

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Council 93, Local 3438
Sullivan County Nursing Home Employees

Complainant

v.

Sullivan County Nursing Home

Respondent

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Case No. A-0518-1

Decision No. 2003-040

PARTICIPATING REPRESENTATIVES

For the Complainant:

Daniel A. Cocuzzo, Esquire, Associate General Counsel, AFSCME

For the Respondent:

Marc Hathaway, Esquire, Sullivan County Attorney

Also appearing as witnesses:

1. Dorothy Cowitt, Restorative Aide
2. Jack McMath, Union Field Representative
3. Ed Gil De Rubio, County Manager
4. Robert Hemenay, Administrator

BACKGROUND

AFSCME Council 93, Local 3438 (hereinafter referred to as the "Union") filed an unfair labor practice charge on November 19, 2002 on behalf of the Sullivan County Nursing Home Employees alleging that the Sullivan County Nursing Home (hereinafter referred to as the "County"), acting through their agents, including its Business Manager,

Administrator and Director of Human Services, unilaterally changed the hours of work of certain bargaining unit members and refused to bargain over the impact of the change in hours. The Union asserts that such actions constitute a breach of the parties' collective bargaining agreement and violate certain provisions of RSA 273-A (e), (g), (h) and (i) thereby committing an unfair labor practice.

The Union requests that the PELRB make a finding that the County has committed an unfair labor practice and issue a cease and desist order to compel a return to the previously scheduled hours of work and to negotiate the impact of any proposed change in hours. The Union further requests that it be reimbursed for the costs necessary to bring this complaint and asks that a copy of the PELRB's Order be publicly posted at the work site.

The County filed its Answer with the PELRB on December 4, 2002. In essence, it agrees with the factual allegations alleged by the Union that the County has changed hours of work but asserts that all alleged changes have been done within the authority possessed by it under the provisions of RSA 273:A and the parties' collective bargaining agreement (CBA). For its part, the County requests that the PELRB find that no unfair labor practice has occurred.

A Pre-Hearing Conference was conducted on January 3, 2003 at which time the parties discussed pending and indicated that they would attempt to submit a Joint Stipulation of Facts and List of Joint Exhibits, submission of legal memoranda and a waiver of the need for an evidentiary hearing. They were not completely successful, resulting in the evidentiary hearing conducted on February 20, 2003.

The parties did submit joint exhibits and stipulate to certain facts. Those facts are incorporated in the list of Findings of Facts that follows. At the hearing, both parties were represented by legal counsel and presented exhibits. The parties also presented witness testimony and had the opportunity to cross-examine the witnesses. At the close of evidence, the record was left open until March 31, 2003 for the submission of legal memoranda from the parties in support of their respective positions.

FINDINGS OF FACT

1. Sullivan County employs individuals in the operation of the Sullivan County Nursing Home and thereby is a "public employer" within the meaning of RSA 273-A:1 X.
2. AFSCME Council #93, Local 3438 is the duly certified bargaining agent for certain Sullivan County Nursing Home employees as previously certified by the Public Employee Labor Relations Board, including Restorative Therapy Aides.
3. The County and the Union are parties to a CBA, the terms of which governed the parties' relationship at the time of the County's actions at issue in this matter.

The agreement covers the time period of July 1, 2000 through June 30, 2003. Article II of the parties' CBA is the so-called "management rights" clause and provides:

ARTICLE II

MANAGEMENT CLAUSE

Except as specifically limited or abridged by the terms of this Agreement, the management of the Sullivan County Nursing Home, in all its phases and details shall remain vested exclusively in the Employer and its designated agents. The Employer and its agents shall have jurisdiction over all matters concerning the management and operation of said Facility, including, but not limited to, the right to decide the functions, programs and methods to be used for all of the operations of said Facility, including the use of technology, the Facility's organizational structure and the selection, direction and number of all personnel so as to continue public control of governmental functions as well as all rights retained by virtue of New Hampshire RSA Chapter 273-A. It is further specifically agreed that this Article shall not be subject to the Grievance Procedure as hereinafter set forth.

4. "The phrase 'managerial policy within the exclusive prerogative of the public employer' shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions." RSA 273-A:1 XI.
5. Sullivan County has a job description for a position entitled "Restorative Therapy Aide" that among other duties provides: "9. Perform Certified Nursing Assistant duties and responsibilities, as required." (Joint Exhibit #4.) Sullivan County presently employs three (3) Restorative Therapy Aides.
6. Restorative Therapy Aides, as described in Joint Exhibit #4 and under the Recognition Clause (Article I) of the parties' CBA are direct care nursing staff.
7. Prior to the CBA being signed Restorative Therapy Aides commonly were assigned to a day shift, Monday thru Friday and the position had been previously posted with those hours as evidenced by the February 16, 1996 posting. (Joint Exhibit #5).
8. Credible testimony was offered establishing that the Restorative Therapy Aides who have worked on Saturday have performed Certified Nursing Assistant duties

and have not yet performed duties that can only be provided by Restorative Therapy Aides.

9. Prior to the current CBA being signed, and until August of 2002 when the Sullivan County Nursing Home was approved by the Centers for Medicare & Medicaid Services (in August of 2002), to become a Skilled Nursing Facility, the Restorative Aides were routinely scheduled to work day shifts, Monday thru Friday.
10. Sullivan County, subsequent to becoming a Skilled Nursing Facility, has had the Restorative Aides work a rotating schedule that requires one Restorative Therapy Aide to work on each Saturday.
11. Sullivan County is paying the Restorative Therapy Aides, when they are scheduled to work on Saturday, the shift differential for weekend work as required in the CBA.
12. Uncontroverted testimony from Mr. Hemenway established that the designation of "Skilled Nursing Home" requires that the County have restorative services available at the nursing home six days each week and only by having a Restorative Therapy Aide on the premises can the County provide those required services, if needed by a patient, and meet the federal regulations in order to maintain the status of "Skilled Nursing Facility". He also indicated that the actions undertaken to achieve the "Skilled Nursing Facility" designation and consequently cause the rescheduling of Restorative Therapy Aides were motivated by budgetary considerations.
13. On or about August 26, 2002 the County placed a "Notice to All Staff" (Union Exhibit #1) that was issued by its administrator in a "Memo book" that all employees were accustomed to reviewing regularly. This notice informed the employees that the nursing home had been approved to become a federally designated "Skilled Nursing Facility" effective September 15, 2002. It did not inform any employee that the existing work schedule for Restorative Aids would be changed by the County to meet the standard required by its designation as a "Skilled Nursing Facility". (The significance of a designation of "Skilled Nursing Facility" is that the nursing home can accept Medicare patients for treatment).
14. At some time on or after August 26, 2002, the Director of Nursing informed the Restorative Aids that the work schedule that they had been working, namely shifts on Monday through Friday from 6:00AM to 2:00 PM, would be changed in a manner that would cause each of them to work a Saturday shift in a cyclical rotation. Further, in that week for which a Restorative Therapy Aide was to work a Saturday shift, the workweek would be 6:00 AM to 2:00 PM Monday, Tuesday, Wednesday, Thursday, and Saturday. The total regular hours would remain at forty (40) hours each week. Also, the differential pay stated in the parties' CBA

for weekend work would be paid to the Restorative Aid for the work performed on Saturday.

15. On August 28, 2002 and October 7, 2002 the Union's NH Coordinator wrote to the county requesting first, by letter dated August 28, 2002 (Union Exhibit #2) to discuss the proposed change, and then by letter of October 7, 2002 to demand bargaining about the change. (Union Exhibit #3).
16. The County refused to bargain over the change in schedule affecting the Restorative Therapy Aides not through a written response to the Union's requests, but by the County Manager's reply to the Union's NH Coordinator's oral inquiry prior to a negotiations session. The request to bargain the impact of the change of hours was not included on the list of issues included on the Union's list of demands provided to the County during negotiations. However, at that time, the Union had filed a separate grievance in connection with the change of schedule.
17. Article X of the parties' CBA is entitled "Hours of Work and Overtime." It provides that the "normal workweek for full-time employees is forty (40) hours exclusive of overtime." (Joint Exhibit #1).
18. When a Restorative Therapy Aide is scheduled to work on a weekend, that employee is paid additional base pay and a weekend differential set forth in CBA Article XI. (Joint Exhibit #1).
19. The County admitted that it recognizes its obligation to bargain under RSA Chapter 273-A and is prepared to bargain with the Union on this issue if the Union takes the appropriate steps to bring this issue to the bargaining table in future negotiations.

DECISION AND ORDER

The Public Employee Labor Relations Board (PELRB) has exclusive primary jurisdiction over complaints filed by the exclusive representatives of public employee associations against public employers and *vice versa*. RSA 273-A: 6. This is particularly true where the complaint involves conduct alleging an unfair labor practice under the provisions of RSA-A:5. In this case, the parties have entered into a collective bargaining agreement that spanned the time period during which the Union alleges that the County undertook a unilateral action that violates both the statute and the parties' collective bargaining agreement.

In or about August 2002 the County informed the members of the Union that the nursing home had received federal approval to act as a "Skilled Nursing Facility." (Union Exhibit #1). The effective date of the facility's change in status, that would henceforth allow it to receive and care for Medicare patients, was September 15, 2002.

As a condition for obtaining that operational level of approval for the facility, the County was obligated to make restorative care available six days each week instead of the previous five day availability of restorative care for patients at the facility. (Finding of Fact #12). To meet this obligation, the County's Director of Nursing told the three Restorative Therapy Aides employed by the county that each would have to work a Saturday in a rotation cycle. This resulted in a change from the previous work week of a Restorative Therapy Aide from the Monday-Friday 6:00AM – 2:00PM to a schedule consisting of 6:00AM – 2:00 PM shifts on Monday, Tuesday, Wednesday, Thursday and Saturday during an assigned rotation week. (Finding of Fact #14) The total number of hours remained at forty per week consistent with Article X of the parties' CBA (Joint Exhibit #1) exclusive of overtime. (Finding of Fact #17). When a Restorative Therapy Aide worked a shift on a Saturday, the employee received a pay differential as provided in the parties' CBA Article XI. (Finding of Fact #18).

The issue, then, is whether the County's change in the workweek of Restorative Therapy Aides that required them report to work on a Saturday, albeit on a rotating basis, is violative of RSA 273-A:5 I (e), (g), (h) or (i) or constitutes a breach of the parties' CBA. Considering the parties' filings in this case, all of the exhibits and testimony presented at the hearing the Hearing Officer does not find that the actions undertaken by the County constitute a violation of the statute.

In cases such as this one, one must consider the obligation of the public employer to negotiate "terms and conditions of employment", a category that includes hours of employment and also consider the so-called "managerial policy" exclusion found at RSA 273-A:1 XI. This exclusion gives to public employers the right to determine their organizational structure, to determine the number and direction of their employees and to continue public control of governmental functions." The County, as an entity of government in the "business" of operating a nursing home, was obligated to do so responsibly and reasonably, within the confines of duly promulgated regulations, and to render an acceptable level of care, to all patients, be they Medicaid patients or, subsequent to September 15, 2002, Medicare patients. They must, in a reasonable manner, do so consistent with necessary program regulations in caring and providing for patients in a residential setting. Such care would include meeting the requirement of a "Skilled Nursing Facility" to have restorative care available six days each week. The County's focus in making the change was to have that restorative care available. From the evidence presented, it can only do so by having a qualified Restorative Therapy Aide in the facility six days each week. The focus of much of the testimony of the Union witnesses was that the Restorative Therapy Aides are not performing restorative care when they are at work on Saturday. That focus misplaced. It is both reasonable and responsible for the County to operate its facility by scheduling a qualified Restorative Therapy Aide to be present in the facility so that the care can be available. It is likewise both reasonable and responsible for the County to expect that, since the Restorative Therapy Aide is qualified and obligated to perform the services of a certified nursing assistant as well, that the employee not stand idle on Saturday, but perform the services of a certified nursing assistant, as required.

Considering the exhibits submitted in this case and weighing the credibility of each witness's testimony as it relates to the issue here, the Hearing Officer finds that when the County changed the hours to include a Saturday shift rotation once every three

weeks so that restorative care was available, it was doing so to anticipate patient care needs and meet regulatory standards necessary to the expansion of its services as well as seeking an additional source of revenue for the facility's continued operation. This is synonymous with maintaining its "control of governmental functions," namely, the responsible and reasonable business operation of the nursing home. (See RSA 273-A:1, XI.)

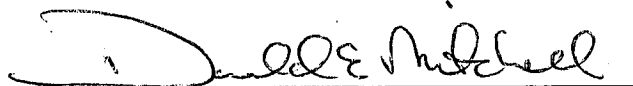
The Hearing Officer finds that the actions of the County in this matter fall within the "managerial policy" exclusion and that any impact upon the Restorative Therapy Aides was not sufficient to create an obligation to negotiate further with the Union. Therefore, it is determined that the County did not violate RSA 273-A:5,I (e) by failing to negotiate in good faith or (g) by failing to comply with this statute or any rules promulgated thereby. Further, to the extent that the Union's pleadings can be read to have claimed that the County improperly dealt directly with members of the bargaining unit, the Hearing officer finds that the manner of communication and substance of that communication to unit members relating to the change in schedule did not constitute prohibited direct contact by the County .

The Union also alleges that the County's change in the workweek of Restorative Therapy Aides that required them to report to work to a Saturday day shift invalidates a portion of the parties' CBA in violation of RSA 273-A:5,I (i). There is insufficient evidence presented to establish which provision of the parties' CBA was invalidated and in what manner it was invalidate to permit a determination by the Hearing officer.

The complaint is, therefore, denied.

Having denied the Union's complaint and previously explaining to the parties' the appeal rights of any aggrieved party, the Hearing Officer observes that the County has represented that it is willing to negotiate with the Union over the issues raised by its implementation of the change in work days. The parties should weigh the costs of protracted proceedings before this tribunal or, arguably, in arbitration and incorporate their differences into their present negotiations for a successor agreement to the current CBA, notwithstanding that these negotiations have commenced. The policy mandate to the Public Labor Relations Board is to foster harmonious and cooperative relations between public employers and their employees and the interests of these two parties may best be served by that course of action.

Signed this 24th day of April, 2003



Donald E. Mitchell, Esq.
Hearings Officer

Distribution:

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