State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CONCORD EDUCATION OFFICE PERSONNEL ASSOCIATION/NEA-NEW HAMPSHIRE Complainant v. CONCORD SCHOOL BOARD Respondent	CASE NO. M-0504:13 DECISION NO. 92-04

APPEARANCES

Representing Concord Education Office Personnel:

James Allmendinger, Esq.

Representing Concord School Board:

Edward M. Kaplan, Esq.

Also appearing:

Angela M. Carter, CEOPA
Pearl L. Deschenes, CEOPA
Linda Labbe, CEOPA
Sally Doane, CEOPA
Cheryl Miner, CEOPA
Barbara Kuhlman-Brown, Concord School District
Mike Martin, Concord School District
Waldo B. Cumings, NEA-New Hampshire
Judi Faulkner, CEOPA

BACKGROUND

The Concord Education Office Personnel Association (CEOPA) filed charges of an unfair labor practice (ULP) on November 21, 1990, against the Concord School Board (Employer) alleging violations of RSA 273-A:5, I (a), (d), (e), and (g). The employer responded, through counsel, Edward M. Kaplan, Esq. by filing an answer on December 11, 1990. The case was scheduled and rescheduled for hearings on February 21, 1991, April 21, 1991, and June 27, 1991, the Board directed negotiations in Decision No. 91-44, maintaining jurisdiction but taking no further action. Those negotiations did not result in a settlement; the complaint that the employer refused to negotiate retroactive pay remained. Accordingly, an additional hearing was set for October 10, 1991, wherein a

discussion ensued about the composition of the Board whereupon the Board , on its own motion, reconstituted, as noted below, and scheduled hearings on December 9, 1991, and December 16, 1991.

The complaint (ULP) alleged in this case is the latest manifestation of a tortuous bargaining history over the past three years during which time the parties have been unable to reach a negotiated contract settlement. At issue is CEOPA's complaint that the employer refuses and has refused to bargain over retroactivity for pay dating into a prior fiscal year(s). The complaint now before the Board also alleges that the employer's bargaining history has been regressive, represents withdrawal of offers previously made, and is discriminatory against employees in the unit for filing a prior complaint with and testifying before the Board, in violation of RSA 273-A:5, I, (a), (d), (e), and (g).

Bargaining for a successor contract has continued since before the expiration of the last agreement on June 30, 1989. After an exchange of written first proposals which included wage increases for the 1989/90 school year. The parties engaged in mediation and fact finding without reaching agreement in 1989. The returned to mediation in 1990, for the 1989-90 contract, again without success. The Association petitioned for a second fact finding. The employer refused, saying it did not believe it was obligated to do so. Unfair practice charges were filed and the employer was ordered to participate in fact finding (Decision No. 90-48). CEOPA has alleged that this caused an unnecessary delay in negotiations of approximately six month and that the employer not only submitted no written materials at the fact finding on July 6, 1990, but, also withdrew its prior offer which had involved retroactively for the 1989-1990 school year. Given the additional modifications involving the steps of the wage schedule, the employer's overall package, during the second round of mediation, amounted to approximately seven (7%) percent. By October 2, 1990, the parties were again bargaining at which time the employer advised that there would be no increases for the 1989-90 school year and that the 4% offer for that year had been withdrawn. It was also on October 2, 1990, when negotiator(s) for the employer said that there would be "not one penny of retroactivity until a contract is signed." A third fact finding was held in 1991, after the filing date of the complaint (ULP). Neither it nor the Board directed negotiations (June 27, 1991, Decision No. 91-44) resulted in settlement. Meanwhile, CEOPA complains that the employer has agreed to retroactivity in bargaining with employees from another unit but acknowledges that it was not of multi-year duration.

Board negotiators appear to have raised retroactivity as an issue to CEOPA on or about May 25, 1990. (Board Exhibit No. 1) Testimony indicated that retroactivity for the 1989-90 school year would be "a problem" after the close of the fiscal year on June 30th, especially because a vote of seven, instead of five, members of the board of the Concord School District would be required according to Section 355:13 of its charter (Assn. Exhibit No. 14) [Department of Revenue Administration regulations (Section 510.07) contemplate retroactive appropriations for such purposes. (Assn. Exhibit No. 15)]. By the time of the July 6, 1990 fact finding, estimated to have lasted twenty minutes by one witness, the employer had withdrawn the 4% offer for 1989-90. The employer has taken the position that unencumbered funds, as of June 30th each year, lapse to offset the tax rate according to provisions in Chapter 5 of the New Hampshire Financial Handbook (Board Exhibit No. 3).

Board negotiations also claim that retroactivity was possible in other units which either settled before the expiration of the current agreement or within a few months thereafter was the case with Concord Union School District Aides Association (CUSDAA) and with the teachers. Alternatively, the Board cited an occasion, on May 25, 1990, when the Association placed an offer on the table and withdrew it and collected copies when it was not accepted. (Board Exhibit No. 1) There was evidence both that Board negotiators felt the economic climate

would not support an affirmative vote on some CEOPA proposals as well as times when CEOPA proposals would not be taken back because they were too far beyond pre-set negotiating authority or guidelines. Other than its proposals to the fact finder in April of 1991, the Board has attempted to maintain a posture of only being willing to negotiate retroactivity back to the beginning of the fiscal year in which the settlement is to be reached. [It is noted that the Board position to the fact finder on April 27, 1991, still called for a 4% increase for the 1989-90 school year (Assn. Exhibit No. 7) but was later described as an "oversight" by a Board witness.] Notwithstanding what have been described herein as accepted procedures for authorizing retroactive salary payments, Board negotiators said that a 4% proposal for either 1989-90 or 1990-91 would not now be taken back for a vote because it exceeded bargaining authority. This is exactly what happened on October 2, 1990; the negotiator declined to take back an Association proposal involving retroactivity.

FINDINGS OF FACT

1. The Concord Educational Office Personnel Association (CEOPA) is the certified bargaining agent for secretarial and clerical personnel employed by the Concord School Board (employer).

2. The parties commenced bargaining for a successor collective bargaining agreement before the expiration of the last agreement on June 30, 1989. To date, no settlement has been reached in those negotiations.

3. Since that bargaining commenced, there have been numerous negotiations meetings, several mediation sessions, and three fact findings on July 19, 1989; July 6, 1990; and April 17, 1991, the 1990 hearing having been ordered by the PELRB, having lasted "about twenty minutes", and having resulted in no written presentations by the employer because the employer took the position that neither conditions nor its position had changed from 1989.

4. On or about May 25, 1990, Board negotiators told Association negotiators that retroactivity would be "a problem", especially if a agreement could not be reached before the end of the fiscal year on June 30th.

5. At a fact finding held July 6, 1990, per order of the PELRB, Association negotiators were told that the wage offer for 1989-90 had been withdrawn by Board negotiators. Board negotiators presented no written materials to the fact finder.

6. With the exception of the Board's position to the fact finder on April 17, 1991 (described by a Board witness as an "oversight"), all Board proposals on and after the July 6, 1990 fact finding have involved only bargaining for the then current fiscal year with retroactivity, in some but not all instances, possible dating back to the prior July 1st.

7. On or about October 2, 1990, a Board negotiator told CEOPA negotiators that there would be "not one penny of retroactivity until a contract is signed." Notwithstanding that comment, bargaining unit employees entitled to step increases due to service longevity have received those increases from 1988-89 to 1989-90, 1990-91, and 1991-92 if they have not previously attained the top of their scale.

8. On or about October 2, 1990, a Board negotiator declined to take an Association wage proposal, involving retroactivity for the 1989-90 school year, back to the Board for consideration, approval or rejection.

9. All there fact finding reports have recommended settlements dating to the first year (1989-90) during which there was no negotiated agreement, i.e., they have all recommended retroactivity.

10. Since rejection of retroactivity in July of 1990, Board negotiators have been willing to negotiate multi-year contracts but only for the current and future fiscal years, i.e., no retroactivity dating back into a prior fiscal year(s).

11. During the course of negotiations discussed herein, the Board has reached settlements with other bargaining units involving retroactivity, i.e., the Concord Union School District Aides Association (CUSDAA) bargaining unit, involving some five months of retroactivity.

DECISION AND ORDER

The history of negotiations in this case has been one of attrition, not of achievement. There is a conspicuous lack of evidence that either side has really attempted to reach settlement since bargaining started three years ago. While these parties have a long history and much experience with the bargaining process, the constant bickering in this case is symptomatic of neophytes. The avowed purpose of RSA 273-A:1 is "to foster harmonious and cooperative relations between public employers and their employees..." The parties have successfully eluded this mandate throughout these negotiations. If they are ever to reach agreement on a successor contract, this must stop! Repeated trips to this Board can only serve to perpetuate the hard feelings which already are and have been evident. This Board can provide short term answers to specific issues, such as allegations of unfair practices. It cannot control either the ultimate contents of the contract or the attitude of the parties. Only the parties themselves can do that. They are urged to give these matters their utmost priority.

On the issue of short term answers, noted above, this Board finds that the employer violated RSA 273-A:5, I (e) by the manner in which it engaged in fact finding on or about July 6, 1990. Without presenting written materials, new facts as they might have been or as the employer's negotiators might have known them, and/or additional justification, there is no reasonable expectation that a second fact finder would make any findings substantially different that the first fact finder. That is exactly what happened. Given that the employer had already exhibited an unwillingness to settle on the basis of the July 19, 1989 fact finding, its oral "conditions have not changed" presentation to the fact finder without documentation in 1990 was neither a good faith participation in the fact finding process nor in compliance with the obligation to bargain in good faith found in RSA 273-A:3, I and RSA 273-A:5, I (e), and (g).

It was also a violation of RSA 273-A:5, I (e) for the employer's negotiator to have refused to take a CEOPA offer back for a vote. What appears to have been the objectionable portion of that offer was its provisions relating to retroactivity. As an element of wages, retroactivity must be bargained when a demand is made therefor. This is not to say that either side cannot maintain its position to impasse. RSA 273-A:3, I specifically provides that "the obligation to negotiate in good faith shall not compel either party to agree to a proposal

or to make a concession." The language protects either party from being compelled to agree to a proposal; it does not insulate either party from the need to take a proposal back to its constituents to see if their sentiments, whether from management or labor, have mellowed to the point of acceptability which may nor may not be beyond the known areas of authority previously conveyed to the negotiator(s). Negotiators must be vested with sufficient authority to negotiate in good faith and to be able to make proposals and counter-proposals. They, likewise, have the responsibility to take proposals to their principals for evaluation, approval or rejection. To the extent this did not occur in this case, we find a violation of RSA A-5:I (e). Notwithstanding this finding, there is nothing to preclude the voted rejection of such a proposal once made. The party making the proposal and seeking the vote of the opposite side must be and is presumed to be aware of this risk.

Having found the foregoing violations of RSA A:5 I (e), part of our remedy will be to order the parties back to bargaining. That prompts this Board to observe that evidence presented in the hearing clearly supports the proposition that retroactive wage settlements can be made. This was supported both by the Department of Revenue Administration Rule 510.07 as well as the Charter of the Concord Union School District, Sections 355:13 and 355:14. We cannot speak to whether the ultimate settlement will contain retroactivity; however, we do find that it must be negotiated.

There is a strong public policy purpose in encouraging the parties to negotiate in good faith under RSA 273-A:1 (Statement of Policy), 273-A:3 1 (Obligation to Bargain) and 273-A:5 1 (e) and 2 (d) (Improper refusal to bargain). That policy is woven into the fabric of RSA 273-A when Section 12 speaks to the "Resolution of Disputes" and the utilization of mediators and/or fact finders. The parties in this case have demonstrated their awareness of the availability and utilization of this assistance. Once the negotiation, mediation, fact finding and approval by the legislative body cycle has been completed under RSA 273-A:12 and, due to lack of settlement, the parties commence that cycle once again at the negotiation stage, neither side may rely on prior settlement offers of the other in the new cycle of bargaining. To be sure, the prior bargaining efforts may signal where the areas of compromise might be found, but those prior areas of settlement or compromise are not "binding" or "tentatively agreed" between the parties until renegotiated in the current cycle of bargaining. In this case, this means that when the bargaining cycle is re-commenced, any prior reliance on settlement provisions relating to retroactivity start "from scratch." Neither side can presume of the other that they are necessarily returning to prior mediation, fact finding, or approval by the legislative body positions, although this may be the case if the parties elect to make it so. RSA 273-A:12 IV provides that "negotiations shall be reopened" if the impasse is not resolved following the action of the legislative body. Inasmuch as this reopening of negotiations may be in whole or in part, it is within the authority of either party to return to "ground zero" relative to positions it had taken earlier and which were modified in the course of earlier bargaining, the history of which is no longer binding on the parties.

As for the allegations of violations of RSA 273-A:5 I, (a) and (d), we dismiss those charges. There is insufficient nexus to show that the filing of the complaint (ULP) which resulted in the referenced Decision No. 90-48 in June of 1990 influenced the employer's proposals or attitudes towards bargaining. The complaint was dated April 3, 1990. Management announced "problems" with retroactivity at the May 25, 1990, meeting but was still willing to consider it up to the end of the fiscal year.

By way of remedy we order the following:

1. The refusal to bargain the subject of retroactivity of wages was violative of RSA 273-A:5 I (e); therefore, the parties are directed that it is a

mandatory subject of bargaining and must be bargained if raised by either side.

2. The Board's conduct at the July 6, 1990 fact finding violated RSA 273-A:5 I (e) and (g); therefore, the Board is directed to reimburse CEOPA for its share of expenses paid to the fact finder for his services relative to that proceeding.

3. The parties are directed to recommence negotiations forthwith at a mutually acceptable schedule and to continue to negotiate for a period of sixty (60) days, or until settlement is reached, on that schedule.

4. If the parties do not achieve settlement within the foregoing sixty (60) day period, they are directed to negotiate at least twelve (12) hours per weekend (between 7:00 a.m. on Saturday and 7:00 p.m. on Sunday) each weekend thereafter (in addition to any times they may elect to negotiate during the week) until they reach settlement.

5. The parties are directed to file monthly reports with the Board (30, 60, 90, etc. days from the date of this decision) of their progress in negotiations.

So ordered.

Signed this 16th day of March, 1992.

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and Richard E. Molan present and voting.