State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Department of Employment Security, State of New Hampshire Petitioner v. State Employees Association of New Hampshire, SEIU, Local 1984 Respondent	Case No. S-0306-1 Decision No. 2002-129 PETITION FOR DECLARATORY JUDGMENT

APPEARANCES

Representing the Department of Employment Security:

Charles, M. Bradley, Esq.

Representing the State Employees Association of New Hampshire:

Michael Reynolds, Esq., State Employees Association

Also appearing:

John J. Ratoff, Commissioner Department of Employment Security
Eric Scheiner, WNDS
Delroy Franklin, WNDS
Diana Ceresi, State Employees Association

BACKGROUND

John J. Ratoff, Commissioner of the New Hampshire Department of Employment Security, filed a Petition for Declaratory Judgment on August 9, 2002 seeking answers to four questions: (1) whether a modification petition must be filed in order to modify the composition of a bargaining unit, (2) what hearing process will the PELRB utilize to hear or "examine" that petition, especially if its effect will be to remove more than 1, 000 public, state employees from eligibility for union member-

ship, (3) will the Union or the Director of Personnel be ordered to provide notice of the modification petition to "each public employee and/or incumbent" who may be impacted by the petition, and (4) whether it is "a violation of the precedents of the PELRB and the New Hampshire Supreme Court to allow a mass [re-]classification of over 1,000 positions as confidential. The Union filed its answer and motion to dismiss on August 22, 2002.

On August 23, 2002, Commissioner Ratoff filed an Amendment to Pre-Hearing Statement and Reservation of Rights. By notice of August 28, 2002, hearing was set for September 11, 2002. The Union requested a continuance on August 30, 2002 which was granted with the hearing then being set forward to October 1, 2002. In the interim, Commissioner Ratoff filed (1) Objection to Motion to Dismiss, (2) Motion to Amend Petition for Declaratory Ruling and (3) an application for subpoena. On September 20, 2002, the Union filed (1) an objection to the application for subpoena (2) an amended motion to dismiss and (3) an objection to the petitioner's Motion to Amend Petition for Declaratory Ruling. On September 25, 2002, Commissioner Ratoff filed an Objection to Amend Motion to Dismiss. On September 26, 2002 each party filed their respective lists of witnesses, testimony and exhibits. This matter then proceeded to hearing before the PELRB on October 1, 2002.

At the conclusion of the October 1, 2002 hearing, the Board asked the parties to file post hearing briefs on or before October 21, 2002 on the issue of "whether RSA 273-A:9, I, II, III and/or IV created, or intended to create, an exclusive entity in the form of the office of the state negotiator [1] whose purpose it is to have the exclusive authority to administer and interpret the collective bargaining agreement between the state and its employees." Both briefs were timely filed on October 21, 2002.

FINDINGS OF FACT

These preliminary proceedings involve the petitioner's standing, or lack thereof, to bring this Petition for Declaratory Judgment. Thus, our findings are limited and narrowly construed as to that issue. We take notice of both the applicable statutory provisions, RSA 273-A:9, I, II, III and/or IV and the applicable administrative rule, PUB 206.01, which provides, in pertinent part:

> Any public employer, any public employee or any employee organization may petition the board under RSA 541-A for a ruling regarding the applicability of any statute within the jurisdiction of the board to enforce, or regarding any rule or order of the board...

We also take notice of Article V, Section 8.1 of the parties' current collective bargaining agreement for the period July 1, 2001 through June 30, 2003, which provides:

[1] The PELRB is cognizant of the "substantial amend[ments]" to RSA 273-A:9 referenced on page 8 of the petitioner's brief and is aware of the functions of the manager of employee relations. These distinctions aside, the essence of the issue posed is whether there is an intent to convey authority to persons or entities outside the provisions of RSA 273-A:9 such as to delegate responsibilities beyond what is stated therein.

5.8.1 Agency Fee: Any full-time employee who is not a member of the Association shall be required to pay a fee to the Association as a condition of employment in accordance with the following provisions:

a. This provision shall take effect only when the Association can demonstrate that the sum of its membership in all bargaining units is equal to 60% of the eligible full-time permanent employees in all bargaining units.

b. Employees who are exempt from the definition of employee contained in RSA 273-A or designated by the Employer as human resources employees shall not be counted as eligible bargaining unit employees and shall be exempt from the fee requirement.

c. The fee shall not exceed an amount that represents a prorated share of actual cost of negotiating and administering this Collective Bargaining Agreement.

d. The Employer shall refuse to enforce the fee requirement if the Employer does not agree that the Association has achieved the required level of membership or, if the Employer believes that the amount of the fee exceeds the prorated share of the actual cost of negotiating and administering the Collective Bargaining Agreement. As a remedy, the Association shall file an unfair labor practice charge against the Employer for breach of contract.

e. Any employee who is hired by the Employer on or after the effective date of this Agreement shall be required to become a member of or pay a fee to the Association as a condition of employment if the Association membership in the bargaining unit into which the employee is hired is equal to 50% or more of the eligible full-time employees in that bargaining unit.

> Determination of whether 50% Association membership exists in any bargaining unit shall be made by the parties at least thirty (30) days prior to the expiration date of the Agreement. The fee payments in which a 50% or greater Association membership is determined to exist shall be effective on the first payday following July 1st of that year and shall continue for the duration of the Agreement regardless of any change in the in the percentage of Association membership in those units.
>
> Notwithstanding provisions set forth above to the contrary, in the first year of this Agreement, the Association shall calculate the amount of the fee after an audit of its books no later than October 1, 2001 and the fee will be effective on the first pay day after confirmation of the fee by both parties. The fee shall be assessed on a prospective basis on employees hired on or after August 1, 2001 in accordance with the terms of this Agreement.

Finally, we take notice of attachments 4, 5, 6, and 8[2] to the petitioner's brief, namely: a letter from Thomas Manning, Director of Personnel, to Timothy J. Decker, President of SEIU Local 1984 dated August 2, 2002 explaining the calculations and resulting numbers involved in achieving a 60% membership status by the Union; a letter from Timothy J. Decker to Thomas F. Manning dated August 6, 2002 acknowledging the "target number" calculated by Thomas Manning as being required to achieve 60% membership status and asserting that that standard had been met and exceeded; and a letter from Thomas Manning to Timothy J. Decker dated August 13, 2002 confirming that "the Association has met the sixty percent bargaining unit membership requirement" specified in Article V, Section 5.8.1 of the collective bargaining agreement, respectively.

In addition to the foregoing, we make implicit findings that: (1) the State of New Hampshire is a "public employer" within the meaning of RSA 273-A:1 X, (2) the State Employees Association of New Hampshire, SEIU Local 1984, is the duly certified bargaining agent for organized employees of the state, exclusive of those employees represented by the N.H. Troopers Association, and (3) the State and the Union are parties to a CBA for the period July 1, 2001 to June 30, 2003, as referenced above.

[2] Attachment 8 is another reiteration of Attachment 4 but in a different format with changes in language (e.g., "excluded versus "confidential" criteria), but identical mathematical calculations with the exception of correcting 5521 (Att. #4) to 5532 (Att. #8).

DECISION AND ORDER

We first turn our attention to what the *parties* have negotiated into *their* collective agreement concerning agency fee, namely Article 5.8.1. We are mindful that the CBA is a bilateral instrument between the union and the state. The methodology of Article 5.8.1. articulates this not only in concept but also in practice. In particular, Article 5.8.1 repeatedly refers to procedures agreed to by the parties as to their respective responsibilities and obligations under this article. By way of example, when reciting the criteria in Article 5.8.1.a, the parties have agreed to a standard, "60% of the eligible full-time permanent employees in all bargaining units," and an obligation, i.e. "only when the union can demonstrate..."

At Article 5.8.1.b the *parties* have agreed to a measurement standard which excludes "employees who are exempt from the definition of employee contained in RSA 273-A" and have added "or designated by the Employer as human resource employees." Then, at Article 5.8.1.d, the parties have agreed and conferred upon the employer certain enforcement responsibilities, to wit:

> The Employer shall refuse to enforce the fee requirement if the Employer does not agree that the Association has achieved the required level of membership or, if the Employer believes the amount of the fee exceeds the prorated share of the actual cost of negotiating and administering the contract.

Thus, the parties have bilaterally agreed to standards and have given the employer certain unilateral latitude to make compliance decisions. We see no justification which would call for us to intervene in this matter of contract interpretation which the parties are presumed to know and understand inasmuch as they have, to date, agreed on both standards and, now, implementation. Here, the parties have also defined their own "remedy" by contractually providing that the union may file a ULP for breach of contract if it disagrees with the employer's determination.

Our mandate under PUB 206.01, as quoted above, to respond to petitions for declaratory rulings or declaratory judgments, both terms being synonymous in these proceedings, extends to statutes, rules and orders over which we have authority. The petitioner here would have us become involved in a matter of contract interpretation over which the *parties* have no dispute. The union (brief, p. 5) has suggested that, absent unfair labor practice charges, we are not "empowered" to "interpret what the terms of a negotiated settlement are intended to mean." To the extent that the CBA contains a " workable grievance procedure" under RSA 273-A:4 for adjusting questions of involving "interpretation or application" of the CBA, and it does at Article 14.1, we agree with the union in the first instance.

We next examine Article 5.8.1.d and .e as they pertain to agency fee itself. The parties have set and recited their own standards, namely, that the agency fee must not "exceed the prorated share of the actual cost of negotiating and administering" the CBA. We make no determination as to the appropriateness of the agency fee and its amount at this time because that issue is not before us. We do, however, note that these provisions are the parties' agreement, not part of the statute, our administrative rules or any orders issued by this board, and appear to conform to conceptual requirements set forth in Nashua Teachers Union v. Nashua School District, 142 NH 683, 691 (1998) pertaining to

member costs versus agency fee costs and the need to tailor "non-union employees' pro rata share of the costs of collective bargaining, contract administration and grievance adjustment."

Lastly, we look to the petitioner and his status. Under PUB 206.01, he must be a public employer, a public employee or public employee organization. We find he is not a public employer; that entity is the State of New Hampshire. Likewise, and obviously, the petitioner is not a public employee organization. The issue then remains whether the petitioner is a public employee.

While it is undisputed that the petitioner is an employee of the State of New Hampshire in his role as Commissioner of the Department of Employment Security, we are confronted with the need to define a "public employee" within the meaning of PUB. 206.01. For that, we look to the definitions found at RSA 273-A:1 IX pertaining to "public employee." RSA 273-A:1 IX (b) excludes from the definition of "public employer" those "persons appointed to office by the chief executive or legislative body of the public employer." The petitioner is so appointed and the appointing authority unquestionably qualifies as the "chief executive" as discussed in Appeal of the Town of Litchfield, 147 NH 415, 418 (2002).

Based on the foregoing, the Union's motion to dismiss, as amended, is GRANTED.

So Ordered.

Signed this 19th day of November, 2002.

BRUCE K. JOHNSON
Alternate Chairman

By unanimous decisions. Alternate Chairman Bruce K. Johnson presiding. Members Richard W. Roulx and E. Vincent Hall present and voting.