State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

State Employees Association of New Hampshire, SEIU Local 1984	*	
Complainant	*	
v.	*	Case No. S-0376-16
State of New Hampshire, Department of Corrections	*	Decision No. 2006-024
Respondent	*	

APPEARANCES

Representing the SEA, SEIU Local 1984:

Lorri Hayes, Esquire
Contract and Field Operations Administrator

Representing the State of NH Department of Corrections:

John Vinson, Esquire
Legal Counsel

BACKGROUND

The State Employees Association, SEIU Local 1984 (hereinafter the "Union') filed an unfair labor practice complaint on June 30, 2005 alleging that the State of New Hampshire, Department of Corrections (hereinafter the "Department") has violated RSA 273-A:5 I (c), (e), and (h) by failing to implement or comply with an arbitration award issued on March 25, 2005. The Department filed its answer denying the Union's charge on July 15, 2005. A pre-hearing conference was conducted by the undersigned-hearing officer at the offices of the Public Employee Labor Relations Board ("PELRB" or "Board") on August 26, 2005, as well as a telephone conference call on September 7, 2005. As reflected in the Pre-Hearing Memorandum and Order issued on September 8, 2005 (PELRB Decision No. 2005-121), the parties stipulated to presenting the instant matter to the hearing officer for a decision based upon a statement of

agreed facts and written submissions, and that the sole matter for determination concerns the enforceability of the arbitrator's March 25, 2005 award.

The parties' counsel filed stipulations of fact on September 14, 2005 (an original signed copy was received by the PELRB on October 6, 2005) and their respective memorandums of law on October 14, 2005. In accordance with the Pre-Hearing Memorandum and Order referenced above (PELRB Decision No. 2005-121), upon receipt of these documents, the record was closed. On November 15, 2005, the Union filed a Motion to Strike, claiming, among other things, that Department counsel submitted additional facts in his brief that were not previously stipulated to by the parties. On November 28, 2005, the Department filed a Response to the Union's Motion to Strike, as well as its' own Motion to Strike, requesting, in part, that the Union's memorandum of law should be rejected because of its' alleged late filing. The Union filed a replication to the Department's Response and Motion to Strike on December 14, 2005. Upon review and consideration of all relevant evidence, including the parties' joint factual stipulations incorporated as Findings of Fact paragraphs 3 through 39, below, the hearing officer determines the following:

FINDINGS OF FACT

1. The State of New Hampshire, Department of Corrections, employs personnel in various positions and is 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 Corrections.

3. On October 31, 2003, the State Employees Association grieved an alleged violation of the Collective Bargaining Agreement, concerning, *inter alia*, Article 27.17 on behalf of then Sergeant Boyajian about a 'lateral transfer'. (ULP # S-0376-13).

4. On October 30, 2003 Lt. Whitten responded to the grievance.

5. On October 30, 2003, the State Employees Association filed a Step II grievance on behalf of then Sergeant Boyajian.

6. On November 21, 2003, the Warden as the appointing authority responded to the Step II Grievance.

7. On January 16, 2004, by letter, the Acting Commissioner responded to the third step grievance and notified then Sergeant Boyajian that since the issue he raised was part of an Unfair Labor Practice charge which was before the PELRB, that she would defer action on his grievance until it was resolved by the PELRB.

8. On January 23, 2004, the State Employees Association indicating that it was representing then Sergeant Boyajian, asked the State Labor Management Committee

to appoint an Arbitrator in accordance with Article 14.5 of the Collective Bargaining Agreement.

9. On May 20th, 2004 Sgt. Smith, sent an email to Lorri Hayes stating that "we had gone through step 4 (LMC) and agreed to set up arbitration for the Boyajian grievance (lateral transfer)."

10. On May 24, 2004, Ms. Hayes emailed Mr. Vinson forwarding Sgt. Smith's email and indicating that she had faxed a list of arbitrators and requested that arbitrators be picked for Boyajian and Hallums (sic) cases.

11. The parties then sent several emails back and forth concerning potential arbitrators, including Mr. Ryan in early June 2004. Mr. Vinson and Ms Hayes agreed to Mr. Ryan as an arbitrator for the Boyajian case.

12. Ms. Hayes is a member of the State LMC. Mr. Vinson is not.

13. The ULP # S-0376-13 was originally scheduled for a hearing on March 4, 2004 but was continued to June 17, 2004. The PELRB held a hearing and received evidence on, *inter alia*, the Boyajian grievance on June 17, 2004.

14. The June 17 hearing was continued to August 12, 2004.

15. The August 12, 2004 hearing was postponed through no fault of the parties until November 9, 2004 with closing argument due to the Board by December 1, 2004.

16. On September 8, 2004, Ms. Hayes wrote "as you know, the Union has filed several lateral transfer and investigations grievances. We believe it is important that we at least identify each of these grievances for you. What we would like to do, so as to save quite a bit of paper, is to hold each of the grievances we file (prospective of today) suggesting a violation of Articles 27.16, 27.17 and 27.18 in abeyance at the first step. We hold these cases in abeyance pending the outcome of the ULP, and the Arbitrations we have scheduled in these matters. We expect that the outcome of those cases will be applied to the grievances we have outstanding as well as any new grievances that we file. What is your position on this proposal?"

17. Ms. Hayes wrote to Mr. Ryan on July 30th confirming the Boyajian arbitration on October 5, 2004.

18. On October 4, 2004, Mr. Vinson emailed Ms. Hayes concerning the posting of the position at issue and he requested that the Union cancel the arbitration scheduled for October 5, 2004.

19. Ms. Hayes emailed Mr. Vinson on October 4, 2004 stating "I will not cancel Mr. Ryan for tomorrow". Ms. Hayes also listed three reasons to continue the arbitration. They are: "First: There is no requirement that we raise this issue in only one forum.

Please provide any law, rule, or regulation that you have that specifies this requirement. Second: We raised this issue for Charles Boyajian et al. Mr. Boyajian may not have applied for the position but everyone else similarly situated should have been given the opportunity to apply at the time that the Mr. Hickman's transfer was made. Everyone was not given that opportunity, we believe it to be a violation of the CBA and we will prove it tomorrow. Third: We believe there is a question at issue for the arbitration tomorrow, which is whether or not the DOC violated the CBA when it transferred Sgt Hickman to Interior Squad, F/S off, without posting?"

20. Mr. Vinson emailed Mr. Ryan with a copy to Ms. Hayes informing him that the Department of Corrections would not arbitrate Boyajian the next day because the requested relief had been provided and that the issue was still before the PELRB. On October 5, 2004, the parties conducted a teleconference with Arbitrator Ryan. During the teleconference, Ms. Hayes objected to the cancellation of the arbitration. Mr. Ryan cancelled the arbitration on October 5, 2004 and proposed an additional date.

21. The arbitration was not held on October 5, 2004.

22. Mr. Ryan submitted a bill for the cancelled arbitration to the Department of Corrections.

23. On December 10, 2004, Mr. Vinson emailed the arbitrator "Since we will probably not hear regarding the PELRB ULP until near the end of January 2005, I recommend that any arbitration on that issue be cancelled, especially any case used in the ULP".

24. On December 10, 2004, Mr. Ryan emailed the parties the following "I had offered you 1/26/05 on this case in early October, but when I did not hear back I did not continue to protect that date, so I no longer have it available. If you decide you want a date at some point, just let me know...."

25. Ms. Hayes emailed Mr. Ryan on December 13, 2004 requesting a new arbitration date.

26. February 14, 2004 was suggested by Mr. Ryan.

27. Ms. Hayes agreed to that date on December 14, 2004.

28. Mr. Vinson responded to this email on December 14, 2004 with the following: "It is not acceptable to me. The Boyajian case is currently before the PELRB. The Board's decision, which we expect to be awarded in February, one way or another, will render the grievance in Boyajian moot. I reiterate. I will not arbitrate Boyajian."

29. Ms. Hayes sent Mr. Vinson an email on December 14, 2004 which stated "John: I will schedule the date, if you fail to appear, that is only something you must answer to. Thank you"

30. On December 15, 2004, Mr. Ryan wrote both parties "in light of the dispute over whether to proceed on this case at this time, I left Lorri a message to send me a copy of the Contract. Thank you, Lorri, for sending it. I will review the contract and arguments of the parties and determine shortly whether to proceed on 2/14/05." Mr. Vinson wrote an e-mail to all parties "we (DOC) will not arbitrate Boyajian nor will we arbitrate whether the CBA allows, permits, or requires an arbitrator to decide whether an issue before the PELRB is also subject to arbitration. The latter was not raised in the request for arbitration. The issue for the arbitration was the posting of a lateral transfer position notice which Sgt. Boyajian wanted. The Union and management will be bound by the PELRB decision. I apologize if I appear strident on this issue but it defies logic and legal and equitable principles to litigate the same issue in two fora." Mr. Ryan set the arbitration date for February 14, 2005.

31. On Sunday, February 13, 2005, Mr. Ryan informed the parties by email that "I will be at the hearing tomorrow at 10 a.m. at the SEA conference room..."

32. Mr. Vinson responded that he did not agree to the hearing or the date.

33. The State Labor Management Committee sent a letter to Commissioner Curry and President Smith dated January 31, 2005 indicating that on "October 18, 2004, we acted to forward the case (Boyajian) to arbitration in accordance with Article 14.5.1 of the Collective Bargaining Agreement. In accordance with Article 14.5, the Department must contact the Union as soon as possible to confirm the arbitration scheduled for February 14, 2005."

34. Mr. Ryan and Ms. Hayes met on February 14, 2005 regarding Boyajian case.

35. The PELRB rendered a decision in S-0376-011 directing the parties to utilize the "arbitration procedures". This decision was issued on February 14, 2005.

36. Mr. Ryan sent his decision on the Boyajian case to the parties on March 25, 2005.

37. On April 8, 2005, Mr. Vinson asked Mr. Ryan to reopen his hearing.

38. On April 13, 2005, the Union sent a letter to Mr. Stephen Curry, Commissioner, DOC and Mr. John Vinson, Legal Counsel, DOC requiring that they implement the Boyajian arbitration decision. The Department has yet to reply to this request.

39. On May 5, 2005, Mr. Ryan denied that request.

40. 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.

The Parties further agree that questions of arbitrability are proper issues for the arbitrator to decide.

(Joint Exhibit 1, p. 33).

41. The arbitrator set the arbitration date for February 14, 2005 after reviewing the parties' CBA and considering the parties' positions with respect to rescheduling. He concluded that the grievance procedure leading to arbitration had been followed and determined that in the absence of a stay of arbitration, or the parties' voluntary agreement, he had "no authority to *not* proceed to arbitrate this case under the CBA." (Joint Exhibit 2, p. 8)(emphasis in original).

42. "Only the Union appeared [on that day]. It offered argument and testimony of three witnesses. [The arbitrator] decided to keep the record open for thirty days for any submission of evidence or argument by the Employer, but there was no further communication." (Joint Exhibit 2, p. 3).

43. In his March 25, 2005 award, the arbitrator sustained the Union's grievance and found that the Department "violated Article 27.17 when it did not post the position vacated by Sergeant Washburn that was filled by Sergeant Hickman for more than 60 days." He concluded that "[i]n sum, by soliciting a voluntary transfer under the temporary reassignment provision, but then treating it as a long term or permanent transfer, the Department circumvented its clear obligation to post [the] vacancy [under Article 27.17]." (Joint Exhibit 2, p. 8, 9).

44. By way of remedy, he noted that "[t]he Union only seeks the proper posting of the position. I award such." He ordered the Department to "post the position Sgt. Washburn vacated and specify the rank, facility, unit, shift, days off, and position number in the posting." (Joint Exhibit 2, p. 9).

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 (c), (e), & (h) as a result of its non-compliance with a final and binding arbitrator's award. It is well-settled that failure to "comply with an arbitrator's award may constitute an unfair labor practice," *Appeal of Police Commission of City of Rochester*, 149 N.H. 528, 531 (2003), citing *Board of Trustees v.*

Keene State Coll. Educ. Assoc., 126 N.H. 339, 341-342 (1985). This would include RSA 273-A:5 I (h), breach of a collective bargaining agreement, and 273-A:5 I (e), breach of the obligation to negotiate in good faith. *Id.* at 531.

DISCUSSION

I first address the parties' respective Motions to Strike. The Union's motion requests that the Board strike additional facts added to the Department's memorandum of law. Within its Motion to Strike, the Union also offers a response and certain factual references to portions of the Department's memorandum, including the Department's assertion that the arbitrator's award violates the CBA. In responding to the Union's motion, the Department does not deny that additional facts were included within its' legal brief, but states, among other things, that all such facts are supported by the attached exhibits, that Union counsel has not claimed that such facts are inaccurate, that if Union counsel disagrees with the accuracy of such facts, she should and can ask for a hearing on those facts, that the Board only required the parties to submit a mutual statement of agreed facts and that this did not preclude submitting facts in the respective memoranda which were not agreed to by the parties. As to the Department's Motion to Strike, it requests that the Board strike (1) the fact references in the Union's Motion to Strike that are responsive to certain portions of the Department's memorandum of law, specifically contained in paragraphs 3 and 4, and (2) the Union's legal brief, in its entirety, due to its' being filed after 4:30 p.m., the Board's close of business, on October 14, 2005.

I grant the Union's Motion to Strike as to the additional facts submitted by the Department. As indicated in the Pre-Hearing Memorandum and Order issued on September 8, 2005 (PELRB Decision No. 2005-121), the parties stipulated to presenting the instant matter to the hearing officer for a decision solely through written submissions. Moreover, it was ordered that the parties' counsel compose a mutual statement of agreed facts and exhibits, and that both execute said document and file it with the PELRB. The parties were further informed and instructed that upon filing their supporting memorandums of law, that the record would be deemed closed and a decision would be issued based solely upon the file documents, stipulated facts and the parties' memoranda.[1] Since the hearing officer's decision was accordingly to be based upon a fully stipulated record, it was therefore improper for the Department to include additional facts within its brief, whether or not those particular facts are disputed by the Union.

I grant in part and deny in part the Department's Motion to Strike. It is granted with respect to the facts raised by the Union in its Motion to Strike, since, once again, the hearing officer's decision is to be based upon a fully stipulated record. It is denied as to the filing of the Union's brief. In accordance with Pub. 201.01 (a) (2), "[a]ll electronic filings shall be completed before midnight local time in order to be considered timely filed that day...," and thus when the Union filed its' brief with the Board electronically on October 14, 2005, but after 4:30 p.m.,[2] it was filed in a timely fashion.

[1] I note that the pre-hearing order contained the proviso that the close of the record was still subject to a later determination that a hearing was necessary.

[2] A review of the Board's electronic file indicates that the Union's brief was in fact received by the Board at 6:58 p.m. on October 14, 2005.

Regarding the merits of the Union's complaint, I find that the arbitrator's March 25, 2005 award is enforceable and that the Department has committed an unfair labor practice within the meaning of RSA 273-A:5 I (e) and (h) by failing to comply with its terms. The record reflects that the arbitrator was appointed under the terms of the parties' CBA. Article XIV of the parties' CBA contains the parties' grievance procedure, which includes provisions for the appointment of an arbitrator, as well as final and binding arbitration. The record also reflects that both parties' counsel in this case specifically selected the arbitrator who rendered the March 25, 2005 award (Finding of Fact No. 11, above), and, at least initially, scheduled an October 5, 2004 hearing date with him. The October 5, 2004 arbitration was ultimately postponed at the request of the Department's counsel and the Department was billed for the short notice cancellation of said hearing by the arbitrator. (Finding of Fact No. 22, Union Exhibit 3). These facts indicate, at the very least, that the Department was not questioning the arbitrator's jurisdiction and authority to hear the case as of that point in time. The fact that on October 18, 2004 the State Labor Management Committee forwarded the "Boyajian grievance" to arbitration only served to formalize the arbitrator's jurisdiction and authority in this regard. (Finding of Fact No. 33).

The evidence further indicates that thereafter the Department's counsel refused to agree to another hearing date, not because he and the Department were otherwise unavailable for a hearing but based upon the contention that the subject "Boyajian grievance" was already pending before the PELRB. (Finding of Fact Nos. 28, 30 & 32 , Union Exhibit 1). When this dispute as to rescheduling the matter for February 14, 2005 came to the attention of the arbitrator, he reviewed the contract in order to determine whether to proceed on that date. After considering the parties positions, including the Department's claim that "it would be neither legal or equitable to litigate the same issue in two forums..." the arbitrator found as follows:

> absent a voluntary agreement of the parties or a stay of arbitration, I understand my ethical obligation as an arbitrator under the typical [CBA] (and yours on its face is not apparently different) is to move forward without delay in the exercise of the jurisdiction conferred on me in the CBA to hear the grievance and, if I determine that I do have authority, decide it.

(Joint Exhibit 2, p. 3). The arbitrator accordingly scheduled the arbitration hearing for February 14, 2005. I find that the arbitrator acted appropriately and within his authority under the contract in addressing this issue, since, in accordance with Article 14.5.2 of the CBA, the parties have agreed "that questions of arbitrability are proper issues for the arbitrator to decide" and often times arbitrators are faced with resolving questions of procedural arbitrability and/or scheduling.

The Department was aware of the arbitrator's decision to proceed on February 14, 2005 and was also directed by State Labor Management Committee to contact the Union as soon as possible to confirm the arbitration scheduled for February 14, 2005 in a letter sent to Commissioner Curry dated January 31, 2005. Despite having due notice and full knowledge of the February 14, 2005 hearing, the Department did not appear, nor did it ever seek a stay of the arbitration from the PELRB. The Department was therefore in default. "When a party deliberately fails to appear for a hearing after due notice, the arbitrator will hear testimony and render an award based on the evidence, as if both parties had participated." ELKOURI & ELKOURI, HOW ARBITRATION WORKS 323 (Ruben 6th ed. 2003). This is precisely the course

followed by Arbitrator Ryan in the matter at hand and I find no fault with it. As stated by Arbitrator Pope in 1947, "[a] general arbitration clause in a contract would be rendered meaningless if its implementation depended upon the willingness of each party to the contract to present its case, as the party desiring no change in relationships could nullify arbitration simply be refusing to make an appearance." Id. at 323, quoting Velvet Textile Corp., 7 LA 685, 691 (Pope, 1947). It is therefore readily apparent that the ex parte communications upon which the Department claims should be a basis to vacate the arbitrator's award, or otherwise render it unenforceable, are the product of its own actions. Consequently, I conclude that the arbitrator and the Union did not engage in prohibited ex parte communications, but in fact participated in a duly scheduled arbitration hearing for which the Department knowingly chose to be absent.

In reference to the award itself, it is important to bear in mind that the Board generally has a limited role in reviewing final and binding arbitration decisions unless the parties have reserved such a right for judicial or administrative review within the provisions of their CBA. Where a working agreement did not provide either for review under RSA 542 or an appeal to the PELRB, the PELRB's decision that an arbitrator's binding award was not subject to review was affirmed. *Appeal of International Association of Firefighters, AFL-CIO, Local 1088*, 123 N.H. 400 (1983). More recently, the Board has stated that it "is mindful of the legitimate role arbitration plays in labor relations, the parties' volitional submission [of grievances] to arbitration..., and its otherwise limited jurisdiction to review an arbitrator's decision where the parties have not reserved the right to administrative review. *Professional Firefighters of Hanover, Local 3288 v. Town of Hanover; Town of Hanover v. Professional Firefighters of Hanover, Local 3288*, PELRB Decision No. 2004-106, p. 10 (July 29, 2004). However, since the Department makes the assertion here that the arbitrator's award violates Article 14.5.2 by inappropriately adding terms to the parties' agreement, I review it for this limited purpose.

In Article 14.5.2, the parties have agreed that an arbitrator is prohibited from rendering "a decision that will add to, subtract from or alter, change or modify the terms of [their] Agreement." (Joint Exhibit 1, p. 33). The Department claims that when the arbitrator directed it to include certain information in its' posting of the vacancy, specifically "rank," "facility," and "position number," the arbitrator effectively added these terms to Article 27.16 of the parties' CBA in contravention of Article 14.5.2.[3] I do not agree with the Department's argument.

First of all, Article 27.17, which is cited by the arbitrator as being violated by the Department, is silent as to what information shall be included in a posting for a lateral transfer. The fact that Article 27.17 provides, in pertinent part, that "[a]ll lateral transfers shall be posted by the Employer..." would indicate that a written posting containing reasonably identifying information must occur and this is what the arbitrator has directed. I therefore cannot conclude based upon the evidence presented that the information the Department has been directed to include in the posting adds to, subtracts from or alters, changes or modifies the terms of the parties' agreement.

If, on the other hand, Article 27.16 is applicable to the instant circumstances, the words chosen by the arbitrator still do not otherwise add to or alter the terms of the parties' agreement.

[3] In his award, the arbitrator also directed the Department to post the "shift" and "days off" of the position, terms that are referenced within Article 27.16, and "unit" which is not included within said article.

It is true that Article 27.16 states that "[a]ll postings shall identify the vacancy's assignment, location, shift and days off if they are known," and does not include the words of "rank," "facility," and "position number" as used by the arbitrator. However, these words are consistent with, and within the scope of, the parties' language, in that "rank," "facility" and "position number" are consistent with the terms "assignment" and "location." The arbitrator's use of the additional descriptors simply serves to more particularly identify the position at issue in the Union's grievance, that being the one that was vacated by Sgt. Washburn and is well known to the parties. In accordance with the Court's holding in *Appeal of State of New Hampshire*, 147 N.H. 106 (2001), it is ultimately up to the parties, and, if necessary another arbitrator, to determine whether "rank," "facility," and "position number" shall be included in future postings.

I therefore conclude that the arbitrator's decision and award is enforceable and binding upon the parties. As a result, I find that the Department has committed an unfair labor practice within the meaning of RSA 273-A:5 I (e) and (h) by its failure to implement and comply with its' terms. I dismiss the Union's RSA 273-A:5 I (c) allegation based upon the fact that there is insufficient evidence in the record that the Department's failure to abide by the arbitrator's ruling constitutes discrimination in the hiring or tenure, or terms and conditions of employment, for the purpose of encouraging or discouraging membership in any employee organization.

The Department is hereby directed to comply with the arbitrator's March 25, 2005 award forthwith.

It is so ordered.

Signed this 3rd day of February, 2006.

Peter C. Phillips, Esq.
Hearing Officer

Distribution:
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