



NH Supreme Court dismissed appeal of this decision on October 15, 1997, Supreme Court Case No. 97-564.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

SULLIVAN COUNTY NURSING HOME :
:
Complainant :
:
v. :
:
AMERICAN FEDERATION OF :
STATE, COUNTY and MUNICIPAL :
EMPLOYEES (AFSCME), LOCAL :
3438 :
:
Respondent :
:

CASE NO. A-0491:21

DECISION NO. 97-045

APPEARANCES

Representing Sullivan County Nursing Home:

Marc Hathaway, Esq., Counsel

Representing AFSCME, Local 3438:

James C. Anderson, Staff Representative, AFSCME

Also appearing:

Howard Tawney, Sullivan County
Judy McDonald, Local 3438
Robert McDonald, Local 3438
Robert B. Courtemanche, Jr., Local 3438

BACKGROUND

Sullivan County Nursing Home (County) filed unfair labor practice (ULP) charges against the American Federation of State, County and Municipal Employees (AFSCME), Council 93, Local 3438 (Union) on August 19, 1996 alleging violations of RSA 273-A:5 II (d) and (f) resulting from the Union's attempting to grieve and process to arbitration a non-arbitrable subject and from the

Union's refusal to negotiate in good faith. The Union filed its answer on August 27, 1996 after which the County's case was heard by the PELRB on October 17, 1996. At the conclusion of those proceedings, at which time the County had rested, the PELRB granted a Union Motion to Continue in Decision No. 96-093, dated October 23, 1996, and directed the parties to meet at least two (2) additional times to see if outstanding differences might be resolved by and between them. By letters from the County on December 19, 1996 and from the Union on January 7, 1997, the parties advised the PELRB that their settlement efforts were unsuccessful and that this matter should be re-docketed so that the Union might present its case. That hearing occurred before the PELRB on April 15, 1997.

FINDINGS OF FACT

1. Sullivan County operates a county nursing home which employs maintenance personnel and others to insure its safe and efficient operation and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.
2. Council 93, Local 3438, AFSCME is the duly certified bargaining agent for maintenance workers and other non-administrative and non-supervisory employees at the Sullivan County Nursing Home.
3. The Union and the County are parties to a collective bargaining agreement (CBA) for these employees for the period July 1, 1994 through June 30, 1997. Article XX of that agreement defines "grievance" as "a written dispute, claim or complaint which is filed and signed by an employee in the Bargaining Unit and which arises under and during the term of this Agreement. Grievances are limited to matters of interpretation or application of specific provisions of this Agreement and must specify the specific Article and Section of this Agreement which has allegedly been violated, the date of the alleged violation, all witnesses to same and the relief requested." "Excluded from this grievance procedure are grievances which question the exercise of rights set forth in Article II of this Agreement, entitled Management Clause, or which question the

use of [sic] application of any right over which the Employer or its designated agents have discretion."

4. On April 9, 1996, the County restructured the Maintenance Department at the nursing home. This action created three lay-offs, one of whom was Robert McDonald, a Maintenance Worker II. When the layoff was announced to McDonald by letter of April 9, 1996 (County Exhibit No. 5), the Commissioners told him that they were creating a full-time Maintenance Worker II position, Mondays through Fridays, on the day shift, 7:00 a.m. to 3:00 p.m. McDonald was invited to express his interest in this position and ultimately took it.
5. On April 12, 1996, the County and the Union, the latter represented by Staff Representative James Anderson, met over the Union's allegation that the County could not layoff McDonald and then rehire him to the same position on a different shift, and with a change in his scope of duties, without bargaining impact. The County pled that it agreed to bargain over the impact.
6. On April 18, 1996, County Administrator Robert Hemenway wrote to McDonald saying:

The County has decided to delay the implementation of your layoff until May 1, 1996. You will have April 30, 1996 as a day off. When you return on May 1, 1996, your hours of work will be from 7 am to 3 pm and you will be required to work every other weekend. Your first weekend will be that of May 4th and 5th, 1996. During May 1st thru the 3rd you will be required to refamiliarize yourself with the boiler room so that you can take care of any contingencies during the weekend.
(County Appendix No. 6)

This represented a change in schedule from what McDonald had been working, both as to shift and as to alternate weekends, and from what was

explained in the Commissioners' letter of April 9, 1996.

7. On April 22, 1996, McDonald submitted a grievance alleging violations of contract articles XV, section C; XVI, section 3, and XVII, "past practice, change in working conditions of employment in violation of RSA 273.A [sic]" seeking "to be made whole." It was processed through his superior, Leo Duranleau, the administrator, Hemenway, and the Commissioners (County Appendices Nos. 1,2,3,9 & 13) without resolution.
8. Human Resources Manager, Howard Tawney, wrote Anderson on April 25, 1996 to indicate that he was delaying the layoff and movement of McDonald and F. Reno until May 10, 1996 and that May 8th and 9th were acceptable dates for bargaining the impact of these changes.
9. Staff Representative Anderson requested a list of arbitrators by letter to the PELRB on June 25, 1996. That list was provided to the parties by letter of June 27, 1996. Tawney wrote the PELRB on July 12, 1996, saying arbitration was inappropriate and that neither side had declared impasse. The PELRB Executive Director responded by letter to Tawney on July 15, 1996 saying that if he was alleging "the subject matter of this grievance is inappropriate for processing as such, [then] your remedy is by filing an unfair labor practice charge..." The County then filed this ULP on August 19, 1996. (County Appendices Nos. 15, 16, 17 and 18.)

DECISION AND ORDER

The "Management Clause" of the CBA, as negotiated by the parties, provides:

Except as specifically limited or abridged by the terms of this Agreement, the management of the Sullivan County Nursing Home in all its phases and details shall remain vested exclusively in the Employer and its designated agents. The Employer and its agents shall have jurisdiction over all matters concerning the management and operation of said Facility, including, but not limited to, the

functions, programs and methods to be used for all of the operations of said Facility, including the use of technology, the Facility's organizational structure and the selection, direction and number of all personnel so as to continue public control of governmental functions as well as all rights retained by virtue of New Hampshire RSA Chapter 273-A. It is further specifically agreed that this Article shall not be subject to the Grievance Procedure Article as hereinafter set forth.

Thus, management is protected in its right to determine staffing levels, shifts, organizational structure, direction of personnel and maintaining control over governmental functions both under the contract, which specifically excludes these areas from the grievance procedure, and under the statute, RSA 273-A:1 XI.

When we look to the CBA, we find that it addresses numerous "working conditions," such as wages, holidays, vacation time, personal days, hours of work and overtime, differentials and even, specifically, pager compensation. Pager compensation is an issue in controversy in this case because, when McDonald was rehired into the day shift (Finding No. 4), he was subsequently told that he would have to carry and respond to pager calls. Testimony presented to us alleged that pager compensation (i.e., for carrying it versus responding to it) was negotiated out of the 1994-97 CBA based on the representation that unit members would no longer be required to carry beepers.

Staff Representative Anderson, in his argument to the PELRB as well as in his letter of January 7, 1997, requesting redocketing of this case, spoke not only of the beeper issue and beeper compensation, but also of jointly modifying job descriptions and week-end work vis-à-vis the former work schedule. We heard testimony about alleged new extra duties relative to chemical tests, ordering materials and chemicals and preventive maintenance. All of these strike us as working conditions, and, in the case of pager compensation, a very specific working condition over which the parties have a history of negotiating, thus raising the potential for a past practice grievance.

For us to stop the grievance arbitration process, there must be "positive assurance" that the parties did not intend to arbitrate the dispute in question. The definition of grievance (Finding No. 3) is a broad one which has not excluded working conditions, such as we have noted above, from that process. The two leading cases on arbitrability are Appeal of Westmoreland

School Board, 132 N.H. 103 (1989) and Appeal of City of Nashua School Board, 132 N.H. 699 (1990). "Under the 'positive assurance' standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists" and "in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

In this case there simply is no "forceful evidence" that the parties intended to exclude the likes of the working conditions grievances presented to us from arbitration. The grievance form itself cites Articles XV, XVI, and XVII representing seniority, promotions and transfers, and disciplinary procedures, respectively. There is no evidence of any intent to exclude any of these from arbitration.

The County has failed in its attempt to convince us that the Union is seeking to arbitrate a non-arbitrable subject. The ULP is dismissed and we decline to stay the arbitration process.

So ordered.

Signed this 25th day of April, 1997.


EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding.
Members E. Vincent Hall and William Kidder present and voting.