



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION	:	
LOCAL 1984	:	
	:	
	:	
Petitioner	:	
	:	
v.	:	CASE NO. S-0399:1
	:	
COOS COUNTY DEPARTMENT OF	:	DECISION NO. 1998-015
CORRECTIONS	:	
	:	
Respondent	:	

APPEARANCES

Representing State Employees Association:

Theresa DeNafio Donovan, Esq.

Representing Coos County Department of Corrections:

Thomas Flygare, Esq.

Also appearing:

- Suzanne Collins, Coos County
- Norman A. Brown, Coos County
- Stephen J. McCormick, State Employees Association
- Robert Brown, Coos County
- Scott Grassetto, Coos County
- Brendon K. McKeage, Coos County
- Craig Hamelin, Coos County
- Daniel P. Ward, Merrimack County
- Heidi Silveira, State Employees Association
- Richard A. Grenier, Belknap County
- Dennis Martino, State Employees Association
- Christine Paquette, State Employees Association

BACKGROUND

On November 5, 1997, SEA Local 1984 filed a petition to certify a bargaining unit for Coos County correctional employees. The County filed objections on November 18, 1997, and a hearing commenced on December 17, 1997. A question arose regarding the validity of subpoenas issued by a justice of the peace to witnesses for the Association. On the day of the hearing, the Association filed unfair labor practice charges pursuant to RSA 273-A:5 I (b) and (g) when the County insisted that their employees take personal time to appear as witnesses. The hearing of December 17, 1997, was continued at the request of the parties so that both the subpoena question and the related ULP charges, could be briefed and decided in this one proceeding. A request for an extension of the time for submitting briefs was granted and briefs were received on January 15, 1998.

FINDINGS OF FACT

1. Coos County is a "public employer" within the meaning of RSA 273-A:1 X.
2. State Employees Association Local 1984 seeks to become the exclusive bargaining representative for employees who are correctional officers employed by Coos County.
3. The parties stipulated that certain Coos County correctional employees were desired as witnesses by State Employees Association at the certification hearing of December 17, 1998 and so were issued subpoenas by a justice of the peace.
4. It was stipulated that the County told the employees who had been issued subpoenas that they would be required to utilize their personal leave time in order to attend the hearing.
5. It was stipulated that the County employees attended the hearing knowing that they would be required to charge the time against their personal time.

6. RSA 273-A:6 IV reads:

The board shall have the power to compel the attendance of witnesses and the production of documents by the issuance of subpoenas, and to take testimony under oath, as provided in RSA 516, and may delegate such powers to any persons it may appoint.

7. The PELRB has adopted rules pursuant to RSA 273-A:2 VI and RSA 541-A, the Administrative Procedures Act. Among these rules is Rule Pub. 203.01 which deals with witnesses and subpoenas. It reads:

(a) Upon request therefor or on his own motion, the hearing examiner may compel the attendance and deposition of witnesses and the production of documents by issuing writs and subpoenas in the name of the board under RSA 273-A:6, IV. The hearing examiner shall administer oaths to witnesses in the manner provided in 515:19 (sic) and 20. In all matters pertaining to witnesses the provisions of RSA 516 shall apply.

(b) Any party may file a written application for subpoena requesting the board to issue a subpoena. The application shall identify the witnesses or documents sought and shall set out a clear and concise statement of the reason for making the application. Witnesses subpoenaed by the board shall be allowed the same fees as those paid to witnesses in the superior court. Fees shall be borne by the party requesting the subpoena or as the board may otherwise direct.

(c) No employee serving as witness or as counsel at a hearing shall suffer any loss of pay or benefits because of his attendance; but any pay to which he may be entitled to under this paragraph may be reduced by the amount of any witness fee he may receive.

8. RSA 516 referred to in RSA 273-A:6 IV and in Rule

Pub 203.01 (a), (See Finding No. 7), is the general long established statutory authority regarding subpoenas and witnesses. RSA 516:3 reads:

Any justice may issue such writs for witnesses, in cases pending before himself or any other justice, in any case in any court, in all matters before the general court, or before auditors, referees, arbitrators or commissioners.

DECISION AND ORDER

The County has raised a question to be answered preliminary to addressing the Association's unfair labor practice charges. The County questions the sufficiency of the Association's subpoenas issued to witnesses by a justice of the peace to appear before the PELRB. In essence, the County argues that the PELRB has sole and exclusive authority, under RSA 273-A:6 IV, to subpoena witnesses before the Board.

The statutory reference to RSA 516 in RSA 273-A:6 IV is echoed in Rule Pub 203.01. (See Findings 6 and 7.) Essentially, the parties have asked for an interpretation of statute and rule and how they are to be read in relation to RSA 516. Looking at the plain meaning, the wording of RSA 273-A:6 IV does not suggest an exclusive authority to issue subpoenas. Reading the rule, the last sentence of Rule Pub 203.01 (a), taken on its face, is key. The rule in question states that, in "all" matters pertaining to witnesses, RSA 516 shall apply. There is no qualifier or word of limitation, such as "other," to suggest an exception. The rule is to be read as explaining the statute. Therefore, the wordings of the rule and the statute indicate that they are to be read as harmonious with RSA 516.

If proper in other ways, the subpoenas issued by a justice of the peace for the Association's witnesses are to be honored as the provisions on witnesses stated in RSA 516 are incorporated into RSA 273-A:6 by reference. Accordingly, the Association may cause to issue subpoenas by justices of the peace for witnesses to appear at PELRB hearings, not because those employees have an interest in the outcome of the matter, but because those witnesses are necessary to provide testimony for the record of the case.

The Association has first charged a violation of RSA 273-A:5 I (b), domination or interference in the formation or administration of any employee organization. An employer deterring witnesses from testifying against its position at a hearing which is part of the process for certifying a bargaining unit is indeed interference with formation of the bargaining unit. For a variety of reasons, the use of personal time to attend these hearings may be a deterrence, an obstacle to overcome and, thus interference. But that is not enough for a ruling for the petitioner. When the charge is made under RSA 273-A:5 I (a) through (d), illegal motivation is an essential element to be pled and proven by the complainant. *Appeal of Sullivan County*, 141 NH 82, 88 and 89 (1996). In the present case, intent has not been pled by the Association. There is no unfair labor practice under RSA 273-A:5 I (b).

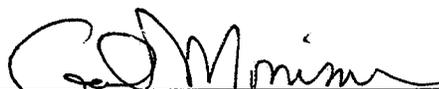
Second, the Association has charged a violation of RSA 273-A:5 I (g), failure to comply with the statute governing public employee labor relations and rules adopted thereunder. Rule Pub 203.01, a rule adopted under the statute, deals with witnesses who appear before the Public Employee Labor Relations Board. It states, in paragraph (c), that "[n]o employee serving as a witness or as counsel at a hearing shall suffer any loss of pay or benefits because of his attendance,..."

The question of employer policies requiring the use of annual time by employees subpoenaed as witnesses has been raised from time to time. It is rarely a matter for decision. It is noted that the question at hand was raised during a 1991 hearing, the decision from which was subsequently appealed. *Appeal of Newport*, 140 N.H. 343 (1995). The first five pages of the hearing transcript capture the discussion of such an employer policy. *Id.*, N.H. Supreme Court No. 92-000, Ex. No. 8. Posthearing, the requirement that witness employees use vacation or personal time was addressed on behalf of the Board in a letter, dated June 8, 1992, from Parker Denaco, Executive Director, to Daniel O'Neil, Newport Town Manager. The letter read, in part, "If either [witness were scheduled to work] during that time when they traveled to or from or during the course of giving testimony and were required to take vacation time or uncompensated time in order to do so, such action would be inappropriate under RSA 273-A:5 I (d)." Though not a part of the decision, the Board did not look favorably on the position now taken by the County.

A published rule of this Board has been violated. Arguments that no unfair labor practice has been committed are not convincing. Because the public employer has adopted a policy contrary to Rule Pub 203.01 (c), witness employees enjoy a lesser amount of a benefit, personal leave, when they attend a hearing under subpoena. Attending such a hearing is an employment related activity for the County's witnesses and for the Association's witnesses. The County's error constitutes an unfair labor practice under RSA 273-A:5 I (g). The County shall restore the witness employees' personal leave time, a benefit reduced as a result of attending the hearing of December 17, 1997. The County shall cease and desist from the practice of requiring employees who are witnesses before the PELRB to utilize personal leave time.

So ordered.

Signed this 26th day of February, 1998.



Gail C. Morrison
Hearing Officer