STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

National Correctional Employees Union
v.
Hillsborough County, Department of Corrections

Case No. G-0014-2
Decision No. 2017-131

Appearances:

Lan T. Kantany, Esq.,
Connor & Morneau, LLP
Springfield, Massachusetts for the Complainant

Carolyn M. Kirby, Esq.,
Hillsborough County Legal Counsel
Goffstown, New Hampshire for the Respondent

Background:

On January 30, 2017 the National Correctional Employees Union (NCEU) filed an unfair labor practice complaint under the Public Employee Labor Relations Act (Act) against Hillsborough County. Following a representation election, the NCEU replaced Teamsters Local 633 as the certified bargaining unit representative for certain Hillsborough County Department of Corrections employees effective December 13, 2016. When Teamsters representation ended, employee access to the Teamsters sponsored health insurance plan (provided through Northern New England Benefits Trust, or NNEBT) ended as well. Effective January 1, 2017 the County replaced the NNEBT plan with comparable, but more expensive, new plans. However, the County claimed it was not obligated to cover any portion of the increased cost of the replacement plans, and has refused to do so. The NCEU maintains that as a result the County has improperly shifted all of the increased cost of the replacement plans to employees, action which the NCEU contends is a form of restraint and interference with the right of employees to change bargaining

unit representatives, and is in violation of the County's existing agreement to share the cost of the contractual health insurance benefit on a 77.5-22.5% basis with employees.

The NCEU charges that the County has violated 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); (g)(to fail to comply with this chapter or any rule adopted under this chapter); (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 NCEU has requested a cease and desist order and other relief, including insurance benefits at the same level and cost as the NNEBT plan.

The County denies the charge. According to the County, its contribution to the cost of the employee health insurance benefit must be determined based on the expense of the Teamsters NNEBT plan, regardless of whether the NNEBT plan is still available to employees. Therefore, the County maintains that it continues to meet its cost sharing obligation for the health insurance benefit since it is now paying the same dollar amount toward the replacement plans that it paid toward the NNEBT plan. The County reasons that the increased premium expense is the result of employee actions, and therefore any resulting increase in the cost of health insurance benefits should be their responsibility. The County also points out that the NCEU never opposed the replacement plans or identified alternative plans, which the County offers as additional justification for why unit employees should be responsible for the increased cost. Finally, in its post-hearing brief, the County raises, for the first time, a request that the PELRB dismiss the

complaint on the grounds that the PELRB lacks jurisdiction because the dispute is covered by the grievance procedure, which includes final and binding arbitration.

The undersigned held a hearing on the NCEU complaint on March 16, 2017, and both parties filed post-hearing briefs by the April 18, 2017 deadline.

Findings of Fact

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

2. The NCEU has been the certified exclusive representative of and bargaining agent for the following employees of the Hillsborough County Department of Corrections since December 13, 2016 (PELRB Decisions 2016-291 & 292):

> Lieutenants, Corrections Training Assistant, Maintenance Supervisor, Work Release Supervisor, Education Director, Records Supervisor, E.I.P. Supervisor, Classification/Corrections Officer, Project Supervisor, Housekeeping Assistant, Correctional Officer II (Sgts.), Food Service Supervisor, Housekeeping Supervisor, Account Clerks II, Nurse II, Cook II, Maintenance II, Secretary II, Teacher, and Mental Health Clinician.

3. The bargaining unit was previously represented by the Teamsters Local 633 (Teamsters), and the Teamsters negotiated the current collective bargaining agreement with the County (CBA).

4. CBA Article XII is titled "Insurance," and section 12.1 provides as follows:

> All employees as outlined in Article 1.1 are eligible to enroll in the health insurance plan currently offered by Northern NE Benefit Trust Municipal Plan A. The cost of this plan shall be shared with the County paying 77½ % and the employee 22½ % of the cost of coverage through payroll deduction. It is understood that this medical plan also provides vision and dental care, which these employees will receive in lieu of those insurance benefits provided to County employees not included in this bargaining unit. In the event this agreement expires without a successor agreement in place, the employees' contribution shall remain at twenty two and one-half percent (22.5%).
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> During the course of this agreement should it be determined that the implementation of the so called Affordable Care Act as it pertains to members of this Bargaining Unit will have adverse financial implications for the County it may request to reopen negotiations on the limited issue of health insurance.

5. The 77.5-22.5% premium cost share formula referenced in CBA Article 12.1 is not unique to the employees in the Corrections bargaining unit. The County has a similar cost share arrangement for other County employee health insurance benefit plans, both represented and unrepresented.

6. The NNEBT plan described in CBA Article 12.1 is only available to Teamsters represented employees. As a result, following the change in bargaining unit exclusive representative from the Teamsters to the NCEU, the NNEBT plan became unavailable effective January 1, 2017, and a replacement insurance plan was needed.

7. Within a week of the election the County began informing NCEU representatives it would only contribute to the cost of any NNEBT replacement plans at the same dollar level it paid toward the NNEBT plan under the CBA 77.5-22.5% formula. For example, under the 77.5-22.5% formula the County contributed $726.47 per pay period to the NNEBT family plan cost and therefore would only contribute $726.47 per pay period to the HPHC HMO Mid family plan cost. The employee must pay $338.65 per pay period for the HPHC HMO Mid family plan (a per pay period increase of $127.74). The employee must also pay the $56.58 per pay period for the dental and vision plans, for a total per pay period increase of $184.32, and a total increased cost to the employee of $2,396.16 over 13 pay periods (the January 1 to June 30, 2017 time period).

8. In a December 12, 2016 email (Union Ex. A), the Union summarized its understanding of the County's position on premium expense contribution as follows:

> Based on our recent phone conversation the County stance regarding an MOU pertaining to insurance premiums for the Supervisor group would be at the current rate as of today which is an employer contribution on 77.5% which equates to $276.50, $597.35 and $726.47 respectively for single, 2-person and family coverage. The employer (sic) would have to make up the difference in the insurance costs, which would be much higher than the 22.5% they contribute to for (sic) the previous plan....If you would like to draft up a

formal MOU on behalf of the County indicating the above mentioned monetary contribution regarding insurance, I can get that over to our legal team immediately for review. Please keep in mind the the (sic) NCEU's opinion differs from the County regarding this issue.

9. The County never provided the NCEU with the requested memorandum of understanding (MOU), and never negotiated with the NCEU over employee responsibility for the cost of the replacement plans.

10. The County obtained three replacement health insurance plan options for unit employees offered through Harvard Pilgrim Health Care (HPHC): HPHC HMO-Mid, Low, and Bronze, each offered at the single person, 2-person, and family level. The HPHC HMO-Mid and Low plan options are all more expensive than the Teamsters NNEBT plan, as summarized in the following table which lists total premium costs by plan type per pay period:

Plan	Teamsters NNEBT	HPHC HMO-Mid	HPHC HMO-Low	HPHC HMO Bronze
Family	$937.38	$1,065.12	$1,012.80	$789.98
2 person	$770.77	$788.78	$750.03	$585.02
1 person	$356.77	$393.96	$347.60	$292.19

See Union Exhibit B and Joint Exhibit 2. Unlike the Teamsters NNEBT plan, the HPHC plans do not include dental insurance or a vision service benefit. The total additional per pay period cost of these benefits are $19.92 (1 person), $34.61 (2 person), and $56.58 (family).

11. The HPHC HMO-Mid plan is essentially the equivalent of the Teamsters NNEBT plan, and the NCEU is not complaining about any coverage differences between these two plans.

12. At the end of December, 2016, bargaining unit employees completed the paperwork necessary to continue their health insurance coverage under the new plan effective January 1, 2017.

13. Although there were communications between County representatives and NCEU representatives between December 12, 2016 and the end of the year concerning the pending expiration of the NNEBT insurance plan and health insurance alternatives, the parties did not negotiate and reach an agreement amending the cost sharing provision applicable to health insurance contained in Article 12.1 of the CBA.

14. Since January 1, 2017, the County has limited its contribution to the cost of the new insurance plan to an amount equivalent to the dollar amount it was previously paying using the 77.5%-22.5% formula in Article 12.1 of the CBA. The net effect of the County's refusal to apply the 77.5%-22.5 formula to the new plan is that unit employees are paying 100% of the cost increase. In some cases this has resulted in increased costs to individual employees of approximately $200.00 per month.

Decision and Order

Decision Summary:

The County improperly shifted 100% of the increased cost of replacement insurance to bargaining unit employees in violation of RSA 273-A:5, I (a) and (h). The County shall take all steps necessary to make bargaining unit employees whole.

Jurisdiction:

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

Discussion:

The first issue is whether this case should be dismissed pursuant to the parties' arbitration agreement, a request made by the County for the first time in its post-hearing brief. In support of its request the County cites Article 15.2, which states that "[t]he decision of the arbitrator shall

be final and binding upon the parties as to the matter in dispute, subject to appeal under RSA 542."[1] When such requests are properly made, they are examined under familiar criteria. See, e.g., *Appeal of City of Manchester*, 153 N.H. 289 (2006). However, in this case, although the County could have raised such a request at numerous points prior to the filing of post-hearing briefs, it failed to do so. For example, the County could have raised and preserved this dismissal request in the answer to the complaint, by motion filed prior to hearing, in the joint pre-hearing worksheet;[2] or by objection at hearing. Instead, the County proceeded through the pre-hearing and hearing process and then made this request, without prior notice to the NCEU or the PELRB, in its post hearing brief.[3] The PELRB hears breach of collective bargaining agreement claims under RSA 273-A:5, I (h) and II (f). The County's attempt to invoke an arbitration agreement at this stage in the proceedings is untimely and will not be considered. Both the NCEU sub-section (a) and (h) claims have been duly submitted to the PELRB for decision.

The remaining issues in the case involve the County's refusal to cover 77.5% of the current health insurance premium cost after an employee vote to change bargaining unit representatives. Following the unanticipated year end loss of the NNEBT insurance plan, the parties had only a few weeks to arrange replacement insurance. During this time period, the County informed the NCEU that it intended to contribute to the cost of any replacement plan at the same dollar level it was currently paying for the NNEBT plan under the CBA percentage

[1] RSA 542:1 provides that "...[t]he provisions of this chapter shall not apply to any arbitration agreement between employers and employees, or between employers and associations of employees unless such agreement specifically provides that it shall be subject to the provisions of this chapter." This right of appeal under the parties' CBA grievance procedure in this case distinguishes the "final and binding" nature of any arbitration award from those grievance procedures which are truly "final and binding" upon the parties, without any right of appeal under RSA 542.

[2] See N.H. Admin. Rules, Pub 202.01, Pre-Hearing Conference (joint pre-hearing worksheet shall include a summary of issue(s) presented for hearing and identification of any procedural issues per sub-sections (c) (2) and (3)).

[3] Post-hearing briefs are an opportunity for the parties to summarize, in writing, the legal basis for the position they have taken in the case based upon the claims and defenses duly raised and preserved in the pleadings and at hearing.

formula. The NCEU acknowledged the County's position but did not agree to it, and also did not waive its right to demand that the County contribute to the cost of replacement insurance under the percentage formula ("please keep in mind that the NCEU's opinion differs from the County regarding this issue"). This was essentially the sum and substance of the parties' communications about how the costs of any replacement insurance would be addressed. There were no negotiations, and there was no agreement on the part of the NCEU to limit the County's contribution to the health insurance benefit to the dollar amount the County had paid toward the NNEBT plan. Any argument by the County to the contrary is not persuasive.

With respect to how the current dispute between the parties should be resolved given the unit employees' decision to change representatives, the resulting loss of the NNEBT plan, and the parties' 77.5/22.5% premium cost share formula, the analysis in another case involving a somewhat similar issue provides relevant guidance. In *Teamsters Local 633 of New Hampshire v. Rockingham County*, the PELRB also addressed a dispute over employer-employee responsibility for a health insurance premium increase.[4] See PELRB Decision No. 2012-233 (October 18, 2012). The collective bargaining agreement had expired, and the parties were in the status quo. The health insurance cost sharing agreement was on a percentage basis, with an 80-20% employer/employee premium split for 2-person and family health insurance plans, and a 90-10% employer/employee split for a single person plan. Like the County here, the Teamsters wanted to avoid contributing to the increased cost of the insurance by limiting employee payments to the dollar amount previously calculated and paid under the percentage formulas.

[4] The premium increase occurred during the status quo period after the expiration of the parties' agreement and before a successor agreement was reached. It was due to a rating status change caused by the employer's decision to offer LGC Health Trust insurance plans to non-bargaining unit employees when a prior insurance vendor (Primex) discontinued health insurance products for municipal employees.

The PELRB rejected the Teamsters' claim, finding that the 80-20% and 90-10% cost agreement applied to the increase caused by the change in the County's rating status:

> By utilizing a percentage premium schedule, the parties adopted one of several common approaches to the allocation of the cost of health insurance benefits between public employers and public employers. Other commonly used allocation arrangements options include a fixed dollar contribution by employees (i.e. $150 per month) or a fixed dollar contribution by the employer (i.e. employer agrees to pay up to $10,000 per year and any additional plan expense is responsibility of the employee). The distinctions between these different approaches must be observed and maintained during a status quo period. The interpretation of the County's status quo obligations in the present case that is most consistent with the terms and conditions established under Article 22 of the 2010 CBA is one which requires that unit employees remain responsible for their percentage share of premium expense. This is so despite the fact that the actual premium expense increased in an unanticipated amount on account of the change in the County's rating status.
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> It does appear that neither the County nor the Union anticipated the rating and premium changes that occurred, and neither party is content with the extent to which their respective contributions to the cost of the LGC HMO and POS plans has increased. The increase in premiums, and the related impact on unit employees, is a subject that is suitable for discussion at the bargaining table, and the parties are encouraged to proceed on that basis.

See PELRB Decision No. 2012-233.

Although the reasons for the premium increases in the two cases are different, the reasoning in *Teamsters* still applies to this case. In *Teamsters,* neither party anticipated the withdrawal of Primex health insurance products, the County's rating status change, or the increased cost of the LGC Health Trust insurance plans. Likewise, in this case, when the parties entered into the current CBA they did not anticipate a change in bargaining unit representation, the loss of the NNEBT insurance plan during the contract term, or the increased cost of replacement health insurance plans. Circumstances relating to CBA Article 12 did change in December of 2016, but the change was not significant or material enough to excuse the County from its agreement to contribute to the cost of the health insurance benefit according to the percentage formula. Moreover, the County cannot avoid paying its full percentage share of the

increased cost of health insurance on the grounds that the increase amount was not known to the County at the time it entered the CBA. "Ratification requires knowledge, to some reasonable degree, of the extent of a cost item's financial burden, not just the fact of a burden." *Appeal of Town of Rye*, 140 N.H. 323, 327 (1995). Mathematical certainty of the actual cost is not necessary.

> The extent need not be precisely ascertainable at the time the cost item is approved, however, and resubmission to the voters is not necessary when the financial burden exceeds expectations. RSA 273-A:3, II(b) does not require submission of a CBA's "cost items" more than once. Moreover, our interpretation of RSA chapter 273-A recognizes the city council's right to review the financial terms of a CBA in detail before approving or disapproving of them. Accordingly, the city council, along with the association and the school district, will know that the final cost of any CBA will ultimately depend on such unknown factors as mid-year personnel turnover or a teacher's family planning decisions. If the city council approves a CBA, it has no choice but to fund whatever benefits the teachers decide to enjoy pursuant to its terms.

Id. at 327-328 (quotations and citations omitted). In summary, the County agreed to provide a health insurance benefit based upon the CBA Article 12.1 percentage formula, and its failure to do so constitutes a violation of RSA 273-A:5, I (h)(to breach a collective bargaining agreement).

The County has also interfered with the right of employees to use the statutory election process to select a new bargaining unit representative 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). Here, unit employees exercised their right to change bargaining representatives, which in turn led to the loss of the NNEBT insurance plan. This sequence of events, an unknown factor under *Appeal of Town of Rye,* did not entitle the County to shift 100% of the increased cost of replacement health insurance to unit employees. As a result, the County has imposed a significant financial sanction and burden on employees for exercising their statutory right to select their representative, in violation of RSA 273-A:5, I (a).

Based on the foregoing, the County has committed an unfair labor practice in violation of RSA 273-A:5, I (a) and (h). The charges based on alleged violations of sub-sections (b), (g), or (i) are dismissed. The County shall, effective as of January 1, 2017: 1) comply with the 77.5-22.5% premium cost share agreement; 2) take all steps necessary to make all affected bargaining unit employees whole; and 3) post a copy of this decision in locations and areas where bargaining unit employees work for 30 days.

So ordered.

Date: July 25, 2017

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

Distribution: Carolyn M. Kirby, Esq.
Lan T. Kantany, Esq.