



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NH State Employees' Association, Inc.,
SEIU Local 1984

Complainant

v.

NH Department of Health and Human Services

Respondent

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Case No. S-0308-6
S-0308-8

Decision No. 2004-187

APPEARANCES

Representing NH State Employees' Association, Inc., SEIU Local 1984:

Michael C. Reynolds, General Counsel

Representing NH Department of Health and Human Services:

Frank D. Nachman, Chief Legal Counsel

BACKGROUND

The State Employees Association of New Hampshire, Inc., SEIU Local 1984, (hereinafter "the Union") filed unfair labor practice charges with the Public Employee Labor Relations Board ("PELRB" or "Board") against the State of New Hampshire, Department of Health and Human Services (hereinafter "the State") on May 14, 2004 alleging violations of RSA 273-A:5 I (e), (g), (h) and (i). Specifically, the Union alleges that the State has failed to comply with an arbitrator's award, issued on November 19, 2003, that awarded certain make whole remedies to the grievant, Bette Jane Riordan.

The State filed its answer on May 28, 2004. The State essentially agreed with the chronology of events as alleged by the Union and admitted that an award as to damages regarding the grievant was issued on November 19, 2004. However, the State further answered

A tele-conference was conducted on July 14, 2004 at 3:00 PM, during which both parties were represented by counsel. During the course of the pre-hearing tele-conference, counsel for the Union indicated his intent to file a Motion for Summary Judgment and subsequently did so on July 21, 2004. Counsel for the State filed an objection to the Union's motion on August 4, 2004. A hearing was held on the pending motion on August 26, 2004 before the undersigned hearing officer at the offices of the Board in Concord, New Hampshire. Both parties were represented by counsel at the hearing, and had the opportunity to present witnesses for examination, to undertake cross-examination, and to offer exhibits into evidence. At the conclusion of the hearing, the record was closed. Upon review of all filings submitted by the parties and a consideration of all relevant evidence, including the parties' joint factual stipulations incorporated as Findings of Fact paragraphs 5 through 28, below, the hearing officer determines the following:

FINDINGS OF FACT

1. The State of New Hampshire, through its Department of Health and Human Services, employs personnel in various job positions and is therefore determined to be 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 exclusive representative for certain classified employees within the Department of Health and Human Services.
3. The State and the Union are parties to an existing collective bargaining agreement (CBA) for the period July 1, 2002 to June 30, 2003. (Joint Exhibit No. 2).
4. Article XIV of the parties' CBA contains a grievance procedure. Article 14.5.2, Arbitrator's Powers, provides as follows:

The arbitrator shall have no power to render a decision that will add to, subtract from or alter, change or modify the terms of this Agreement, and his/her power shall be limited to interpretation or application of the express terms of this Agreement, and all other matters shall be excluded from arbitration. To the extent that a matter is properly before an arbitrator in accordance with this provision, the arbitrator's decision thereon shall be final and binding providing it is not contrary to existing law or regulation nor requires an appropriation of additional funds, in either of which case it will be advisory in nature.

5. Bette Jane Riordan was laid off effective November 30, 1997 from her classified State position at DHHS.
6. The union filed a grievance on her behalf citing a violation of Article 16.9 of the Collective Bargaining Agreement.

7. The Union sought arbitration, and a hearing was held before Arbitrator Nancy Peace to determine arbitrability on May 5, 1998.
8. On June 30, 1998, Ms. Peace issued her decision finding that the matter was arbitrable.
9. On or about February 1999, the State informed the Union that it would not abide by the arbitrator's decision on arbitrability; and informed the Union that it was treating as advisory the decision of the arbitrator that the matter was arbitrable.
10. The union filed an ULP with the PELRB and a hearing was held on April 1, 1999.
11. The PELRB issued its decision on May 5, 1999 finding for the Union/Riordan. See Case No. S-0398:2, Decision No. 1999-039. The PELRB ordered the State to arbitrate.
12. After its motion for reconsideration was denied by the PELRB, DHHS appealed the PELRB's decision to the NH Supreme Court.
13. On October 23, 2001 the Supreme Court issued its decision concluding that the State had not acted in good faith and that the grievances should be arbitrated.
14. The State and Union mutually agreed on Allan McCausland, Ph.D. as arbitrator.
15. Initial arbitration hearings were held March 27, March 29, and April 18, 2002, on the liability issues, e.g., whether the State had violated the CBA in the layoffs, without deciding damages.
16. The Union and State filed Briefs and reply briefs to the arbitrator.
17. The arbitrator issued his decision on November 19, 2002, finding for the Union/Riordan on the issue of liability/CBA violation.
18. On May 16, 2003, the Union filed the Unfair Labor Practice charges which became PELRB Case No. S-0308-6.
19. The parties did not reach agreement on the make whole remedy reflecting in the arbitrator's November 19, 2002 decision. Therefore, the parties requested a hearing before Arbitrator McCausland. The damages hearings concerning Ms. Riordan was held before the arbitrator on May 15, 2003.
20. On September 12, 2003, the Union submitted its brief and arguments to the arbitrator on the Riordan damages issues.
21. On September 12, 2003, the State submitted its brief and arguments to the arbitrator on the Riordan damages issues.

22. On September 26, 2003, the Union submitted a reply brief.
23. The arbitrator issued his decision on November 19, 2003 addressing remedy issues concerning Ms. Riordan.
24. On May 14, 2004, the Union filed an ULP which stated, in part, that the State had not stated that it would refuse to comply with the arbitrator's award but that State had not complied with the award to date, and had had sufficient time to comply.
25. On May 28, 2004, the State filed with PELRB an answer to the ULP and, in paragraph 9: admitted that the State had not stated or expressed a refusal to comply with the arbitrator's damages award; but denied the balance of the allegations in ULP paragraph 9 because the State either denied or said it was without sufficient information to either admit or deny.
26. The Union filed a Motion for Summary Judgment with PELRB on June 21, 2004.
27. The Union filed a Clarification/Response to the July 23, 2004 Prehearing Memorandum and Order.
28. The State filed an Objection to Petitioner's Motion for Summary Judgment with PELRB on August 4, 2004.
29. In his November 19, 2003 award, the arbitrator addressed various issues remaining in dispute as to the grievant's "make whole" remedy. He determined, *inter alia*, that the "reinstatement of Ms. Riordan 'is not contrary to existing law or regulation,' nor should it require 'an appropriation of additional funds.'...*The State is acting in bad faith and in violation of the Award of November 19, 2002, by not having reinstated Ms. Riordan.* The Union is sustained in its argument that Ms. Riordan's wage and benefit losses continue to accrue, and will continue to accrue, until she is reinstated as per the November 19, 2002, Arbitration Award...." (Union's Complaint, Attachment No. 2, p. 7). (Emphasis added).
30. In his November 19, 2003 award, the arbitrator determined, *inter alia*, that "Ms. Riordan's back pay earnings and benefit losses, including all reduced vacation and/or leave pay immediately following her lay off and thereafter shall be:
 1. From the date of her layoff through September 17, 1999.
 2. From December 2, 2002 until she is reinstated with all of her past and present seniority entitlements, to a position of Program Specialist IV, or the equivalent position today, within the Department of Health and Human Services for which she qualifies.

(Union's Complaint, Attachment No. 2, p. 15).

31. In his November 19, 2003 award, the arbitrator determined, inter alia, that Ms. Riordan was not entitled to mileage for commuting from Portsmouth to Concord. (Union's Complaint, Attachment No. 2, p. 16).
32. In his November 19, 2003 award, the arbitrator determined, inter alia, that "Ms. Riordan is entitled to statutory interest on her past losses. Interest shall be computed on the monetary award for her lost pay and benefits utilizing the applicable rate(s) reflected in NH RSA 524:1-b and NH RSA 336:1 from the date of the filing of her grievance." (Union's Complaint, Attachment No. 2, p. 21).
33. In his November 19, 2003 award, the arbitrator determined, inter alia, that "Ms. Riordan was not entitled to compensation for any increased tax burden she may suffer as a result of receiving all of her past income and benefit losses, as well as interest thereon, in one tax year." (Union's Complaint, Attachment No. 2, p. 22).
34. In his November 19, 2003 award, the arbitrator retained "jurisdiction over the issue of remedy, as per the agreement of the parties, in the event that any further disputes regarding the "remedy" for Ms. Riordan's case should arise." (Union's Complaint, Attachment No. 2, p. 22).
35. Neither the State nor the Union has sought any additional proceedings before the arbitrator seeking a clarification of his award or a ruling on any further disputes regarding the "make whole" remedy for Ms. Riordan.
36. The Union's Motion for Summary Judgment states, among other things, that the State has filed no unfair labor practice in this matter and that "while, arguably, ...[it]...may have been able to argue about the *meaning* of the arbitrator's awards, those awards are final and binding and may not now be challenged." (Petitioner's Motion for Summary Judgment) (Emphasis in original).
37. In its objection to said motion, the State indicates, inter alia, that "[b]y agreement of the parties, the arbitrator has reserved jurisdiction on the issue of remedy." It also asserts that "there is no firm time limit under which the Department must act in declaring that an arbitrator's award is advisory only...[and that its'] right to treat the award of the arbitrator as advisory has not extinguished by law." (State's Objection to Petitioner's Motion for Summary Judgment). However, it presented no evidence, or offers of proof, as to how the arbitrator's award is contrary to existing law or regulation, or requires an appropriation of additional funds, to otherwise render it "advisory" under Article 14.5.2 of the parties' CBA.

DECISION AND ORDER

JURISDICTION

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. RSA 273-A:6 I. Here, the Union alleges that the State has violated RSA 273-A:5 I (e), (g), (h) and (i)

as a result of its non-compliance with a final and binding arbitrator's award, and files the instant motion asserting that it is entitled to judgment as a matter of law. It is well settled that the PELRB has jurisdiction to consider whether a party's failure to implement an arbitrator's award constitutes an unfair labor practice. See *Appeal of Belknap County Commissioners*, 146 N.H. 757 (2001); *Board of Trustees of the University System of New Hampshire v. Keene State College Education Association*, 126 N.H. 339 (1985).

SUMMARY OF DECISION

The Union's Motion for Summary Judgment is granted. An arbitration award has been issued in accordance with the parties' grievance procedure and the State has not complied with the terms of such award, nor challenged its' enforceability, within an appropriate time period. The State has committed an improper labor practice within the meaning of RSA 273-A:5 I (e), (g) and (h).

DISCUSSION

Through the instant Motion for Summary Judgment, the Union seeks the States' compliance with the arbitrator's award of November 19, 2003. In considering the Union's motion, I have reviewed the parties' pleadings, their factual stipulations and their arguments presented at hearing, and weighed all inferences properly drawn from them in the light most favorable to the State in order to determine the existence of a genuine issue of material fact. Upon doing so, I conclude that there is no genuine issue of material fact presented by the instant matter.

Simply stated, arbitration awards concerning Ms. Riordan were issued on November 19, 2002 and November 19, 2003, neither of which has been formally challenged by the State. Even though the State is entitled to consider the arbitrator's awards as advisory under certain circumstances, as specified in Article 14.5.2 of the CBA, its' right in this regard is not without limitation or, as the New Hampshire Supreme Court described earlier in these proceedings, "unfettered." *Appeal of the State of New Hampshire*, N.H. Supreme Court Case No. 99-419 (Order, dated October 23, 2001, p. 3). At some point in time it must in good faith either comply with the awards or take some other formal action in appeal thereof or response thereto. The State has not taken any such steps, nor has it claimed that the arbitrator exceeded his authority. Indeed, there is no dispute that while the State has not refused to comply with the November 19, 2003 award, it has not in fact implemented the arbitrator's findings. In other words, by the State's own failure or refusal to act, these matters have remained unresolved.

The State points out that the arbitrator, by agreement of the parties, has retained jurisdiction over any further disputes over remedy issues. Although this is true, I find that it would be inappropriate for the State to use the fact of the arbitrator's continued retention of jurisdiction as some sort of loophole for non-compliance. The fact is that if the State had any remaining issues with respect to Ms. Riordan's make whole remedies, it could have raised them with the arbitrator long ago. As the record stands, the State has brought no disputes to his attention since the issuance of his most recent award. While the parties may be engaged in protracted settlement discussions, this fact does not otherwise toll the States obligation to comply

with a duly issued and enforceable award. I note that the arbitrator ruled on November 19, 2003 that "the State is acting in bad faith and in violation of the Award of November 19, 2002, by not having reinstated Ms. Riordan" (Union's Complaint, Attachment No. 2, p. 7), and I can only conclude that this continues to be the case.

The New Hampshire Supreme Court has long held that where parties have contracted in their CBA for judicial review of arbitration awards, thirty (30) days is a reasonable period of time for a party challenging an arbitrator's award to seek judicial review. *Board of Trustees of the University System of New Hampshire v. Keene State College Education Association*, 126 N.H. 339 (1985). RSA 273-A:6, VII establishes a six (6) month statute of limitations for the filing of a complaint under RSA 273-A:5, and, under limited circumstances, the PELRB will consider an appeal of an arbitrator's award within the context of an unfair labor practice complaint. See *Appeal of Amalgamated Transit Union*, 144 N.H. 325 (1999); *Town of Hanover v. Professional Firefighters of Hanover, Local 3288*, PELRB Decision No. 2004-106 (July 29, 2004). At the time the instant case was filed by the Union, almost six (6) months had passed without the State's implementation of the arbitrator's November 19, 2003 award. It is now well beyond the six (6) month statute of limitations established under RSA 273-A:6, VII for the State to file an appropriate action, if any, with the Board with respect to the enforceability, or lack thereof, of said award.

Under the circumstances, I find that there is no genuine issue of material fact presented by the instant matter and determine that the State has committed an unfair labor practice within the meaning of RSA 273-A:5 I (e), (g) and (h) by its failure to implement and comply with the arbitrator's award. The State has had more than sufficient time to either seek review of the award or simply follow its terms. In doing neither, it has violated RSA 273-A:5 I (e), (g) and (h). I dismiss the Union's RSA 273-A:5 I (i) allegation because just as the court in *Appeal of Belknap County Commissioners* "was not prepared to equate compliance with a binding arbitration award with the making of a law, rule or regulation," I conclude that "non-compliance" similarly does not rise to that level. *Appeal of Belknap County Commissioners*, 146 N.H. 757, 761 (2001).

The State is hereby directed to comply with the arbitrator's November 19, 2003 damages award forthwith.

So ordered.

Signed this 1st day of December, 2004.



Peter C. Phillips, Esq.
Hearing Officer

Distribution:

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