

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

State Employees Association of New Hampshire,
Local 1984, SEIU

Complainant

v.

State of NH Department of Corrections

Respondent

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Case No. S-0376-13

Decision No. 2003-147

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

The State Employee’s Association, SEIU Local 1984, AFL-CIO (hereinafter “the Union”) filed an unfair labor practice complaint on October 31, 2003 alleging that the State of New Hampshire, Department of Corrections (hereinafter “the Employer”) has committed unfair labor practices by continuously violating certain articles contained in the parties’ collective bargaining agreement (“CBA”). Specifically, the Union claims that the Employer has repeatedly failed to comply with the contractual provisions relating to vacancies and transfers, Articles 27.16 and 27.17 of the CBA, respectively, and therefore violations of RSA 273-A:5 I (e), (g), and (h).

The Union asserts that pursuant to contract the Employer is required to post all vacancy and lateral transfer announcements and to select employees for said vacancies and transfers on the basis of seniority. Moreover, in the event that the most senior employee is found not to be the best qualified, the Union contends, then s/he must be provided a documented performance based reason for the failure. The Union alleges, *inter alia*, that in October 2003 the Employer required employees to submit to an interview prior to being considered for a vacancy, and therefore violated the requirement under Article 27.17 that establishes the only standard of review as being seniority. It also cites further instances in which the Employer has allegedly failed to make proper postings of vacancies and/or transfers, and otherwise violated Articles 27.16 and 27.17 of the CBA.

The Union points out that the Employer has been engaged in sub-unit negotiations with the Union for some time, during which it has made proposals to alter the contract articles in question. The Union argues that such conduct is reflective of the Employer's recognition that it has no right to interview and no right to place rotational employees in positions without providing other employees an opportunity to bid on the positions first. As remedies, the Union requests, among other things, that the PELRB order the Employer to (1) cease and desist in its violation of RSA 273-A:5 and the parties' CBA, (2) fill all vacancies cited in the instant charge in accordance with the CBA, and (3) reimburse the Union for all of its costs in pursuing this action, including the fair market value for attorney's fees.

The Employer filed its answer denying the Union's charge on November 14, 2003. The Employer asserts, *inter alia*, that it has not violated either the contract or statute and that the Union is attempting to encroach on its managerial rights. First, as a preliminary matter, it claims that the Union's allegation relating to an incident that occurred in June 2002 is over 6 months old and should be dismissed as untimely.¹ As to the merits of the Union's complaint, the Employer makes several affirmative arguments. It asserts that the CBA does not specify that an interview process is forbidden and that since it has retained the management rights specified under Article 2.1 of the CBA, it can use a process for determining who is best qualified for an assignment. As to its alleged failure to make postings, it answers that there was no requirement that the assignments at issue be posted because there were no "vacancies" within the meaning of the law. In this context, it requests that the Board adopt the definitions of "transfer" and "vacancy" as provided in the Administrative Rules of the Division of Personnel.

Moreover, the Employer insists, contrary to the Union's assertions, that there is no requirement within the CBA that a performance based reason for non-selection to a vacancy be "documented." While the Employer admits that it has been negotiating for many months with the Union over the reassignment issue, it argues that this fact does not mean that the Employer acknowledges anything except for a willingness in its part to negotiate. Accordingly, it requests that the Union's unfair labor practice charge be dismissed.

A pre-hearing conference was conducted at the offices of the PELRB on December 3, 2003 during which both parties were represented by counsel.

PARTICIPATING REPRESENTATIVES

For the Union: Lorri Hayes, Esquire

For the Employer: John Vinson, Esquire

¹ During the course of the pre-hearing conference, the Union's representative offered the clarification that the Union was not seeking any relief regarding said allegation but had included the facts in the complaint for purposes of showing history and pattern of conduct by the Employer. In response, the Employer's representative indicated a desire to reserve all arguments on the issue of timeliness.

ISSUES FOR DETERMINATION BY THE BOARD

(1) Are any portions of the Union's improper practice complaint barred by the six (6) month statute of limitations as provided in RSA 273-A:6, VII?

(2) Has the Employer committed an improper labor practice, within the meaning of RSA 273-A:5 I (e), (g) and/or (h), by violating the vacancy and/or transfer provisions of the parties' CBA (Articles 27.16, 27.17, respectively) or otherwise failed to negotiate in good faith over said subjects?

WITNESSES

For the Union:

1. Gary Smith, Pres., Chapter 24
2. Thomas McCabe, Field Rep., SEA, SEIU Local 1984
3. Gil Wilkins, Steward, Chapter 24
4. Paul Cascio, Vice-Pres., Chapter 24
5. Wayne Brock, Pres., Chapter 39
6. Tom Hardiman, Former Chief Negotiator, Dept. of Corrections
7. Nick Pishon, Former Commissioner (Ret.)
8. Dan Shaw, Major, NH State Prison
9. Jane Coplan, Warden, NH State Prison

For the Employer:

1. Sara Willingham, Manager of Employee Relations, State of NH
2. Lisa Currier, Human Resources Director, NH Dept of Corrections
3. John Sanfilippo, Warden, Lakes Region Correctional Facility
4. Bruce Cattell, Warden, Northern NH Correctional Facility
5. Tom Manning, Former Manager of Employee Relations, State of NH
6. Dick Gerry, Warden, NH State Prison for Women
7. Les Dolecal, Acting Commissioner

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. It is understood that each party may rely on the representations of the other party that witnesses appearing on their respective list will be available at the hearing.

EXHIBITS

Joint Exhibits:

1. Parties' collective bargaining agreement, July 1, 2001 – June 30, 2003

For the Union:

1. Grievance letter dated August 14, 2002 to Bruce Cattell from Brad Asbury.
2. Letter dated June 9, 2003 to Lorri Hayes from Lisa A. Currier.
3. Dept. of Corrections, Position Vacancy Form, dated October 3, 2003.
4. Grievance letter dated October 8, 2003 to Commissioner Phil Stanley from Thomas McCabe.
5. Arbitration Award re: "Swaps," dated June 9, 1998, SEA v. Dept. of Safety.
6. Step II grievance, dated October 30, 2003, to Jane Coplan from Gary Smith.
7. State Counterproposal – Sub-Unit Negotiations, dated September 15, 2003.
8. Labor Management - Meeting Minutes for March 12, 2001.
9. Labor Management - Meeting Minutes for April 3, 2001.
10. Labor Management - Meeting Minutes for June 5, 2001.
11. Labor Management - Meeting Minutes for July 17, 2001.
12. Labor Management - Meeting Minutes for September 27, 2001.
13. Labor Management - Meeting Minutes for June 5, 2001.
14. Labor Management - Meeting Minutes for April 9, 2002.
15. Labor Management - Meeting Minutes for December 5, 2002.
16. Labor Management - Meeting Minutes for June 10, 2003.
17. Labor Management - Meeting Minutes for September 3, 2003.
18. Intra-Department Memorandum, dated November 5, 2002, from Lisa Currier.
19. Intra-Department Memorandum, dated January 21, 2003, from Lisa Currier.
20. Intra-Department Memorandum, dated March 27, 2003, from Lisa Currier.

For the Employer:

1. Selected vacancy announcements.
2. Selected State Personnel rules.

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. Copies of all exhibits are to be submitted to the presiding officer in accordance with Pub 203.02. It is understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

LENGTH OF HEARING

The time being set aside for this hearing is one (1) day. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least twenty (20) days prior to the date of the evidentiary hearing.

DECISION

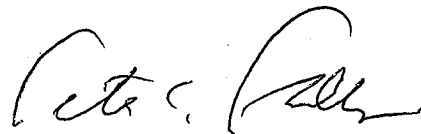
1. The parties stipulate to the Board's jurisdiction in this matter.
2. The parties' representatives shall meet, or otherwise confer, on or before **February 12, 2004** in order to compose a mutual statement of agreed facts. The parties representatives shall memorialize those facts upon which they can so stipulate and file said document with the PELRB at least five (5) days prior to the date of the hearing.
3. The party representatives shall forward any amendments to, or deletions from, their Witness and Exhibit lists, as detailed above, to the opposing representative or counsel, and to the PELRB, at least five (5) days prior to the scheduled hearing date. The party representatives shall meet, or otherwise arrange, to pre-mark any exhibits, for identification, prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.
4. The parties shall file any additional preliminary, procedural or dispositive motions no later than twenty (20) calendar days prior to the scheduled hearing date.
5. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an evidentiary hearing between the parties will be held on:

March 4, 2004 @ 9:30 AM

at the offices of the Public Employee Labor Relations Board, Concord, New Hampshire.

So ordered.

Signed this 8th day of December, 2003.



Peter C. Phillips, Esq.
Hearings Officer

Distribution:
Lorri Hayes, Esquire
John Vinson, Esquire