State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

ROCHESTER FEDERATION OF TEACHERS, LOCAL 3607, AFT, AFL-CIO Complainant	:	
v.	:	CASE NOS. T-0338:19 T-0338:20
ROCHESTER SCHOOL DISTRICT Respondent	:	DECISION NO. 1999-040

APPEARANCES

Representing Rochester Federation of Teachers, Local 3607:

Christopher Callaci, Staff Representative

Representing Rochester School District:

Gary W. Wulf, Chief Negotiator

Also appearing:

Raymond Yeagley, Superintendent
Liz Mantelli, Rochester School Department
George Neagle, Rochester School Department
David Foote, Rochester Federation of Teachers
Jennifer Strubinger, Rochester Federation of Teachers

Background

The Rochester Federation of Teachers, Local 3607, American Federation of Teachers, AFL-CIO (Union) filed unfair labor practice (ULP) charges on July 22, 1998 against the Rochester School District (District) alleging violations of RSA 273-A:5 I

(e) in the form of a continuing violation resulting from a unilateral implementation of an academic block schedule without negotiations and without recognizing certain contractual provisions relating to duty-free preparation time. The District filed its answer on July 29, 1998 after which this matter was heard by the PELRB on October 8, 1998, resulting in an Order to Negotiate memorialized in Decision No. 1998-087 (October 15, 1998). In the meantime, the Union filed another ULP on September 29, 1998 alleging violations of RSA 273-A:5 I (e) resulting from a refusal to bargain on the block schedule which was unilaterally implemented for the 1998-99 school year. The District filed its answer to this second set of charges on October 13, 1998. On November 18, 1998, the Union gave notice pursuant to paragraph 3 (d) of Decision No. 1998-087 that it wanted Case No. T-0338:19 redocketed for hearing. Thereafter, Case Nos. T-0338:19 and T-0338:20 were consolidated for hearings which occurred on December 10, 1998 and February 18, 1999. The last of the post-hearing briefs was received on March 18, 1999 at which time the record was closed.

FINDINGS OF FACT

1. The Rochester School District is a "public employer" of teachers and other personnel within the meaning of RSA 273-A:1 X.

2. The Rochester Federation of Teachers, Local 3607, AFT, is the duly certified bargaining agent for full-time and part-time professional employees of the District inclusive of but not limited to, teachers, department chairpersons, guidance counselors and various specialists.

3. During the times pertinent to the conduct complained of in this complaint, the Union and the District were parties' to a collective bargaining agreement for the period August 27, 1996 to August 31, 1999 (Joint Exhibit No. 1). Article VII of that document is entitled "Working Conditions," it includes the following:

> B. 5. The school day for the High School and Middle School teacher shall commence 15 minutes prior to the beginning of classes and shall conclude 30 minutes

after the end of the regular classes. The school day for the Elementary School teacher shall commence 15 minutes prior to the beginning of classes and the school day shall conclude 30 minutes after the end of regular classes, except that on days when the teacher is assigned to morning or afternoon duties, this time may be extended to allow coverage of said duties.

* * * *

D. *Duty Free Lunch Period*

Each professional shall be provided with a lunch period, free of all duties, for a duration of no less than 30 minutes.

* * * *

R. 3. High School teachers shall have one (1) duty-free period each day for planning and instructional preparation.

Article IX of the CBA contains the grievance procedure which concludes with final and binding arbitration (Level 5, item 5). It also provides that "the arbitrator shall not hear or have jurisdiction over the negotiations or terms of a successor agreement." (Level 5, item 8). Article IX, Section A defines a grievance, to wit:

> A grievance is a claim by a covered employee, a group of covered employees, and/or the Federation, that there has been a misinterpretation or violation of any provision or practice of this Agreement.

4. When the current CBA was signed on May 15, 1996 and during School Year 1996-97, the daily schedule at Spaulding High School consisted of eight (8) periods of 45 minutes each, such as had been the practice for the prior nine (9) years. (Union Exhibit No. 1) The school day was from 7:15 a.m. to 2:12 p.m. During

that same school year, the administration created a Block Scheduling Committee ("BSC") to consider implementing block schedules for School Year 1997-98. The BSC was not a creature of or associated with the Union. It contained no Union officers or stewards, per the testimony Jennifer Strubinger and now-principal Liz Mantelli.

5. On December 2, 1996, the BSC wrote a memo to "Spaulding High School Colleagues" about their proposal for a school day of four blocks for School Year 1997-98 consisting of (1) full block of 80 minutes for one semester, (2) half blocks of 80 minutes for one quarter, or (3) mini-blocks of 40 minutes for one year. These blocks went from 7:30 to 8:50 a.m. (sub-blocks 1 and 2), 9:00 to 10:25 a.m. (sub-blocks 3 and 4), 10:35 a.m. to 12:45 p.m. (mini-blocks 5,6 and 7), and from 12:55 to 2:15 p.m. (sub blocks 8 and 9). (Union Exhibit Nos. 2 and 6.) The "Spaulding High School Colleagues" were asked to vote on the proposal by the BSC which, if passed, would then be forwarded to the school board in the form of a recommendation. The Union was not consulted about and did not participate in this election process. The block scheduling proposed was presented to, considered and unanimously passed by the school board on January 14, 1997. (Exhibit No. 2 to ULP.)

6. The block schedule, basically as reflected in Union Exhibit No. 1 but not inclusive of all the details and proposals referenced in Union Exhibit No. 6, was implemented when the teachers returned for School Year 1997-98. This prompted the filing of a grievance which progressed to Level 4 of the grievance procedure, was heard and then decided and denied by the school board on January 23, 1998. (Exhibit 3 to ULP and Union Exhibit No. 7.) Thereafter, the grievance was submitted to arbitration, under the auspices of the American Arbitration Association. Arbitrator Richard G. Higgins rendered an award on July 20, 1998, which found that the District/Board "did violate Article VII, R.3 when it provided teachers at Spaulding High School with a forty (40) minute mini-block for preparation," less than the time provided in the first year of the CBA when each period was

45 minutes in length. (Joint Exhibit No. 2 and AAA Case No. 1139-000-207-98.) See also the testimony of twenty-year teacher David Foote who chaired the master scheduling committee in 1997 and, at hearing, verified the "old" lunch period of 45 minutes which was in effect "ever since 1979" when teacher hours were 7:30 a.m. to 2:12 p.m. On cross examination and on rebuttal, Foote explained that he has had a thirty minute lunch before and after block scheduling and that it was his experience that he received at least a 47 minute preparation period in accordance with the arbitration award, Joint Exhibit No. 2.)

7. George Neagle, deputy principal at the high school, testified that, in School Year 1997-98, he originally attempted to provide each teacher with an eighty (80) minute preparation block but that staffing would not permit it. He then tried a combination of 40 minutes and 80 minute preparation blocks but still had to rotate extra duties to create preparation time. After implementing these measures and alternating 40 minutes and 80 minute preparation times from one semester to another, he estimated 80% to 85% of the impacted teachers were receiving the contractually guaranteed preparation time or more. On the second day of hearing, he testified that his adjustments to the schedule to guarantee preparation time caused the average preparation time to increase from 40 minutes to 60 minutes in School Year 1997-98. In School Year 1998-99, virtually all teachers had the arbitrated amount of 47 minutes of preparation time except for two teachers, one of whom requested two duties back-to-back and another who taught 5 subjects one semester and had teaching time adjusted the following semester. During School Year 1998-99, the 30 minute lunch period was honored for all teachers without averaging.

8. When teachers returned to school for School Year 1998-99, they found still another scheme of block scheduling, namely, 4 blocks with two forty (40) minute segments in block #1, two forty minute segments in block #2, four thirty (30) minute segments in block #3, and two forty minute segments in block #4 (Union Exhibit No. 3), as is now the subject of the ULP in Case No T-0338:20. Unlike the block schedule for

School Year 1997-98, which had been refined to provide either a 40 minute or 80 minute preparation period, in School Year 1998-99 preparation times varied from 47, 52, 60, 80, 90, and 120 minutes (for department heads) according to those instances where there was an agreement in the pleadings. The Union claims, and the District denies, that some teachers received School Year 1998-99 preparation time of less than 47 minutes, namely, 24, 30 or 40 minutes. Likewise, there were changes in lunch times allowed to teachers. In School Year 1997-98, the block schedule (Union Exhibit No. 2) contemplated a 40 minute lunch period. The School Year 1998-99 block schedule provides for a 30 minute lunch period. The contract language remains as stated in Finding No. 3, above.

9. High School Principal Elizabeth Mantelli testified that the block scheduling program was a product of an adverse accreditation visit and ensuing "probation" imposed by the Association of New England Schools and Colleges in 1995. As the result of continued adjustments to the block scheduling program, she testified that lunch times, teaching times and preparation times all changed between School Year 1997-98 and School Year 1998-99, but that there were no requests to bargain those changes. On January 13, 1997, the Rochester School Board accepted a "4 x 4 Semester Flex Block Schedule," apparently understood to have been the same as the faculty had voted to favor several weeks earlier. As early as September of 1997 there were complaints that this block schedule had not been implemented on the same basis as had been supported earlier by the faulty.

10. Raymond Yeagley has been superintendent for more than ten years and has traditionally attended all negotiating sessions. He testified that post-arbitration negotiations (Joint Exhibit No. 2, dated July 20, 1998) have included issues involving preparation time and that he has been willing to bargain impact of the block schedule, but that no agreement has been reached. (See Board Exhibit No. 5.) The current status of negotiations, over and above the block scheduling issues, is for a CBA to follow the expiration of the current agree-

ment on August 31, 1999.

11. As the result of the filing of Case No. T-0338:19, the parties appeared before the PELRB on October 8, 1998. That proceeding concluded with an Order to Negotiate from the PELRB (Decision No. 1998-087, October 15, 1998) which required the parties to:

> meet at least twice in the next thirty (30) days to conduct formal negotiations over daily dutyfree periods for planning and instructional preparation as reference in Article VII.R.3 of the collective bargain agreement. They shall also negotiate about other schedule changes caused by modifications made to insure that bargaining unit members have a preparation period of at least 47 minutes per day.

It also provided that:

> If neither party requests further hearing in this matter on or before November 19, 1998, it shall be administratively dismissed from the PELRB docket docket of cases.

12. The Union made such a request for further hearing on November 18, 1998 and further requested that the District's request for the appointment of a mediator, filed November 12, 1998, to assist with the bargaining directed in Decision No. 1998-087 be denied because the parties already have valid CBA (Joint Exhibit No. 1) and because that process "defies logic" in that it "would necessarily result in the perpetuation of the District's improper practices" while the mediation efforts were in progress. (Letter from Christopher Callaci to Parker Denaco, Executive Director, PELRB dated November 18, 1998.)

DECISION AND ORDER

The single and most compelling observation in this case is that the parties arrived at and signed a collective bargaining agreement for the period August 27, 1996 to August 31, 1999. All of the complained of conduct referenced in the ULP occurred

during this period, a period during which the mandates of the CBA were side stepped or minimized in order to achieve certain goals whose results may, and in certain instances did, conflict with the contract for periods of varying duration and which, for practical purposes, were basically remedied by the time this litigation was heard by the PELRB.

Even if the District were to assert "managerial policy" defenses under RSA 273-A:1 XI relative to topics within its "exclusive prerogative," such as its "functions, programs and methods," the obligation still remains to negotiate or re-open for negotiations, as would have been the case under the facts presented herein, "wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer." Translated to this case, this means that *contractually guaranteed* benefits, such as preparation time and lunch periods, must be observed in accordance with the contract. Likewise, topics protected under the "managerial policy" exceptions of RSA 273-A:1 XI are still subject to "impact bargaining" if the employer's unilateral actions have modified wages and benefits under an existing contract or *status quo* conditions.

On balance, the evidence convinces us that the District did not live up to its obligation to bargain, impact or otherwise, under RSA 273-A:3 and as explained in RSA 273-A:5 I (e). Two very cogent observations lead us to this conclusion: first, the composition of the Block Scheduling Committee (Finding No. 4) and, second, the unilaterally implemented block schedules at the commencement of School Year 1997-98 and School Year 1998-99, both of which were undefined and undisclosed to teachers when they closed school in June of the prior two academic years. (Finding Nos. 6 and 8.) Thus, we conclude there was at least a technical violation of RSA 273-A:5:I (e) on the part of the District when it unilaterally, and without contact with the Union, implemented previously undefined and not discussed block schedules at the commencement of School Year 1997-98 and School Year 1998-99, during a period when the Union had full rights as a duly certified bargaining agent under RSA 273-A:11. The concept of "exclusive representation" under RSA 273-A:11 not merely suggests, but mandates that public employers deal with certified bargaining representatives "exclusively and without challenge during the term of the collective bargaining agreement." This did not occur. The obligations imposed by RSA 273-A:11 cannot be

satisfied by an incomplete or partial plebiscite without input or participation by the certified bargaining agent.

Next, we turn to the issue of whether there was impermissible "direct dealing" between the District and bargaining unit members. In Fall Mountain Teachers Association, PELRB Decision No. 1997-118 (December 19, 1997), the alleged direct dealing was "aimed at urging employees to take certain actions" to amend a fact finder's report at district meeting. The PELRB expressed concern in that case where the discussions occurred on duty, on premises and where the employees involved were engaged in discussing *bona fide* school business with a member of the administration. Instructive to this case is our determination in Fall Mountain, *supra*, that "it is inappropriate for the administration to seek political support for a position which may vary from the position of the unit's bargaining agent by making direct contact with unit employees." The same principle applies in this case. As noted in Appeal of Franklin Education Association, 136 N.H. 332, 337 (1992), such actions "unlawfully shifted the balance of power guaranteed by RSA Chapter 273-A in favor of the school board."

Having made these findings, we now direct our attention to the issue of remedy. Other than directing the parties to bargain in good faith as the result of our finding these to have been a violation of RSA 273-A:5 I (e), above, for having made unilateral changes in working conditions without involving the duly constituted and certified bargaining agent, we find no need for a further remedy. Upon examination of the contract as well as the testimony which was offered, we find changes in the length of the school day (fifteen minutes' difference between 7:15 and 7:30 a.m. and three minutes difference between 2:12 and 2:15 p.m.), scattered deviations, at worst, from the 30 minute lunch break, and deviations in preparation time which, while departing from the 47 minutes awarded in the Higgins decision, on balance averaged more than this amount of time, to have been *de minimus*. These findings are supported by the Foote testimony in Finding No. 6 and the efforts and testimony of George Neagle as reflected in Finding No. 7.

Based on the testimony of witnesses for both sides, we are mindful that the parties are currently in negotiations for a successor collective bargaining agreement commencing September 1, 1999 and effective for whatever period they negotiate thereafter. We affirm our finding of a violation of RSA 273-A:5 I (e), direct

the parties to engage in good faith negotiations for their successor agreement, inclusive of the issues, complained of herein, and deny all other requests for relief. Finally, we do not vacate the employer's request for mediation (Finding No. 10) over these topics and general contract negotiations because help from any source which will assist in the ultimate resolution of a successor contract will be a welcomed assist to the parties.

So ordered.

Signed this 12th day of MAY, 1999.

JACK BUCKLEY
Chairman

By unanimous decision. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.