State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Fall Mountain Regional Educational Support Personnel Association/NEA-NH Complainant v. Fall Mountain Regional School District Respondent	Case No: T-0380-7 Decision No. 2004-198

APPEARANCES

Representing the Complainant:

James F. Allmendinger, Esq., NEA-NH

Representing the Respondent:

Edward M. Kaplan, Esq., Sulloway & Hollis PLLC

BACKGROUND

The Fall Mountain Regional Educational Support Personnel Association, NEA-NH (hereinafter "the Association") filed an unfair labor practice complaint on May 7, 2004 alleging that the Fall Mountain Regional School District (hereinafter "the District") committed an unfair labor practice by unilaterally reducing the number of work hours for certain bargaining unit employees and by otherwise not maintaining the *status quo* for certain benefits after the expiration of the parties' collective bargaining agreement ("CBA") on June 30, 2003. The Association states that the voters rejected a fact-finder's recommendations in March 2004 and

adopted a budget that resulted in the reduction of the number of hours to be worked by a number of employees in the bargaining unit to less than thirty (30) hours weekly. Because of this reduction in work hours, the Association states that many of these employees have lost negotiated health insurance benefits, and also suffered losses of increased vacation time, increased longevity payments and retirement stipends. The Association contends that the District was required to maintain the *status quo* as to terms and conditions of employment during the period of the parties' contract impasse, including employees' hours of work and other benefits. When the District unilaterally took this action, the Association alleges that it violated not only the *status quo* doctrine but also RSA 273-A:5 I (a), (c), (e), (g), (h) and (i).

Accordingly, the Association asks, inter alia, that the PELRB order the District (1) to cease in its commission of unfair labor practices, (2) to restore the hours of work that it unilaterally reduced, (3) to provide employees with the appropriate level of vacation, retirement and longevity benefits per the CBA, and (4) to make employees whole for any losses suffered.

The District filed its answer denying the Association's unfair labor practice charge on June 3, 2004. While the District admits that the voters rejected the fact-finder's recommendations on March 9, 2004 and that on the same date a separate warrant article was adopted by the voters setting a new budget amount, it denies that this new budget unilaterally reduced hours of work for bargaining unit employees. The District submits that some employees were offered the opportunity to work for the District during the 2004-2005 academic year at hours that are different than those that they worked in the 2003-2004 academic year, and that as a result of reduced hours employees who previously had access to certain benefits lost such access. The District denies that its actions in this regard violated any provision of RSA 273-A and/or any obligation to maintain status quo. The District notes that in accordance with Article XVIII of the CBA, "[h]ours of work are to be determined by the Board to meet the needs of the District." It asserts that it has applied the principle of *status quo* since June 30, 2003 and denies that said principle requires increases in vacation time or longevity. It also maintains that it has properly applied the *status quo* doctrine to retirement payments. The District therefore requests that the Association's unfair labor practice be dismissed.

A Pre-Hearing Conference was convened on June 30, 2004 at the PELRB offices in Concord, New Hampshire. Despite a notice of the same, duly issued by the PELRB, no representative of the Association attended that conference and it proceeded without their attendance.[1] An evidentiary hearing was convened at the offices of the Public Employee Labor Relations Board in Concord on August 17, 2004 at which both parties were represented by counsel. Each was provided the opportunity to present witnesses and exhibits and had the opportunity to cross-examine witnesses. The parties' submitted a Statement of Agreed Facts that was made a part of the record and are incorporated below as Findings #1 through #13. Prior to the hearing on the record, the District counsel represented that the issue of the District's continued contribution to retirement payments had been resolved and that the District was continuing to make appropriate payments. During the hearing the Association sought to amend its original complaint, over the objection of the District, to assert that June 22, 2004 letter of the

[1] At the time of the pre-hearing, an agent of the PELRB attempted to contact representative(s) of the Association at their office in order to inquire as to the reason for their absence. The agent was informed that the representatives were away from the office and were otherwise unavailable.

District sent to the Association after the filing of the original complaint also constituted an unfair labor practice in violation of RSA 273-A:5,I (a) and (e). The amendment alleged that a letter from the District to the Association on June 22, 2004 indicating that the District felt it was "inappropriate to re-open negotiations." The letter also indicated that its position was "Due to the unresolved Improper Practices charges of the [Association] against the [District]..."

The board reserved its decision on the motion to amend and invited written pleadings memorializing the parties' respective positions on the amendment to be submitted following the hearing. The board otherwise proceeded to hear evidence on all issues and at the conclusion of the hearing held the record open for the submission of post-hearing pleadings, including legal memoranda from the parties. The board also requested that the District provide a copy of a financial document entitled "Support Staff Compensation Detail". That document and briefs were filed on August 27, 2004. Also on August 27, 2004 a written Motion to Amend the original complaint was filed by the Association and a written objection filed by the District on September 8, 2004 and the record was closed.

The Board has reviewed all filings submitted by the parties and considered all relevant evidence, including testimony and exhibits offered by the parties and weighed the credibility of the several witnesses.

The Board determines the following:

FINDINGS OF FACT

i. The Fall Mountain Regional School District ("District") employs individuals in support staff positions within its schools and therefore is a public employer within the meaning of RSA 273- A:1, X.

ii. The Fall Mountain Regional Education Support Personnel Association is the exclusive bargaining representative for certain support personnel employed members by the District.

iii. The parties have executed several previous collective bargaining agreements and are signatories to a collective bargaining agreement that governed the terms and conditions of the parties' employment relationship and which expired on June 30, 2003,

1. In March, 2003, the voters of the Fall Mountain Regional School District ("FMRSD") approved a warrant article establishing the FMRSD Budget Committee, and said Committee began its meetings in June of 2003 and concluded those meetings in December of 2003.

2. At the February, 2004 informational meeting, the FMRSD Budget Committee recommended a budget of $20,984,868.

3. The budget recommended by the FMRSD Budget Committee was increased at the district informational meeting by $91,000 so that the Junior ROTC Program which had been eliminated from the budget could be returned to it. The total budget was, therefore, increased by $91,000 to $21,075,868.

4. The FMRSD default budget amount for the July, 2004-June 30, 2005 year was $21, 255, 344.

5. On or before April 15, 2004, the FMRSD issued individual contracts to each member of the Fall Mountain Educational Support Personnel Association, NEA-NH ("the Association"), which contracts set forth the specific number of hours each individual would be expected to work for the 2004-2005 academic year.

6. The FMRSD has not modified any of the hours set forth in said individual contracts.

7. Some of the individual contracts noted in paragraph 5 and 6 above offered fewer hours of work than in the preceding year, one contract increased the hours of work, and some contracts offered the same number of hours worked in the previous year.

8. Article XVIII of the parties' Collective Bargaining Agreement states:

> "Hours of Work
>
> 18.1 Hours of work are to be determined by the Board to meet the needs of the district."

9. Wages and benefits represent over 80% of the FMRSD budget.

10. In the 2003-2004 academic year, the FMRSD issued 89 contracts for paraprofessionals who were educational aides.
    - 59 of said contracts were for positions of 30 hours or more and were therefore eligible for benefits.
    - 30 of said contracts were for positions of fewer than 30 hours and therefore were not eligible for benefits.

11. In the contracts offered for the 2004-2005 academic year:
    - 23 contracts were offered for positions of 30 hours or more and were therefore eligible for benefits.
    - 36 contracts were offered for positions of less than 30 hours and therefore were not eligible for benefits.
    - 1 position was increased from 25 to 30 hours and therefore became eligible for benefits.

- 1 position was reduced from 35 to 32 ½ hours and continued to be eligible for benefits.

12. In addition to changes noted above, in the 2004-2005 academic year, the FMRSD eliminated four high school teaching positions and one elementary teaching position.

13. The Association is compromised of approximately 190 positions. More than 100 of these positions are contracted for 30 or more hours and are therefore eligible for benefits.

14. Article XVIII, appearing above, had been part of the parties' collective bargaining agreements since, at least, 1989.

15. The Preamble to the parties' CBA defines certain employee classifications as follows:

> "Full Time Employees – Employees who work a total of forty (40) hours per week for the school year or longer.
>
> Part Time Employees – Employees who work less than forty (40) hours per week for the school year or longer."

and indicates that certain employees shall maintain the "full time" classification if they fall into the following category, as follows:

> "Employees who worked less than 40 hours per week and were classified as Full Time Employees prior to July 1, 1996, will be grandfathered in that classification as long as they remain with the district."

16. Witnesses for both parties testified that they understood their agreement did not provide certain health insurance coverage for employees, other than those grandfathered, who were employed to work less than thirty (30) hours per week.

17. On August 27, 2004 a written Motion to Amend their original complaint was filed by the Association asserting that during this pending matter the District indicated that because the union had filed a complaint with this board the District wasn't going to re-open negotiations. A written objection was filed by the District on September 8, 2004 alleging insufficient notice of the basis of the amendment and the delay of the resolution of the initial complaint that consideration, if not additional proceedings, of an amendment would require.

18. The parties began negotiations for a successor agreement in Fall of 2002 that resulted in impasse, mediation and fact-finding in Spring 2003. Following that

impasse, the parties conducted only one negotiation session on April 22, 2004 and has not conducted any negotiations since the filing of the Association's complaint on May 7, 2004.

19. The District indicated its willingness to participate in a negotiations session at the hearing conducted by the PELRB.

20. The parties were aware that individuals who are members of the bargaining units also enter into individual contracts with the District on an annual basis. One of the purposes that these individual contracts serve is to establish the number of hours per week that each employee is scheduled to work.

21. In previous years, several members of the bargaining unit had their hours per week reduced by the District below 30 hours weekly, and as a result lost certain health insurance benefits.

22. No negotiation of the number of hours per week for employees or a change in the required minimum hours to receive certain health benefits occurred between the parties during their negotiations for the successor agreement.

23. The Association witnesses testimony established that its objection to the District's action in reducing the number of hours related to the significant number of employees who were effected this time as opposed to the several who were affected in past years.

24. No evidence was presented that indicated that any paraprofessional work previously performed by the employees who had had their hours reduced was subsequently sub-contracted to non-unit members or outside contractors.

DECISION AND ORDER

DECISION SUMMARY

The District and the Association are parties to a collective bargaining agreement that expired June 30, 2003 and, at the time of the hearing, they had been unable to agree on the provisions of a successor agreement. Under these circumstances, by law, the parties' relationship is governed by the doctrine of *status quo*. This doctrine provides that, while the collective bargaining agreement is said to have expired, the conditions of employment that previously existed remain the same until a successor agreement is negotiated. At the time of the expiration of the parties' contract in June 2003 the paraprofessionals comprising this bargaining unit had agreed to work on a condition that reserved, solely to the District, the right to set the number of hours each employee would work. In addition, the parties also established a condition that made the receipt of medical insurance coverage contingent upon an employee working a minimum of

thirty (30) hours weekly with the exception of certain employees who had medical insurance coverage "grandfathered" to them regardless of the hours worked. The receipt of the health insurance benefit was contingent upon the number of hours worked weekly, a condition precedent solely within the right of the District. Since these were the conditions under which the parties performed during the life of the contract, these are the conditions that are maintained under the doctrine of *status quo*. Therefore, the District did not commit an unfair labor practice when it mandated that certain employees' work hours were to be reduced below thirty (30) hours weekly and they consequently lost medical insurance coverage. The Association's complaint, as amended, is denied.

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has sole original jurisdiction to adjudicate claims of unfair labor practices committed by a public employer or an exclusive bargaining representative certified under RSA 273-A:8 through the application of RSA 273-A:6. The PELRB also is authorized to determine whether claims alleging the commission of an improper or unfair labor practice pursuant to RSA 273-A:5, I are filed in a timely manner as calculated in RSA 273-A:7.

DISCUSSION

The District and the Association have been parties to collective bargaining agreements, the most recent one of which expired, by its terms, on June 30, 2003. It had been effective and governed the parties since July 1, 2001. The parties had arrived at its terms through mutual negotiations and each indicated its acceptance of those terms by their respective execution of the document. (Joint Exhibit #1). Following its expiration and without a successor agreement having been negotiated, the parties entered into a *status quo* period. A status quo period is a period of time following the expiration of a collective bargaining agreement and prior to the parties achieving agreement to a new collective bargaining agreement. During the status quo period the terms and conditions of employment are to remain the same while the parties continue through the collective bargaining process for the new agreement. (See *Appeal of Alton School District, et al,* 140 N.H. 303. (1995).

The relevant conditions that were, to borrow a word, to endure (*Id.* at 306) include (1) that employees, with the exception of those with grandfathered rights, that were scheduled to work less than 30 hours per week would not receive full health insurance benefits (See Appendix B generally); (2) that the District had reserved an exclusive right, through negotiation of the language in Article XVIII, that provided, " 18.1 Hours of work are to be determined by the Board to meet the needs of the district." (See Joint Exhibit #1) to set the number of hours for each employee; and (3) that the District had exercised this exclusive right, albeit with fewer affected employees, in past years under the same CBA language and through the utilization of the individual contracts. While the Association asserts that the District's actions constituted a unilateral action, it was an action that the District was allowed to make unilaterally by the terms of the parties' agreement.

It is a fact that when the pre-existing collective bargaining agreement expired on June 30, 2003 certain later affected employees were receiving health benefits as a condition of their work. A condition precedent to their receipt of those health benefits however was that an employee's eligibility was contingent upon being assigned, by the District without their need to negotiate further, to work a minimum of thirty (30) hours per week While we respect the Association's position that the District's action resulted in an unprecedented number of employees being adversely affected and represented a substantial diminishment in compensation, we cannot find that the District's action resulting in the loss of these benefits was an action that violates RSA 273-A:5, I.

Next, we examine the issue raised by the Association that the District is obligated to grant increases in paid vacation time based upon years of service and to provide longevity payments following the expiration of the CBA and during the *status quo* period. The court has previously ruled that salary step increases are not required to be paid by the public employer during a *status quo* period. *Appeal of Milton School District*, 137 N.H. 240, 247. Without evidence that longevity payments were based upon any other term or condition other than experience we find them analogous to salary step increases. We find the same to be true of increases in vacation time that are also based upon experience. Both are unlike the educational incentive exception that the court pointed to as contrasting with an increase based solely on experience in *Appeal of Alton School District, et al,* 140 N.H. 303, 310. (1995). We do not consider the allegation by the Association regarding retirement payments on the representation of the District's counsel to the Board, in the presence of the District representatives, that these payments are being paid. If it is later learned by the Association that said payments have not been made, it may petition this board with a complaint so that evidence may be heard on that issue and a separate decision rendered by the board.

Last, we consider the issue of the Association's motion to amend its original complaint that was advanced for the first time during the evidentiary hearing. The Association desired to add an additional allegation that the District was violating its obligation to bargain in good faith violative of RSA 273-A:5, I (a) and (e) when, during the pendency of these proceedings it indicated that "it was not appropriate" to continue to negotiate and further indicated that it hoped that the parties could be able to move forward, impliedly after the PELRB had resolved the matter through its decision and the impact would be known. The board allowed the Association to introduce a letter to that effect, dated June 22, 2004, that contained these expressions by the chairman of the Fall Mountain Regional School Board. Given the long standing practice in New Hampshire allowing amendment right up until the case goes to the fact-finder, be it a judge, jury, or in this case the board, we allow the amendment. We do not find, under the circumstances of this case, where (1) the correspondence involved was from one party to another party appearing in the same action before the board; (2) and after the parties had engaged in litigation of issues regarding an allegation of the District's failure to bargain in good faith involving the same statutory prohibitions; (3) and the letter contains a specific reference to this case using this board's assigned case number; that there is sufficient prejudice shown by the District where this is an administrative proceeding that does not contemplate, by its regulations, formal discovery. Therefore, we grant the Association's motion.

We interpret the Association's motion, as reflected in Paragraph #5, to attach an intent to the District in furtherance of the original allegation of the District undertaking a prohibited action, "by unilaterally reducing hours and unilaterally taking away health insurance benefits." Since we find from the weight of the evidence that the District did not undertake any action that it was not entitled to undertake for the reasons stated above, we do not ascribe bad faith intent to the contents or purpose of the June 22, 2004 letter while the matter was pending before this board.

Therefore, we deny the Association's complaint, as amended.

So Ordered.
Signed this 4th day of January, 2005.

Doris Desautel, Alternate Chairperson

By unanimous vote. Alternate Chairman Doris Desautel presiding with Board Members Richard Roulx and E. Vincent Hall also voting.

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