Appeal to NH Supreme Court withdrawn on August 11, 1998, Supreme Court No. 98-149.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

FALL MOUNTAIN TEACHERS ASSOCIATION, NEA-NEW HAMPSHIRE

Complainant

v.

FALL MOUNTAIN REGIONAL SCHOOL DISTRICT

Respondent

CASE NO. T-0227:19

DECISION NO. 97-118

APPEARANCES

Representing Fall Mountain Teachers Association, NEA-NH:

James Allmendinger, Esq.

Representing Fall Mountain Regional School District:

Edward Kaplan, Esq.

Also appearing:

Stephen J. Varone, Fall Mountain Regional School District
Patricia Adams, Fall Mountain Regional School District
Mary E. Gaul, NEA-New Hampshire
Heidi A. Gove, Fall Mountain Teachers Association
Jackie Ronning, Fall Mountain Teachers Association
Gerald Pavao, Fall Mountain Teachers Association
Jay Tolman, NEA-New Hampshire
Roy Steward, GST
Ryan Spaulding, Eagle Times
J.H. McCormick, Public

BACKGROUND

The Fall Mountain Teachers' Association, NEA-New Hampshire (Association) filed unfair labor practice (ULP) charges against the Fall Mountain Regional School District (District) on April 7, 1997, alleging violations of RSA 273-A:5 I (a), (b), (e), (g), (h) and (i) relating to bad faith bargaining, breach of contract by failing to submit a fact finder's report to district voters and for direct dealing between the District and members of the bargaining unit. The District filed its answer and a motion to dismiss on April 22, 1997. After continuances sought by and granted to the parties for the hearing dates of July 24, 1997, August 21, 1997, and October 7, 1997, this matter was heard by the PELRB on October 30, 1997. The record was held open until December 1, 1997 for the filing of post-hearing briefs which were filed by the parties on that date.

FINDINGS OF FACT

1. The Fall Mountain Regional School District is a "public employer" of teachers and other personnel within the meaning of RSA 273-A:1 X.

2. The Fall Mountain Regional Teachers' Association is the duly certified bargaining agent for teachers and other personnel employed by the District.

3. The Association and the District are parties to a collective bargaining agreement (CBA) which was set to expire June 30, 1996, and which continues from year to year thereafter by its own terms. Prior to June 30, 1996, the parties commenced negotiations for a successor CBA in July of 1995. By February of 1996, the parties were at impasse, went unsuccessfully to mediation, and then to fact finding on November 13, 1996. The fact finder issued his report on December 16, 1996 (Joint Exhibit No. 2) which included recommendations which are considered "cost items" under RSA 273-A:1 IV, notably salary increases of 5.75% for School Year 1996-97 and 5.25% for School Year 1997-98, as well as other recommendations. The Association accepted these recommendations; the District did not.

4. After receipts of the fact finding report, the District's negotiator, Gary Wulf, wrote to Association Negotiator Jackie Ronning, on January 20, 1997, offering a proposal which differed from the

fact finder's recommendations "in hopes that both parties may go forward to the District's voters with a mutually agreed to settlement." (Association Exhibit No. 1.) Wulf's proposals were for a two year agreement, School Year 1996-97 and School Year 1997-98, but contained a new salary scale with changes in amounts on Steps 1 through 13, but no change at Step 14, the maximum. Step differentials would become 3.89% of a new base of $22,000 for BA, Step 1.

5. By letter of January 17, 1997, Association President Heidi Gove and Ronning wrote District Business Manager Steve Verone about the size of raises recommended by the fact finder as reported in a local newspaper. (Association Exhibit No. 2.) This letter also said, "It has come for our attention that you have been discussing negotiations, specifically the fact finder's report, with various faculty members....We ask that you do not discuss these issues with our members." During testimony, Gove said she had received member complaints that Verone's overtures to discuss amending the fact finding report occurred while he was dealing with them on other school matters. There was no denial of the type of contact described. In opening, counsel for the District told the PELRB that the district "voters have separate roles as employees and as residents" and that they could be contacted on public interest issues.

6. Between January 20 and January 30, 1997, someone prepared a comparison of the cost of the fact finder's recommendations ($973,608) and Wulf's proposal, also known as the Districts counter-offer ($327,000). (Association Exhibit No. 3.) Verone sent a note to Ronning dated January 28, 1997 saying that the school board had given "preliminary approval" to the following warrant article language on January 27, 1997:

> To see if the District will vote to approve the cost items included in the matter of Fact Finding between the Fall Mountain Regional School District Board and the Fall Mountain Teachers Association, Inc., NEA/NH, pursuant to the provisions of RSA 273-A, for the 1996-97 fiscal year (retroactively) and the 1997-98 fiscal year, which calls in increases in

> salaries and benefits of NINE HUNDRED SEVENTY THREE THOUSAND, SIX HUNDRED AND EIGHT DOLLARS and 00/00 ($973,608.00) and, further to raise and appropriate this sum in the 1997-98 fiscal year, or to take any other action in relation thereto. The School Board does not recommend this Article.

Subsequent correspondence ensured between UniServ Director Mary Gaul and Verone about the manner in which the Association Exhibit No. 3 costs were calculated and projected, with Gaul claiming only the new money needed should be reflected while Verone said the cost of the package should be reflected, regardless of funds available to support it from personnel turnover, retirements and other attrition. (Association Exhibit Nos. 5, 6, 8, 9, 10 and 11.) In her testimony, Gaul said that the District had saved $190,000 in School Year 1996-97 through personnel turnover and attrition and she believed it should be credited against the cost of the School Year 1996-97 settlement recommended by the fact finder. Verone countered by saying he transferred these savings to the capital reserve fund.

7. The District utilizes the Senate Bill 2 provision for its annual meeting and voting. Under RSA 40:13 III, the first session of the annual meeting is for the "transaction of all business other than voting" and is meant for "explanation, discussion and debate of each warrant article." Warrant articles may be amended but "warrant articles that are amended shall be placed on the official ballot for a final vote on the main motion, as amended." "All warrant articles shall be placed on the official ballot for a final vote." RSA 40:13 IV and VI and Joint Exhibit No. 1.

8. At the first session of the Senate Bill 2 annual meeting on March 15th held under RSA 40:13, Lucien Bean moved, and Pete Goodnow seconded, to amend the school funding article (Finding No. 6, above) to read as follows:

> "To see if the District will raise and appropriate the sum of THREE HUNDRED TWENTY-SEVEN THOUSAND DOLLARS and 00/100

> ($327,000.00) for the 1997-98 school year and ZERO DOLLARS ($0.00) for the 1996-97 school year to fund the School Board's most recent counter offer to the Fall Mountain Teachers' Association. The details of said offer are on file in the SAU #60 office and all components of this offer, both economic and non-economic, ought to be agreed to by both parties without any additions, deletions, alterations or redistribution thereof. These terms are different from those in the Fact Finders report."

(District Exhibit No. 1.) At the time the warrant articles were printed on the ballot for the April 8, 1997 voting, only the amended form, above, appeared with the additional words, "The School Board recommends this Article." (District Exhibit No. 2.) The version appearing in Finding No. 6 did not appear on the ballot. The District admitted in its answer that the amended form of the warrant article was the only entry on the ballot "for [the] second session."

9. At the time the Beam amendment was offered at the "deliberative" or first session, that session was being chaired by a moderator who was a former member and chair of the school board. He allowed the amendment which was then approved by the attendees at the first session by a vote of 153-103. (Testimony of Gerald Pavao and District Exhibit No. 1.) During the course of deliberations on the amendment, the moderator entertained a question as to the school board's position on it, moved across the room so that he might speak with the school board, and then returned to the podium to announce that the board supported the amendment by 7 to 0. (Testimony of Pavao and Gove.) Gove testified that the moderator further said, "We can amend the fact finder's recommendations down to one dollar if we want to." Gaul complained that this constituted bad faith in a letter to the District's counsel on March 13, 1997. (Association Exhibit No. 11.)

DECISION AND ORDER

We address our attention in this decision to two areas, the first of which is the direct dealing allegation. We are concerned that the alleged direct dealing, apparently aimed at urging employees to take certain actions relative to "amending" the fact finding report,

occurred on duty, on premises and when the employees involved were engaged in discussing other bona fide school business with a member of the administration. Whether intended or not, discussion of such topics, raised by a supervisor during a conversation with that supervisor which covered other aspects of school business over which that supervisor had authority, gives rise to the perception that the questionable area of discussion is an "official" discussion which, in turn, suggests that compliance is required because it was made by a member of the administration to a member(s) of the bargaining unit.

The District (Finding No. 5) suggested that the complained of conversations were permissible because voters at the district meeting "have separate roles as employees and as residents." We agree fully with this statement, except that district voters vote by virtue of their residency, not by virtue of their employment. Likewise, the administration does not have access to non-employee resident voters in a superior-subordinate, administration-to-employee-on-premises and on-the-clock environment, as was the case with the complained-of conversational overtures. The complained-of conduct was the equivalent of a "captive audience" situation involving necessarily compliant employee(s) who were being asked to consider political issues outside their job responsibilities and within the ambit of the bargaining agent. RSA 273-A:11. We are not intending to say that the District cannot communicate its position on contract matters to the bargaining agent, to the public or even to employees. What we are saying is that the employer cannot take advantage of an employment environment to communicate with employees on these matters which are outside their job responsibilities. Employees, for example, can properly be the recipients of a mailing sent to the general public or to a list of the district's voters. Conversely, as occurred in this case, it is inappropriate for the administration to seek political support for a position which may vary from the position of the unit's bargaining agent by making direct contact with unit employees. This is violative of RSA 273-A:5 (e) and (g) as the latter applies to RSA 273-A:3 and RSA 273-A:11 and must be discontinued immediately.

Our other area of concern involves the development of the warrant articles after the issuance of the fact finder's report on December 16, 1996. In essence, our findings reveal that the warrant article developed as the result of the fact finder's report and recommendations and which had been given "preliminary approval" by the school board (Finding No. 6) did not appear on the printed ballot used for voting at the "second session" of the SB 2 district meeting (Finding No. 8). The Association claims this was an error and in violation of various portions of RSA 273-A, notably RSA 273-A:5 I (e) and 273-A:5 I (g) as it pertains to the requirements of RSA 273-A:3 II (b) and 273-A:12 III, while the District asserts that its actions were permissible and not in violation of those sections.

The PELRB is statutorily charged with the interpretation and administration of RSA 273-A. We look to that statute for guidance in cases such as this one. RSA 273-A:12 I-IV contemplates a progressively demanding scheme of procedures to assist in bringing the bargaining process to conclusion: negotiations, mediation, fact finding and then, if necessary, reopening of negotiations. Fact finding follows the voluntary and consensus-building steps of negotiations and mediation. It is intended to bring the insight of an "outsider" so that the parties might find "room to move" to the recommendations contained in the fact finder's report. If either side rejects those recommendations, as did the District in this case, the fact finder's report "shall be submitted to the legislative body of the public employer, which shall vote to accept or reject so much of his recommendations as otherwise is permitted by law." RSA 273-A:12 III. RSA 273-A:3 II (b) tells us that "only cost items shall be submitted to the legislative body of the public employer."

We conclude from this statutory language that the fact finder's report, with appropriate expenditures cited for the new money to be raised in order to implement it, must be submitted to the legislative body. The legislative body, in this case the voters at the second session of the SB 2 annual meeting, must have an opportunity to vote on that report, as an entity, either for or against, but not to renegotiate its contents. See Appeal of Alton School District, 140 NH 303, 311 (1995), where the legislative body's function is defined as approving or rejecting cost items of the fact finders report. "RSA 273-A:12 III requires that the fact finder's report in its entirety be submitted to the legislative body for review, but...the legislative body may not bind the parties by a vote on non-cost items." Appeal of Derry Education Association, 138 NH 69, 73 (1993). This makes sense in the context of the statute. First, if the legislative body approves the fact finding report, there is finality to the process since the employees already had done so. Second, to allow any employer to ignore the requirement to submit the fact finder's report means that the actions of the public employer's negotiators never get to be reviewed by the voters in the district. This is contrary to the statute, "unlevels" the "playing field" and unbalances the "balance of power" between the parties. Appeal of Franklin Education Association, 136 NH 332, 337 (1992). Finally, not including a warrant article for the fact finder's report deprives voters, especially teacher-voters, of an opportunity to vote on it by attending only the second session, given the expectation created by the "preliminary approval" representation of Finding No. 6.

We find that the failure to submit the fact finder's report was violative of RSA 273-A:5 I (e) and (g). Having so found, we are mindful that the District has argued that RSA 40:13 permits warrant articles to be amended. We do not dispute that assertion (District brief, page 8). We do, however, believe that, in order to be in

compliance with the provisions of RSA 273-A which we have cited, both the original proposed warrant article (as appears in Finding No. 6) and the amended warrant article (as appears in Finding No. 8) must have appeared on the ballot in order to avoid running afoul of statutory requirements pertaining to the bargaining process. Likewise, while we are respectful of Justice Lynn's decision in Tucker v. Town of Goffstown, Hillsborough ND, Docket No. 97-E-103 (March 25, 1997), that the "purpose of the warrant is to notify townspeople of the items to be discussed at a town meeting" and "does not need to be precise," we believe that these observations relating to the warrant cannot and do not obviate the requirements of submitting the fact finder's report to the voters under RSA 273-A:12 and Appeal of Derry Education Association, *supra*.

The violations of RSA 273-A:5 I are as noted, above. The District is to CEASE AND DESIST from any direct dealing activities. As for the warrant article violation, the passage of an erroneous and amended warrant by the voters without the opportunity to vote on a warrant article reflecting the fact finder's report is equivalent to the impasse "not being resolved following the action of the legislative body" under RSA 273-A:12 IV. The statutorily prescribed remedy for such a situation is to reopen negotiations, which the Association is hereby entitled to do, inclusive of bargaining retroactively for the period affected by the April 8, 1997 vote. If negotiations are reopened at the request of the Association, conditions of *status quo* shall prevail while those negotiations continue.

So ordered.

Signed this 19th day of December, 1997.

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Alternate Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.