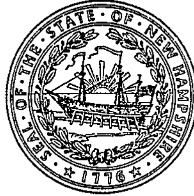


State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Seabrook Employees Association, Local 1984 SEA/SEIU Complainant v. Town of Seabrook Respondent	Case No. M-0575-14 Decision No. 2003-055

APPEARANCES

Representing Seabrook Employees Association, SEA/SE IU, Local 1984:

Jeffrey L. Brown, Field Representative

Representing Town of Seabrook:

Robert Ciandella, Esquire, Counsel

Also appearing:

Karen Knight, Town of Seabrook
Ralph Marshall, Seabrook Employees Association

BACKGROUND

The State Employees Association of New Hampshire, Local 1984, SEIU ("Union"), on behalf on the Seabrook Employees Association ("Association"), filed unfair labor practice (ULP) charges on October 2, 2002 against the Town of Seabrook ("Town") alleging violations of RSA 273-A:5 I (e) and (h) for breach of contract, bad faith bargaining and direct dealing between a member of the Board of Selectmen and a bargaining unit member about scheduling his grievance for a Step IV hearing before the selectmen. The Town filed its answer on October 18, 2003 after which the parties participated in a pre-hearing conference on December 4, 2002, as memorialized by Decision No. 2002-142 dated December 5, 2002. The pre-hearing conference order directed the Town to file an amended answer within fourteen (14) days which the Town did on December 20, 2002. The pre-hearing conference also identified February 11, 2003 as the date for an

evidentiary hearing in this matter. In the interim, the Union filed a Motion for Summary Judgment on January 24, 2003, based upon admissions in the Town's amended answer.

On February 10, 2003, the Town filed a Memorandum of Law in opposition to the Union's motion for summary judgment and in support of its own cross-motion for summary judgment, also filed on February 10, 2003. Then, on February 11, 2003, the Union filed its response to "Respondent's Cross-Motion for Summary Judgment." This matter then proceeded to hearing before the PELRB on February 11, 2003, at the conclusion of which the parties were directed to file their post-hearing briefs on or before March 11, 2003. Both briefs were duly filed on that date, as well as the Union's written "closing argument."

On March 20, 2003, the PELRB, meeting in Concord, reviewed the file and issued an Interim Decision (Decision No. 2003-031, dated April 1, 2003) directing the parties to process the Ralph Marshall grievance, which had been delayed by these proceedings, at the selectmen's level and to report the result within seven days of the disposition and vote by the selectmen. By letter filed on April 24, 2003, the PELRB was notified that the grievance had been processed by the selectmen on April 18, 2003 and that the grievance had been settled. This decision deals with the charges alleged, absent the issue of processing the Marshall grievance which we now consider to have been resolved.

FINDINGS OF FACT

1. The Town of Seabrook employs personnel in the operation of that municipality and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Seabrook Employees Association, SEA, S.E.I.U. Local 1984, is the certified bargaining agent for the following employees employed by the Town, to wit:

   Clerks-Selectmen's Water Dept., Recreation Dept., and Asst. Appraiser's, Custodians-Town Office, Highway Dept., Water Dept., and Recreation Dept., Laborers & Equipment Operations-Highway Department and Water Department, Laborers & Equipment Operations-Highway Department and Water Department, Police Dispatchers, Secretary to Police Chief, Secretary to the Selectmen, Working foreman, Wastewater/water operator, Janitor, Equipment Operator/CDL/laborer and clerk.

   Amended certification M-0575 dated December 21, 2000, with original certification dated May 14, 1986. (This description does not necessarily match that which appears at CBA, Article 1.)

3. The Town and the Union are parties to a collective bargaining agreement (CBA) for the period April 1, 1998 to March 31, 2002, and continuing thereafter under *status quo* conditions. Article 10 contains the grievance procedure where Article 10.3.2 (addressed in Decision No. 2002-105) and Article 10.8 provide as follows:

10.3.2 If the Department/Town does not answer a grievance or an appeal thereof within the specified time limits, the Association may elect to treat the grievance as denied at that step and immediately appeal the grievance to the next step.

* * * * *

10.8. Step IV:

10.8.1. If the grievance is not resolved in Step III and the employee desires to appeal, it shall be referred in writing to the board of selectmen within five (5) business days after the town manager's answer in Step III. Within five (5) days after receipt of a grievance, the board of selectmen shall meet with the grievant and his/her representative for the purpose of hearing the arguments of the parties involved.

10.8.2. Within ten (10) business days after said meeting, the chairman of the board of selectmen shall answer the grievance in writing.

4. The Union's ULP, paragraph 6, alleges, "On Monday September 23, 2002 and again on Monday, September 30, 2002, Mrs. Karen Knight, Chairman of the Board of Selectmen in the Town of Seabrook, initiated contact with Mr. Ralph Marshall for the purpose of discussing the scheduling of hearings for his grievances." In the Town's amended answer filed December 20, 2002, states that:

   Karen Knight, Chairman of the Board of Selectmen in the Town of Seabrook, initiated contact with Ralph Marshall and by way of further answer states that Mr. Marshall was confronted by a firefighter while passing out a publication which was critical of the firefighter and the Board of Selectmen. Mr. Marshall related to the firefighter that he was angered at the Board of Selectmen because he understood that Chairman Knight refused to schedule his grievance for hearing. The firefighter related this information to Chairman Knight. Chairman Knight contacted Mr. Marshall simply to advise him that his understanding was not correct and that he should speak with his Union to establish the position of the Board of Selectmen on scheduling.

5. Karen Knight chairs the Board of Selectmen and is concluding a three-year term. She knew Marshall was unhappy that a grievance he had filed had not been heard by the selectmen inasmuch as he had conveyed this to fire fighter Phelps, who, in turn, told Knight. Knight knew Marshall had handed out a newsletter, called "Behind the Scenes" critical of the Town, of her and of the grievance backlog. He did this prior to and in the vicinity of a selectmen's meeting. When Phelps spoke to Knight, he recommended to her that she contact Marshall. Knight called Marshall the following day on a "personal basis," something she was not uncomfortable doing because they had been friends for twelve years. During this conversation, Knight told Marshall

that she did not say she would not hear his grievance and that he could get the grievance heard by requesting that it be expedited. Knight was familiar with this process because Cora Stockbridge, local Association president, had filed similar papers relating to the another grievance. Knight said she did not go through the Association or its steward when she called Marshall. "I informed Mr. Marshall if he wanted to have his grievance heard, he would have to go through his union." Knight said she called Marshall on two occasions. In neither instance did Marshall tell her that she should not be calling him. Knight described their conversations as "light" and containing "laughter." She said she was not negotiating or bargaining with Marshall; no promises were made.

6. Ralph Marshall is a water/wastewater operator for the Town. He has filed several grievances over the years. The one in question here was for 1 ½ hours of time he used to travel to and from seminars and classes. His claim was initially denied and reached the town manager who also denied it. Marshall said the "Town Manager thought we shouldn't be paid anymore." This matter was still awaiting its Step IV selectmen's hearing when this case was heard by the PELRB but has since been resolved, per the last paragraph of the "Background" section, above. Marshall said that he did pass out literature prior to a selectmen's meeting, that it made reference to both Phelps and to him, and that he "couldn't understand why the Town wouldn't meet with us." Notwithstanding this comment, he was aware that there was a dispute about when the Town and the Union wanted to meet to hear grievances at the selectmen's level, Step IV. He also denied creating or writing the newsletter that he distributed prior to the selectmen's meeting. He said he got it from Stockbridge and that its distribution was a "spur of the moment" event.

7. Marshall recalled that Knight had called him twice. The first time she called him, she had spoken with Phelps and was concerned that there were ill feelings towards her. During the conversation, she offered the immediately approaching Wednesday and the Wednesday thereafter for hearing Marshall's grievance. During this conversation, Knight said something which Marshall understood "to be negative towards the Union president," namely, Stockbridge. Marshall said Knight suggested he call Stockbridge. He agreed to bring Knight's proposed hearing dates back to the Union. When Knight called him the second time, Marshall told her, "This will probably be an unfair labor charge." He said her reply was, "I don't care." When Marshall did call Stockbridge with the two dates Knight suggested, Stockbridge told him that Knight was not supposed to be talking to him. Marshall concluded his testimony by saying this was the first time he has ever been contacted by a member of the board of selectmen about the scheduling of his grievance.

DECISION AND ORDER

The Union has asserted that the actions complained of in their ULP complaint are violations of RSA 273-A:5 I (e) and (h). With reference to the "(h)" or breach of contract allegation, the Union, at paragraph 9 of the ULP statement, refers to Article 10.8.1, which appears in Finding No. 3, above, saying that the "selectmen are obligated to meet with the

grievant and his/her representative for the purpose of hearing the arguments of the parties involved." It is undisputed that these meetings have not occurred within the timeline of the text of Article 10.8.1.

It is well documented not only from Marshall's testimony but also by our decision involving the same parties, but with the Town as complainant (Decision No. 2002-105 dated May 23, 2003), that the Town has not been complying with the Article 10.8.1 timelines for processing Step IV grievance reviews or grievance hearings. It is equally apparent that Article 10.3.2 of the CBA, appearing in Finding No. 3 above, is a self-correcting, self-help, self-initiating provision which the Union may exercise to correct any deficiencies or irregularities caused by the Town's failure to follow contractually agreed-upon timelines. Thus, while we find factually that the Town has not strictly complied with the language in Article 10.8.1, we also find that the self-help mechanism of Article 10.3.2 is and has been available to the Union. No remedy from the PELRB is warranted. If the Union feels it needs a third party opinion about the Town's failure to comply with Article 10.8.1 timeliness accompanied by a compliance order, it may proceed by way of the grievance procedure inasmuch as such a breach, if proved, fulfills the definitional requirements of Article 10.2. We refrain from directing such action, however, because the Union has a much faster route to arbitration for pending cases by exercising Article 10.3.2 rights.

The second element of the ULP involved an "(e)" violation concerning an allegation of direct dealing resulting from Knight's two calls to Marshall. We are hard pressed to find where either Marshall or the Association was prejudiced by this contact or induced (or attempted to have been included) to do or take some action they might not otherwise have taken. In what is a well-known litigious environment between labor and management, it may not have been the smartest thing in the world for Knight to have called Marshall. At worst, this was a *de minimus* incursion as noted in Contoocook Valley Education Association, Decision No. 2000-116.

There is no dispute that Knight called Marshall and that she did this on two occasions. In the first call, from the testimony before us, she attempted to assuage any ill feelings and to explain to Marshall that she had not refused to hear his grievance on a personal or individual basis but that there was a scheduling dispute or problem. Knight also told Marshall that, if he wanted a hearing, "he would have to go through his union." Marshall understood from something she said, or how she said it, that there was an uncomplimentary or negative comment about the local president. Notwithstanding this, the negative remark did not prevent Marshall from later dealing with the local president or from pursuing his grievance rights under the contract with the union.

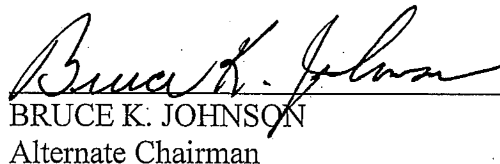
Marshall testified that Knight offered two Step IV hearing dates. The force or purpose of Knight's call to Marshall was not such as to prevent him from bringing these dates back to Stockbridge, a communications path which appears to have been suggested by Knight. Marshall was without authority to, nor did he try to, accept or reject hearing dates on behalf of the Union. He neither tried to do this nor did Knight try to cause him to do so. The net effect of Knight's calls to Marshall was zero. She neither persuaded him to transact any business on behalf of the Union nor sought any actions by or from him which would have prejudiced any of the rights of the Union as the certified exclusive bargaining agent under RSA 273-A:11.

Direct dealing cases in New Hampshire are more than mere communications between management and the members of a bargaining unit, without going through the certified bargaining agent. In Appeal of Franklin Education Association, 136 N.H. 332, 335 (1992), the Supreme Court said, "Together, RSA 273-A:1, XI; 3, I; and ; 5 I (e) compel the school board to negotiate wages in good faith with the association's exclusive representative.... We interpret this requirement to mean that the school board must not only negotiate with the association's exclusive representative, but also *refrain from negotiating with anyone other than the association's exclusive representative.*" (Emphasis added.) We find no violation here, however, because we find neither the overture to nor the product of negotiations in the conversations between Knight and Marshall.

Appeal of City of Portsmouth Bd. of Fire Commr's, 137 N.H. 552, 556 (1993), tells us that, "A public employer will be responsible for its agent's acts when the employees would have just cause to believe that the agent was acting on behalf of the public employer." Thus, this permitted Marshall to assume Knight was acting in her capacity as a selectmen when she made the two calls to him. Nevertheless, the content of those calls did not tip the scale in favor of finding a violation of RSA 273-A:5 I. The dicta in State Employees Association of New Hampshire v. Town of Salem, PELRB Decision 1997-075 (August 1, 1997) is applicable here, namely, "While it appears that communications between the Town and the Union were not exemplary during the times complained of, this does not constitute a ULP, nor is it a breach of the CBA."

In Rochester Federation of Teachers, Local 3607 v. Rochester School District, PELRB Decision 1999-040 (May 12, 1999), we said, quoting from Fall Mountain Teachers Association, PELRB Decision No. 1997-118 (December 19, 1997), "[I]t 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 only element of that formula satisfied here was the direct contact by Knight. The instant case lacks the elements of direct member "political support" of a position contrary to that taken by the Union or of an attempted "end run" around the Union. For this and the foregoing reasons cited herein, the Union's ULP alleging violations of both RSA 273-A:5 I (e) and (h) must be, and hereby is, DISMISSED.

So ordered.
Signed this 10th day of June, 2003.



BRUCE K. JOHNSON
Alternate Chairman

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