State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE Complainant v. STATE OF NEW HAMPSHIRE and JUDD GREGG, GOVERNOR Respondent	CASE NO. S-0384:1 DECISION NO. 92-50

APPEARANCES

Representing State Employees' Association:

Christopher Henchey, Chief Negotiator

Representing State of New Hampshire & Governor Judd Gregg:

Stephen Judge, Esq., Counsel

Also appearing:

Thomas F. Manning, Manager Employee Relations
Thomas F. Hardiman, State Employees' Association

BACKGROUND

On January 27, 1992, the State Employees' Association of New Hampshire, Inc., SEIU Local 1984, filed unfair labor practice charges against the State of New Hampshire and Governor Judd Gregg alleging violations of RSA 273-A:5 I, (a), (e), (h) and (i). On that same date, it also filed a Motion for an Order to Cease and Desist. The State filed its answer on February 11, 1992. The Motion for an Order to Cease and Desist was set for hearing and heard by the Board on February 13, 1992. An Order to Cease and Desist was issued February 20, 1992 (Decision No. 92-32). Thereafter, the State filed a Motion to Stay the Cease and Desist Order and a Motion for Reconsideration on February 25, 1992. Those

two motions and the pending unfair labor practice charge were consolidated for hearing and heard by the Board on March 3, 1992.

FINDINGS OF FACT

1. The State Employees' Association of New Hampshire, Inc., (SEA) is the duly certified bargaining agent of employees employed by the State of New Hampshire.

2. The State of New Hampshire (State) is a public employer as defined by RSA 273-A:1 X and Judd Gregg, as Governor of the State of New Hampshire is the chief executive officer of the State who, in that capacity, is responsible for conducting labor relations on behalf of the State as a public employer.

3. The parties, at all times pertinent to the filing of unfair labor practice charges, a Motion for an Order to Cease and Desist, the issuance of an Order to Cease and Desist, a Motion to Stay the Cease and Desist Order and a Motion for Reconsideration in this case, have been bargaining for a successor collective bargaining agreement. They have engaged in pre fact-finding mediation, fact finding, post fact-finding mediation and are awaiting a second fact finding session. During the pendency of these disputes resolution procedures, as set forth in RSA 273-A:12, contract benefits have been held to the status quo, including the status quo of health insurance benefits for state employees as defined in Article 19.8 of their 1989-91 collective bargaining agreement.

4. State employee health insurance benefits remain a topic over which the parties remain at impasse in their current collective bargaining efforts. These benefits have been the subject of negotiations at all levels of the impasse, namely, pre-fact finding mediation, mediation, fact finding and post fact finding mediation.

5. Negotiators on behalf of the State, as the employer, work for and/or under the directives, supervision, control and guidance of the Governor.

6. There is no dispute between the parties that the negotiations process is continuing under the statute. SEA contests the State's position that the on-going nature of negotiations ipso facto eliminates any possibility of a violation of the obligation to

to bargain found at RSA 273-A:3 and RSA 273-A:5, I, (e).

7. During the pendency of negotiations, Governor Gregg appeared before the Executive Departments and Administrative Committee of the New Hampshire House of Representatives on January 22, 1992 regarding HB 1456 and supported a change to RSA 21 I:30. Governor Gregg didn't offer an amendment to HB 1456 since he was incapable of doing so because he is not a member of the New Hampshire House of Representatives. The proposal he supported would have repealed RSA 273 21-I:30 and replaced it with the following:

> "Notwithstanding any other law, rule or agreement to the contrary the State shall pay, within the limits of the funds appropriated at each legislative session, a premium toward a group health plan for each state employee, his spouse and his fully-dependent children, if any, and each retirement employee, as defined in paragraph II of this section, and his spouse. The group health plan shall include a comprehensive per person annual deductible of not less than two hundred fifty dollars and a per person annual co-payment of not less than twenty percent of the next two thousand dollars of expenses beyond the deductible. The state may, at its sole discretion, insure as much of the group health plan as it deems prudent. Funds appropriated for this purpose shall not be transferred or used for any other purpose."

8. On January 22, 1992, Governor Gregg issued or caused to be issued a press release which provided, in part, that the "alternative amendment" to HB 1456-FN which he supported "would require a $250 per person annual deductible and employee co-payments of 20% of the next $2,000 of health care expenses in excess of the deductible. The total out-of-pocket health care expenses per employee would be limited to $650 for single coverage, $1,300 for two-person membership and $1,700 for family membership. The release continued, "Gregg stated; 'Although we have been unsuccessful to date, we will continue to attempt to negotiate a reasonable plan for employer cost sharing of health insurance. <u>This legislation would assure an appropriate result</u>.'" (Emphasis added)

9. On January 22, 1992, Governor Gregg, sent a letter to each member of the New Hampshire House of Representatives and Senate making reference to the plan "which would provide for employee cost sharing comprised of a $250 deductible and co-payments of 20% of additional health care expenses up to an annual maximum amount." He described this as "My proposal plan..." His letter further provided: (Emphasis added)

> While we have been unsuccessful to date, we will attempt to negotiate a reasonable plan for employee cost sharing of health insurance. Given that our chances for success are doubtful at best, legislation like that proposed in the current House Bill 1456-FN, or my alternative proposal, may be necessary to assure an appropriate result.
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> * * *
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> Please join with me...by supporting this type of legislation (Emphasis added)

10. Health insurance is a "term and condition" of employment" under RSA 273-A:1, XI, RSA 273-A:3 I, and RSA 273-A:9 I, and, as such, is a mandatory subject of bargaining. Professional Firefighters of Keene (Decision No. 91-36, June 11, 1991).

11. The actions of Governor Gregg, as of the date of these proceedings before the Board, did not invalidate the collective bargaining agreement or any provision of that agreement. Therefore, we find no violation of RSA 273-A:5 I (h) or (i).

12. This Board issued a Cease and Desist order on February 20, 1992 (Decision 92-32) directing the public employer and its agents "to cease and desist from the implementation of any changes in or modifications to the overall health insurance program as it currently exists for state employees, whether by decree, encouraging changes outside the collective process, or other forms of executive action, without having negotiated the terms of said changes in or modifications to said health insurance benefits with the duly recognized exclusive bargaining representative of its employees."

DECISION AND ORDER

We direct our attention to that portion of the SEA complaint which alleges a violation of RSA 273-A:5, I (e), refusal to negotiate in good faith. Implicit in this process is the legislative mandate that "the Board shall have primary jurisdiction of all violations of RSA 273-A:5..." We honor that mandate in our analysis of the obligation to bargain found at RSA 273-A;3. Statutorily, 273-A:3 defines "good faith negotiation[s]" as involving "meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession."

After examining the "in an effort to reach agreement" language of RSA 273-A:3, we developed concerns about what appears to have been an attack on two fronts by the employer, one at the bargaining table and another at the legislature. "If it is impossible effectively to distinguish economic from political pressure groups in terms of their ends, and it is desirable to free the political process from the influence of all pressure groups, then effective lobbying and petitioning should be as illegal as strikes." Burton and Krider, The Role and Consequences of Strikes by Public Employees, 79 Yale L. Jr. 424-432 (1970).

We must question whether the attack on two fronts, economic (bargaining table) and political (legislature), is in the best interest of the obligation to bargain in good faith as found in RSA 273-A:3. We conclude that it is not. This conclusion is based on repeated analysis of collective bargaining decisions which affirm our reasoning, to wit:

> "The [National Labor Relations] act, it is true, does not require that the parties agree [as is the case with RSA 273-A:3, I]; but it does require that they negotiate in good faith with the view of reaching an agreement, if possible ..." (Emphasis added).
>
> N.L.R.B. v. Highland Park Mfg. Co., 110 F.2d 632, 637 (1940)

Two public sector cases are equally as compelling.

> "Good faith bargaining is not satisfied by a unilateral determination of what is right or even of what is lawful. It still requires an honest attempt to reach agreement within the confines of legal requirements." (Emphasis added)

University of Oregon Medical School and the State Personnel Division, Ore. PERB Dec. No. C-70 (1972)

"The duty to negotiate in good faith has been defined as an obligation to participate actively in deliberations so as to indicate a present intention to find a basis for agreement. Not only must the employer have an open mind and a sincere desire to reach an agreement but a sincere effort must be made to reach a common ground." (Emphasis added)

West Hartford Ed. Assn v. DeCourvey, 295 A.2d 526 (1972).

We find that the conduct complained of in this case does not comport with the foregoing guidance. The "second front" opened with the legislature undermines the obligation to bargain as found in RSA 273-A:3 and 273-A:5, I (e). This undermining is further compounded by the "chances for success are doubtful," "would assure an appropriate result," and "by supporting this type of legislation" phrases which suggest less than full commitment to the collective bargaining process and an anticipated reliance on an alternative means of unilaterally achieving the employer's position.

Our analysis of this case has been under RSA 273-A. We have not (nor did our Cease and Desist Order of February 20, 1992) attempted to constrain or inhibit the Governor's authority to be the chief executive officer of the state; we have attempted to interpret the role he should be performing as the ultimate approval authority in the Executive Department relative to contract negotiations and the contents of any agreement which is concluded. In this respect, the Governor stands in the shoes of a "public employer" as defined by RSA 273-A:1, XI and faces the same obligations and responsibilities as any other public employer under the statute. Thus, he, too, must adhere to the obligation to bargain in good faith. Were he not to have that obligation and responsibility, this Board could expect no more than superficial or "surface" bargaining that could have little chance of success and would be inconsistent with the mandates of RSA 273-A:3.

This decision is in no way intended to repudiate earlier holdings of this Board relative to legislative authority. We reiterate our belief in the authority of the legislature to pass statutes, e.g. SEA v. State, (Decision 82-53, July 27, 1982); however, this is not a case involving the legislative branch and the passage of statutes. It is, instead, an executive branch case attempting to define the role of the chief executive relative to the duty to bargain in good faith. Likewise, we distinguish this

case from SEA v. Meldrim Thompson (Decision No. 78-52, January 3, 1979) wherein then Governor Thompson was exercising his "constitutional prerogatives" by explaining his position on a veto, seeking to have it sustained, at the conclusion of the bargaining process, not opening a "second front" during that process. He was not acting as a bargaining advocate in the course of operating a backup means of prevailing on a position outside the collective bargaining process.

On this analysis, we conclude that the complained of conduct constituted a violation of RSA 273-A:5 I (e). By way of remedy this Board directs:

1. That the State, its officers and agents, cease and desist the conduct complained of to the extent that conduct constitutes a violation of RSA 273-A:5 I (e) as explained herein.

2. That the unfair labor practice charges, to the extent they allege violations of sections other than RSA 273-A:5, I (e), are DISMISSED.

3. That, consistent with the explanations contained herein, its Cease and Desist Order of February 20, 1992 is made permanent until the conclusion of the current round of bargaining, i.e., until a successor collective bargaining agreement has been negotiated, ratified, approved, funded and signed.

4. The State's Motion to Stay the Cease and Desist Order of February 25, 1992 is DENIED.

5. The State's Motion for Reconsideration of February 25, 1992 relative to earlier Cease and Desist proceedings is DENIED.

So ordered.

Signed this 12th day of March, 1992.

Jack Buckley

JACK BUCKLEY
Alternate Chairman

Chairman Jack Buckley presiding. Member E. Vincent Hall concurring. Member Seymour Osman dissenting.