



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

ETHEL B. ABBOTT, et al.

Complainant

CASE NOS. M-0565
M-0566

v.

THE STATE OF NEW HAMPSHIRE and
STATE EMPLOYEES ASSOCIATION
OF NEW HAMPSHIRE, INC.

DECISION NO. 84-22 (AMENDED)

Respondents

APPEARANCES

Representing the Complainant

National Right to Work Legal Defense Foundation, Inc.
John C. Scully, Esq.

Representing the State of New Hampshire and State Employees Association of
New Hampshire, Inc.

William P. Briggs, Esq.
Richard E. Molan, Assistant Executive Director, SEA

Intervenors

Gary Foster, Administrator, AFSCME
James Allmendinger, Esq., NEA/NH by letter

BACKGROUND

These complaints, brought by certain employees of the State of New Hampshire who are members of bargaining units covered by contracts with the State of New Hampshire are brought against the State of New Hampshire as employer and the State Employees Association of New Hampshire, Inc., representative of the employees in the bargaining units certified for inclusion in the State/SEA contract. The gravamen of the complaints is that the employees have been denied their rights under RSA 273-A, especially RSA 273-A:5 I (c) (as to the employer) which reads:

"It shall be a prohibited practice for any public employer: to discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization..."

And (in the case of the employee organization) RSA 273-A:5 II (c) which provides:

"It shall be a prohibited practice for the exclusive representative of any public employee...to cause or attempt to cause a public employer to discriminate against an employee in violation of RSA 273-A:5 I (c)..."

The State of New Hampshire and the State Employees Association of New Hampshire, Inc. (hereinafter SEA) are and have been parties to collective bargaining agreements, each covering a biennial budget period in accordance with State budgetary processes for some years. Relevant to this case are the 1981-1983 contract and the 1983-1985 contract which was signed in July 1983 to be effective retroactive to the first pay period in the new fiscal year. In the agreement signed for 1983-1985, the following section was included:

"5.5 Those employees who are members of the Association on the effective date of the Agreement shall retain their membership throughout the period (term) of this Agreement. The Association agrees to indemnify and hold harmless the Employer from any actions, complaints or judgments arising from the implementation of this section.

5.6 Membership application documents for employee who join the Association after the effective date of this Agreement shall contain a conspicuous notation that their commitment is effective for not less than the term of the Agreement."

The previous Agreement covering the period 1981-1983 contained a similar provision numbered 5.5 which was identical to a provision which had been in the two immediately previous contracts beginning in 1977 and that language, contained in State/SEA contracts from July 1977 through June 1983, was without apparent controversy:

"5.5 Those employees who are members of the Association on the effective date of the Agreement shall be notified in writing by the Association that they must retain their membership throughout the period (term) of the Agreement except that each member shall have the opportunity to withdraw 15 days following said notice. Notice of withdrawal of membership shall be in writing and postmarked no later than 15 days after the receipt of the notice from the Association."

Following negotiation of the 1983-1985 language cited above, the proposed contract containing the language was submitted to the unit membership by mail on July 12, 1983 and was ratified by a vote of 2,616 in favor to 521 against and the SEA's Board of Directors ratified and executed the contract on July 20, 1983.

The facts stipulated by the parties indicate that some members of the SEA attempted to resign from that organization during the contract period but prior to the termination of the 1981-1983 contract by writing to or otherwise contacting the SEA. Other SEA members covered by the contract attempted to resign after the new contract went into effect. Those attempting to withdraw from the union were informed by letter from union officials that "pursuant to article 5.5 of the 1981-

1983 contract, all members were afforded the opportunity to terminate their membership between August 2-15, 1981." They were also informed that since the 1983-1985 agreement included language requiring the maintenance of membership throughout the term of the agreement, there was no opportunity for them to withdraw from the union. Evidence indicated that those who had attempted to resign prior to the end of the 1981-1983 contract were told that they could only do so during the window period (August 2-15, 1981).

The charging parties through their representative brought an unfair labor practice complaint against the State and the SEA charging violation of the provisions quoted above stating that sections 5.5 as implemented without any window period discriminated against employees by forcing them to maintain membership and thus encouraging union membership as a condition of employment.

The Public Employee Labor Relations Board held a hearing on these complaints at the offices of the Board on January 19, 1984. The parties were all represented at the hearing, the complainants being represented by the National Right To Work Foundation and the State and SEA represented by SEA counsel pursuant to the so-called indemnification clause included in the 1983-1985 section 5.5.

Following the hearing, the parties were given an opportunity to file briefs and reply briefs and these have been received and examined by the Board.

Motions for rehearing filed by the parties was granted and held in the Board's office on May 24, 1984.

FINDINGS OF FACT AND RULINGS OF LAW

The issue presented to this Board is apparently an issue of first impression in the State of New Hampshire. Briefly stated, the issue is whether or not the so-called "maintenance of membership" clause as written and implemented in the 1983-1985 State/SEA contract violates the statute.

Maintenance of membership agreements are a form of so-called "union security" provisions. Under RSA 273-A it is clear that certain union security agreements are outlawed. For example, the closed shop arrangement which requires membership in a union as a condition of employment is illegal as a violation of the cited provisions of the statute. Likewise, a union shop which required becoming a member of a union within a certain period of time of becoming an employee would violate the statutes. An agency shop in which all employees who do not choose to join a union must pay a fee in lieu of dues or a portion of dues to the union for its services as bargaining agent or representative but not for social or other services has been allowed in New Hampshire as a permissive subject of bargaining, that is, one on which the parties may agree but are not required to negotiate. This is on the theory that membership in a union is not required under an agency shop and, therefore, such an agreement may be reached should the parties both consent to negotiate and agree upon such an arrangement.

Maintenance of membership agreements, as stated in the Background section above have been included in collective bargaining agreements for some time in the State of New Hampshire. However, the Board is not aware of any such maintenance of membership agreements which have not included a provision allowing union members covered by an agreement, whether an agreement just passed or one about to come into effect, to resign their membership and be clearly informed about

the term of required continued membership at the time they are given the opportunity to resign. These provisions are normally coupled with a requirement for new union members to be informed clearly as to the term of their membership should they not resign or should they join the union.

In the present case, the provision negotiated is not consistent with past practice. An employee covered by prior agreements reasonably could be expected to know that window periods for resignation had been included at the beginning of each contract. Indeed, some evidence indicated that members who attempted to resign prior to July 1, 1983 were told that they could do so only during an expected upcoming window period. When the agreement was reached, however, no window was included and, in fact, the agreement was retroactive to the beginning of the fiscal year. Thus, SEA members covered by the 1981-1983 agreement who wished to resign membership in the union were given no opportunity to resign after termination of that contract. Indeed, when questioned about this, counsel for the State and SEA forthrightly admitted that it was possible that an employee who wished to resign, informed the union of his desire to resign and attempted to resign would have no ability to resign at any time at the beginning of the contract or during its term and that should succeeding contracts contain the same provisions, an employee might in fact have no opportunity to ever resign from the union until he terminated his employment with the State.

The Board has considered the arguments of counsel, the briefs and the facts. It is the position of the complainant that a maintenance of membership provision in any form is inconsistent with and illegal under RSA 273-A:5. It is the position of the SEA and the State that the provision is legal having been freely negotiated and then ratified by a majority of the bargaining unit members who have the right to bind the minority on this matter as well as any other.

Without considering in this decision the details of the legislative history, prior statutes or decisions in other states and jurisdictions cited by the parties, the Board holds that the provision negotiated by the parties under the circumstances presented in this case violates the provisions of RSA 273-A:5 I (c) and II (c). Those provisions were inserted in the law to ensure that employees not be discriminated against on account of or be forced to be members of employee organizations against their will. This applies to resignations from membership as well as requirements of joining as a condition of employment. The Board considers the maintenance of membership provisions in previous contracts which contained the opportunity for resignation and, therefore, afforded every union member the opportunity to knowingly continue as a member of the union for a set term to be legal in accordance with the statutes. However, under the circumstances presented in the 1983-1985 contract, employees who had a right to expect on the basis of law and prior practice that they would have an opportunity to resign from the union should they so desire, had no such right. Indeed, their membership was forced by the agreement to continue. They had no opportunity to get out. The statutory provisions do not contain any condition that allows the employer and the employee organization to abrogate the right of an employee to terminate his union membership or to refuse to embark upon union membership. Therefore, the argument of the State and SEA that ratification of the provision somehow effected its legality is misplaced.

The Board does not consider the parties entered into the agreement in bad faith or with an intent to discriminate against any group of employees. The effect of their action, however, was in violation of the statutes. The Board is curious as to the reason for the inclusion of the so-called "indemnification language" in the provision and cautions the State that entering into agreements containing provisions

which the State may feel are illegal cannot be excused by having provisions requiring the employee organization to indemnify the State and represent it when legality of such provisions are challenged. The State has a special responsibility to ensure that provisions of contracts into which it enters are legal. The declaratory judgment provisions of statute and Board Rules provide a mechanism to eliminate doubt concerning such provisions.

The effect of this decision and the order under this decision is that properly implemented maintenance of membership provisions are legal under RSA 273-A. The conditions under which they are legal, however, are that they include a period prior to or immediately after the beginning of each contract for a reasonable period as negotiated by the parties but not less than 15 days in length for resignation from the union. Knowledge of such a provision must be given to all employees covered by the agreement so that a knowing decision to resign or not to resign during the window period is provided. Also, should a maintenance of membership provision be included in an agreement, notification of the effect of joining the union as to the minimum term of membership must be included on the application form so as to inform prospective members of the effect of their decision to join a union. The Board notes that the SEA has included such a provision properly on its current application forms.

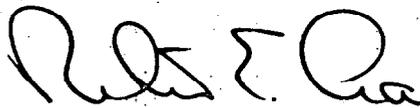
ORDER

Consistent with the above amended findings, the Board reaffirms its original order, as follows:

1. The Board finds that the State of New Hampshire and the State Employees Association of New Hampshire, Inc. have committed unfair labor practices by including Section 5.5 as written and implemented in the 1981-1983 contract. Such action violates RSA 273-A:5 I (c) and II (c).

2. Having found that the State and SEA acted in good faith and without any intent to discriminate, however, the Board orders that no refunds or retroactive effect of this order is required.

3. The SEA and State are ordered to negotiate an appropriate "window period" consistent with this order, said window period to be held prior to June 30, 1984 or within 30 days after a final order or decision issued upon appeal of this decision and order. Written notice of said window period shall be given to all SEA members covered by the 1983-1985 agreement. The window period shall be for a minimum of 15 days.



Robert E. Craig, Chairman

Signed this 31st day of May, 1984.

By unanimous agreement. Chairman Robert E. Craig, presiding. Members Russell F. Hilliard, Richard W. Roulx and Seymour Osman present and voting. Also present, Executive Director, Evelyn C. LeBrun and Board Counsel, Bradford E. Cook, Esq.