies, so that the winning bidder shall be on site as of July 1, 2016." According to the District Superintendent, the motions do not obligate the BOE to accept any bid.

7. By memorandum dated September 16, 2015 from the BOE to the Union the school board stated it planned to contract with a private company to provide custodial services.

8. On September 16, 2015 the BOE issued a press release detailing the substantial savings the District anticipated as a result of privatizing custodial services.

9. On September 17, 2015 the Union provided the District of notice of its intent to negotiate a successor contract to the 2013-16 CBA.

10. On September 18, 2015 the BOE, acting through legal counsel, stated that the school board has voted against negotiating a successor contract as to custodial personnel but the BOE "does anticipate negotiating a successor agreement with those personnel identified as maintenance (including security personnel)." Since this time the BOE has remained steadfast in its refusal to bargain with the Union with respect to custodial personnel but presumably has bargained as to other unit positions as represented.

Decision and Order

Decision Summary:

The District has improperly refused to bargain with the Union over the custodial personnel positions in violation of its bargaining obligations under RSA 273-A:5, I (a) and (e). The District shall engage in bargaining with the full bargaining unit for a successor contract to the 2013-16 CBA without further delay. As reflected in the findings of fact, the parties have in fact negotiated about subcontracting and incorporated a detailed and binding procedure to address questions of privatization in their collective bargaining agreement, as set forth in Article 5. The current dispute over the nature and extent of the District's attempt to privatize the custodial work force should accordingly be addressed in a final and binding arbitration proceedings in accordance with the parties' stipulation and Article 5.

Jurisdiction:

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

Discussion:

It is axiomatic that under the Public Employee Labor Relations Act the District is obligated to bargain an initial collective bargaining agreement, and successor collective

bargaining agreements, with the Union over the terms and conditions of employment for all bargaining unit positions. This principle is firmly grounded in the provisions of RSA 273-A:3, titled "Obligation to Bargain." The first two sub-sections provide as follows:

> I. It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. "Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.
>
> II. (a) Any party desiring to bargain shall serve written notice of its intention on the other party at least 120 days before the budget submission date; provided, however, that bargaining with state employees shall commence not later than 120 days before the deadline for submission of the governor's proposed operating budget.

The obligation to bargain is also specifically stated in the current bargaining unit certification order.

As recounted in the findings of fact, the District gave a notice sufficient to communicate "its desire not to have the agreement [2013-16 CBA] in its then form renewed" per Article 29 of the 2013-16 CBA (the Article 29 notice). Under the law, the Article 29 notice clearly triggered the District's statutory obligation to bargain. The District's argument that its actions are somehow justified because they are happening after the term of the 2013-16 CBA is not persuasive. The last sentence of Article 29 provides that "[i]f such notice shall be sent and the parties shall negotiate for a new agreement or modification thereof, the terms hereof shall continue to apply until the new or modified agreement is executed." The phrase "[i]f...the parties shall negotiate for a new agreement or modification thereof" is somewhat superfluous, because under the Act the parties are already obligated to, and expected to, engage in such negotiations. In any event, the record reflects that the District has undertaken negotiations, at least as to maintenance and security personnel, which is enough to activate the Article 29

duration clause. In this regard we do not believe the District should be allowed to use its refusal, dating back to September of 2015, to bargain over the custodial positions to avoid the operation of the Article 29 duration clause. This case involves one bargaining unit, which is covered by one collective bargaining agreement. Therefore the extended contract applies to the entire bargaining unit, and not just non-custodial personnel.

In summary, nothing in RSA 273-A:3 empowers the District, by virtue of its Article 29 notice or otherwise, to simultaneously and unilaterally terminate its bargaining obligations, in whole or in part, at any point in time. Likewise, nothing in any provision of RSA 273-A authorizes the District, upon the giving of such notice, to unilaterally modify the composition of the PELRB approved bargaining unit, or to avoid the standing PELRB order to negotiate collectively with the Union for the positions listed in the bargaining unit description. Our decision is limited to the question of whether the District has violated its bargaining obligations. As described in the findings of fact, the parties have negotiated a detailed process, set forth in Article 5, for addressing subcontracting activity, inclusive of final and binding arbitration, and they have also stipulated in these proceedings that the Union's breach of contract claim will be addressed in arbitration. Given the provisions of Article 5 we agree that final and binding arbitration is the proper forum.

In accordance with the foregoing, the PELRB bargaining unit certification, PELRB Decision No. 2008-146 (Exhibit A), inclusive of custodial personnel, remains in full force and effect. It is a final order which has not been vacated or modified by any subsequent decision or order. The District BOE does not have the right under RSA 273-A to, in substance, unilaterally cancel its bargaining obligations or unilaterally modify an existing bargaining unit by refusing to recognize and refusing to bargain with certain bargaining unit positions, like custodial personnel,

as has happened in this case. We find that the District has committed an unfair labor practice in violation of RSA 273-A:5, I (a) because it has improperly deprived employees of their right to participate in the collective bargaining process through the duly certified bargaining unit. The District has also violated sub-section (e) because of its refusal to bargain with respect to custodial personnel. The District is ordered to immediately commence bargaining in good faith with the Union as to all bargaining unit positions.

So ordered.

Date: *August 5, 2016*

/s/ Andrew Eills
Andrew Eills, Esq., Chair

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

Distribution: Anna Fletcher, Esq.
Thomas M. Closson, Esq.