State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Council 93, Local 863	*	
Complainant	*	Case No: A-0493-11
v.	*	Decision No. 2004-156
City of Rochester	*	
Respondent	*	

APPEARANCES

Representing AFSCME Counsel 93, Local 863:

Katherine M. McClure, Esq.

Representing the City of Rochester:

Warren D. Atlas, Esq.

BACKGROUND

AFSCME Counsel 93, Local 863 (hereinafter "the Union") filed an unfair labor practice complaint on February 27, 2004 alleging that the City of Rochester, Department of Public Works (hereinafter "the City") committed unfair labor practices in violation of RSA 273-A:5 I (g), (h) and (i) as the result of certain conduct, or lack thereof, relating to annual performance evaluations. More specifically, the Union claims that pursuant to the parties' collective bargaining agreement (CBA), employee evaluations are to be conducted annually prior to July 1st and that those who do not receive a satisfactory evaluation are to be re-evaluated within ninety-days of the first evaluation. The Union states that the City failed to conduct employee evaluations by July 1, 2003 and also failed in its requirement to conduct a second evaluation. By virtue of such inaction, the Union alleges that the City has violated RSA 273-A:5 I (g), (h) and (i) and requests, among other things, that the Public Employee Labor Relations Board (PELRB) order the City to conduct employee evaluations.

The City filed its answer to the complaint on March 26, 2004. While the City generally admits to the chronological history as alleged by the Union, it states that the Union has failed to state a claim upon which relief can be granted and that the Union's improper practice charge is otherwise procedurally defective. In this regard, the City also filed a Motion to Dismiss on March 26, 2004, wherein it raises two arguments. The City first contends that the Union's improper labor practice should be dismissed as untimely, in that it was filed beyond the applicable six (6) month statute of limitations period. The City states that the alleged violation occurred as of July 1, 2003, the date by which employee evaluations were to be completed, and that since the improper practice charge was not filed until February 27, 2004, the Union's case is time barred. Any claim by the Union that the time clock for filing an improper practice charge actually commenced ninety (90) days after July 1, 2003, the City characterizes as "a transparent attempt to bootstrap a meritless allegation onto its untimely charge..." Secondly, the City asserts that based upon the "final and binding" arbitration procedure agreed upon by the parties, the PELRB does not have jurisdiction to hear allegations raised concerning the City's failure to conduct annual performance evaluations.

The Union filed its opposition to the City's Motion to Dismiss on May 19, 2004. It avers that the time period for filing an unfair labor practice did not commence until October 1, 2003, at the end of the ninety-day, "two prong," evaluation procedure, and thus the filing date of February 27, 2004 was within the six (6) month statute of limitations period. As to the City's jurisdictional claim, the Union states that the City's failure to evaluate employees constitutes a new policy that negates a portion of the parties' CBA. Accordingly, it argues that the matter is within the jurisdiction of the PELRB.

A pre-hearing conference was conducted at PELRB offices on June 9, 2004 during which both parties were represented by counsel. Upon discussion between the parties' counsel and the Hearing Officer during the pre-hearing conference, the parties stipulated to submitting the instant matter to the Hearing Officer for decision through written submissions. In accordance with the PELRB's Pre-hearing Memorandum and Order, the parties filed a stipulation of fact on June 28, 2004. Moreover, the City's representative filed written argument on that date. No additional written argument was filed by the Union, and, as of June 28, 2004, the record was closed. Upon review and consideration of all filings, evidence and argument submitted by the parties, the Hearing Officer determines the following:

FINDINGS OF FACT

1. The City of Rochester ("the City") is a public employer within the meaning of RSA 273-A:1 X.

2. AFSCME Counsel 93, Local 863 ("the Union") is the duly certified exclusive bargaining representative for all permanent, full-time employees of the City's Public Works Department, excluding department heads, foremen, assistant department heads, clerical staff, seasonal and probationary employees.

3. The City and the Union are parties to a collective bargaining agreement (CBA) for the period July 5, 2000 to June 30, 2003.

4. Article 10.7 of the parties' CBA provides as follows:

> Employees will be evaluated prior to July 1 annually on their job performance and be granted [sic] to those eligible on July 1st. Applicable step increases will be contingent upon continued satisfactory performance. If an employee does not receive a satisfactory evaluation, they will be re-evaluated 90 days from the first evaluation. If an employee receives a satisfactory re-evaluation, they will be granted a step increase at that time but the step increase will not be retroactive.

5. The City and the Union stipulate to the following fact:

> The City of Rochester Department of Public Works did not conduct employee evaluations on July 1, 2003 or thereafter.

6. Article 20.1 of the of the parties' CBA provides, in part, as follows:

> The purpose of the grievance procedure shall be to settle all employee grievances on the lowest practical level and as quickly as possible in insure efficiency and high employee morale. A grievance for the purpose of this Agreement shall be a complaint or claim rising between the employer and the employee regarding the meaning or application of this Agreement. An employee grievance arising out of matters covered by the Agreement shall be processed in the following manner, at the request of either party…

7. Article 20.5 of the parties' CBA provides, in part, as follows:

> …The findings and decision of the arbitrator shall be final and binding on the Union, the Aggrieved and the City.
>
> The Union and the City agree that any differences between the parties on matters related to this Agreement shall be settled by the means herein provided.

8. On February 5, 2004, the Union's Chief Steward James Keegan wrote the following to Melodie Esterberg, the City's Director of Public Works:

> This letter is to inform you that bargaining unit members have not received a performance evaluation. Failure to do them prior to March 1, 2004 will result in an unfair labor practice charge to be filed with the NH Labor Dept. Thank you for your attention to this matter.

DECISION AND ORDER

JURISDICTION

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. RSA 273-A:6 I. Although the Union does allege that the City has violated RSA 273-A:5 I (g), (h) and (i), in its failure to conduct performance evaluations of employees, for the following reasons the Hearing Officer concludes that the PELRB lacks jurisdiction to consider the merits of the instant matter.

DISCUSSION

The City's Motion to Dismiss raises two jurisdictional issues, specifically that the Union's charge is untimely under the statute of limitations provisions of RSA 273-A and that under the circumstances the PELRB otherwise lacks jurisdiction to interpret the parties' CBA. The Hearing Officer concurs with the City on both arguments.

RSA 273-A:6, VII provides that "the [B]oard shall summarily dismiss any complaint of an alleged violation of RSA 273-A:5 which occurred more than six months prior to the filing of the complaint with the body having original jurisdiction of that complaint." The Union's charge alleges that the City committed an unfair labor practice when it failed to conduct employee evaluations prior to July 1, 2003. In filing the instant charge on February 27, 2004, the Union's charge is beyond six (6) months from the date, prior to which, evaluations were to be completed. Since the plain wording of the parties' contract provides that a re-evaluation, or "second evaluation," is contingent upon the issuance of a "first evaluation," it is not logical that the statute of limitations would commence upon the City's failure to conduct a "second evaluation." In other words, a second evaluation does not occur unless there has already been a first evaluation. Thus, setting aside for the moment the issue of original jurisdiction, the Union's charge is untimely and must be summarily dismissed on this basis.

The PELRB also lacks jurisdiction at this time based upon the nature of the dispute. The Union's improper practice charge, on its face, raises a contract issue and, indeed, it has alleged a violation of RSA 273-A:5 I (h) ("to breach a collective bargaining agreement") by the City. In Article 20.5, however, the parties have specifically agreed "that any differences between the parties on matters related to this Agreement shall be settled by the means herein provided." The "means provided" includes final and binding arbitration. (See Finding of Fact No. 7, above). Under the circumstances this dispute is, first and foremost, appropriately processed through the parties' mutually agreed upon grievance procedure, up to and including binding arbitration, if necessary.

The Hearing Officer understands that the Union has also alleged that the City's conduct constitutes a violation RSA 273-A:5 I (i) ("to make any law or regulation, or to adopt any rule relative to the conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule") and that the record reflects that the City has done nothing with respect to employee evaluations, including conduct them. (See Finding of Fact No. 5, above). Based upon the above discussion relative to

the untimeliness of the Union's charge, the Hearing Officer need not address the issue of whether the City's inaction in this regard constitutes the making of a law or regulation, or adoption of a rule, that serves to invalidate a portion of the parties' CBA.

Accordingly, the City's Motion to Dismiss is granted and the Union's Improper Practice Charge is dismissed.

So ordered.

Signed this 21st day of September, 2004.

Peter C. Phillips, Esq.
Hearing Officer

Distribution:
Katherine M. McClure, Esq.
Warren D. Atlas, Esq.