State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

City of Dover Complainant	*	Case No: M-0608-4
v.	*	Decision No. 2006-090
Dover Municipal Employees Association Respondent	*	

APPEARANCES

Representing City of Dover:

Mark T. Broth, Esq., Devine, Millimet & Branch, P.A.

Representing Dover Municipal Employees Association:

Emmanuel Krasner, Esq., Krasner Law Office
Brian T. Stern, Esq., Law Offices of Brian T. Stern, P.A.

BACKGROUND

The City of Dover (hereinafter "the City") filed an unfair labor practice complaint on December 22, 2005 alleging that the Dover Municipal Employees Association (hereinafter "the DMEA") committed an unfair labor practice in violation of RSA 273-A:3, RSA 273-A:11, and RSA 273-A:5 II (d), (f), and (g) by delegating or assigning its rights, as the certified representative, to three former employees of the City in order for them to pursue claims against the City under the collective bargaining agreement (CBA) between the DMEA and the City. On January 4, 2006, an answer was filed on behalf of the three former employees, namely Parker Blaney, Kenneth Whelan, and Anne Parsons, denying the City's unfair labor practice charge. The DMEA filed an answer denying the City's charge on January 6, 2006.

On January 30, 2006, the City filed a Motion for Entry of Interim Cease and Desist Order, seeking an order from the Public Employee Labor Relations Board ("Board") staying the arbitration proceedings that had been initiated by Blaney, Whelan, and Parsons. On February 6, 2006 the City filed a motion to strike the answer of Blaney, Whelan, and Parsons, stating, among

other things, that they are not parties to the instant matter and have failed to properly intervene. The City withdrew its Motion for Entry of Interim Cease and Desist Order on February 10, 2006.

A pre-hearing conference was conducted on March 6, 2006 at PELRB offices, Concord, New Hampshire. During the course of the pre-hearing conference, the DMEA filed a "Motion to Exclude Testimony and Evidence," specifically referring to a letter dated September 19, 2005 from DMEA counsel to counsel representing Blaney, Whelan, and Parsons, contending that said letter constitutes a privileged communication and therefore it should be excluded from the record in this case.

Thereafter, a Pre-hearing Memorandum and Order was issued to the parties on March 7, 2006. On March 10, 2006, the DMEA filed a "Statement of Clarification of the Association's Position" in response to a portion of the March 7th order. On March 14, 2006, the DMEA filed a "Request to Include Agreement of the Parties in the Pre-hearing Order," seeking to memorialize for the record an agreement by the City (during the pre-hearing conference) that the Union does have the authority (or ability) to hire whomever it wants to represent it in any case. Also on March 14th, the DMEA filed a "Motion to Allow Brian Stern to Appear as Co-Counsel for the DMEA."

On March 17, 2006, the City filed its response to the DMEA's "Request to Include Agreement of the Parties in the Pre-hearing Order," wherein the City stated that it does not object to an inclusion in the pre-hearing order that the City, by its counsel, agreed that the DMEA has the ability to hire whomever it wants to represent it in any given matter. On March 22, 2006, the City filed its objection to the DMEA's motion to exclude testimony and evidence. Also on March 22nd, the DMEA filed its memorandum of law in support of the Motion to Exclude.

On April 13, 2006, the DMEA filed a Motion to Dismiss. On April 19, 2006, the parties filed a joint stipulation in which they agreed, among other things, to submit the instant case for final adjudication on the written submissions of the parties and proposed a case structuring order. The PELRB Hearing Officer granted the proposed structuring order on that date and the evidentiary hearing previously scheduled for April 20, 2006 was cancelled. In accordance with the case structuring order, the City filed its objection to the DMEA's Motion to Dismiss on April 21, 2006 and its memorandum of law in support thereof on May 3, 2006, and the DMEA filed its memorandum of law on May 3, 2006. Upon receipt of the parties' briefs, the record was closed.[1]

Having reviewed the filings submitted by the parties in accordance with the April 19, 2006 order, and considered and weighed all relevant evidence, the Board finds as follows:

FINDINGS OF FACT

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

[1] Although not referenced within the parties' proposed structuring order or the PELRB order of April 19, 2006, the DMEA filed a reply memorandum of law on May 9, 2006.

2. The Dover Municipal Employees Association ("DMEA") is the duly certified exclusive bargaining representative for certain employees employed by the City.

3. The City and the DMEA are parties to a collective bargaining agreement (CBA) for the period July 1, 2002 to June 30, 2005.

4. During the term of the aforementioned CBA, the DMEA represented three (3) individuals employed in the City's Human Service Department, Youth Services Office: Anne Parsons and Parker Blaney, both employed as drug and alcohol counselors; and Ken Whelan, an adolescent community service supervisor.

5. Anne Parsons ("Parsons") and Parker Blaney ("Blaney"), and Ken Whelan ("Whalen") are public employees within the meaning of RSA 273-A:1, IX.

6. By letters dated June 3, 2005, Parsons, Blaney and Whelan were notified that the reorganization of the youth services function had resulted in the elimination of their positions. They were further notified that they would be terminated from employment effective July 8, 2005.

7. The CBA between the City and DMEA contains a grievance and arbitration procedure at Article XXI, pp. 22-24. Step 1 provides that a member having a grievance is encouraged to discuss the matter informally with the member's immediate supervisor and/or superintendent/division head in an attempt to resolve the matter. Step 2 allows either the aggrieved member or the bargaining unit, if the results of the informal discussion are not satisfactory, to present the grievance in writing to the department head. Under Step 3, if the decision of the department head is not satisfactory, either the aggrieved member or the bargaining unit may pursue the grievance before the City Manager. Step 4 provides specifically as follows: "If the bargaining unit is not satisfied with the decision of the City Manager or the designated representative, the bargaining unit may submit, in writing, a request to the American Arbitration Association to submit the names of prospective arbitrators to the parties." There is no reference under Step 4 for an aggrieved member to proceed to arbitration on his or her own.

8. By letter dated July 15, 2005, Attorney Brian Stern notified the City that he represented Parsons, Blaney and Whelan. A stated purpose of his letter was "to trigger the Grievance Procedure under the Collective Bargaining Agreement."

9. By letter dated July 19, 2005, the City's counsel informed Attorney Stern that only the DMEA, as certified bargaining representative, could file a grievance on behalf of any DMEA member; further, that even if properly authorized to access the grievance procedure, any grievance first initiated on July 15, 2005, would be untimely.

10. By letter to the City's counsel dated July 27, 2005, Attorney Stern argued that neither RSA 273-A nor the CBA precluded bargaining unit members from being represented

by private counsel in grievance proceedings. In response, the City's counsel summarized the City's position:

> Simply put, employees are not permitted to supplant their certified representative with private counsel on matters concerning and arising out of a collective bargaining agreement.

11. By letter to the City's counsel dated August 11, 2005, Attorney Stern asserted that while it was not necessary to do so, he would soon be established as "the official representative of the DMEA Collective Bargaining Agreement for purposes of this grievance," and again requested that the City schedule the grievance hearing.

12. In a letter dated October 4, 2005 to Attorney Stern, Christopher Parker, the DMEA President, wrote "[t]he Dover Municipal Employees Association hereby appoints you special counsel to the Association for the specific and limited purpose of representing the three above named members of the bargaining unit in the matter of their termination of their employment with the City of Dover."

13. By letter to the City's counsel dated September 22, 2005 (mailed October 5, 2005) and referencing the case of *Blaney, Parsons and Whelan vs. City of Dover*, Attorney Stern enclosed the assignment or designation of him as counsel for the Dover Municipal Employees Association members Parsons, Blaney and Whelan.

14. By letter to the City's counsel dated October 13, 2005, Attorney Stern writes, among other things, "...I continue to disagree with your restrictive reading of the representation provisions. As previously indicated, I did not believe I needed authorization from the Union to act as representative in this matter. Nonetheless, to avoid this issue, authorization has been obtained..."

15. On or about November 23, 2005, Attorney Stern filed arbitration demands on behalf of Parsons, Blaney and Whelan with the American Arbitration Association, naming the City as the respondent. In each demand, the name of the claimant is referenced as Parsons, Blaney and Whelan, individually. Neither the cover letters to the demands, nor the demands themselves, including any and all attachments, reference the DMEA in any way as the moving party in the respective cases.

16. The parties stipulated during the pre-hearing conference held on March 6, 2006 that the DMEA has the authority and ability to hire whomever it wants to represent it in any given matter.

17. Following the issuance of the PELRB's Pre-hearing Memorandum and Order on March 7, 2006, the DMEA's statement of clarification of its position, filed with the PELRB on March 10, 2006, is as follows:

> The Association wishes to make clear that it is not saying that individual members may pursue grievances to enforce the Collective Bargaining Agreement outside

the scope of their representation by the Association. The Association maintains that it may choose to assign the prosecution of the case to any attorney of its own choosing. The Association may be persuaded by a particular attorney that said attorney can prosecute the case with a strong probability of success, and, therefore assign that attorney to act on behalf of the Association, but always on behalf of the Association, not on behalf of individual members. Only the Association may bring a case to arbitration under the existing Collective Bargaining Agreement.

DECISION AND ORDER

JURISDICTION

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. N.H. REV. STAT. ANN. 273-A:6 I (1999). Here, the City alleges violations by the Union of RSA 273-A:5 II (d) [to refuse to negotiate in good faith with the public employer], (f) [to breach a collective bargaining agreement] and (g) [to fail to comply with this chapter or any rule adopted hereunder]. The City also alleges violations of RSA 273-A:3 [obligation to bargain] and RSA 273-A:11 [rights accompanying certification] which, if established, would constitute violations of RSA 273-A:5 II (g). Accordingly, PELRB jurisdiction is appropriate under the circumstances.

DISCUSSION

The parties numerous filings have presented us with several matters to decide. We address each as follows. First of all, the DMEA's motion for Attorney Brian Stern to appear as co-counsel to the Association in this matter is granted.

Second, the DMEA's "Request to Include Agreement of the Parties in the Pre-hearing Order" is granted. As referenced above, the parties have stipulated that the Union has the authority and ability to hire whomever it wants to represent it in any given matter.

Third, the DMEA's "Statement of Clarification of the Association's Position" is accepted. (See Finding of Fact No. 17, above).

Fourth, the DMEA's Motion to Exclude is granted. In accordance with Pub. 203.02(e), "the board shall observe those matters of privilege recognized by law." New Hampshire Rule of Evidence 502 establishes the so-called "lawyer-client privilege" under the laws of this state. Pursuant to NH Rule of Evidence 502(a)(5) "a communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Further, under NH Rule of Evidence 502(b):

> a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client...(3) by the client or...the clients lawyer...to a

lawyer...representing another party in a pending action and concerning a matter of common interest therein...or (5) among lawyers.... representing the same client.

It is presumed under the rule that the client's lawyer has the authority to claim the privilege. NH Rule of Evidence 502(c).

Here, the DMEA, through its counsel, seeks to exclude from the record a letter dated September 19, 2005 from Attorney Krasner to Attorney Stern that is offered for our consideration by the City. The subject letter relates to issues of representation between the DMEA and the recently terminated members Parsons, Blaney and Whelan. The only direct parties to the letter are Attorney Krasner, as the sender, and Attorney Stern, as the recipient. The DMEA asserts that the letter is a confidential communication that is protected under the lawyer-client privilege and we agree. It is clear in our minds that the letter was not intended to be disclosed to third persons and was supposed to be confidential between counsel and their respective clients. In this regard, whether or not Attorney Stern, on September 19, 2005, is considered a lawyer to DMEA or to Parsons, Blaney and Whelan, we conclude that the letter is protected from disclosure under either NH Rule of Evidence 502(b)(3) or 502(b)(5).

Despite the fact that the letter apparently came into the City's possession, based upon the record before us we find no waiver of the privilege and, in accordance with NH Rule of Evidence 502(c), Attorney Krasner has requisite standing to claim the privilege on behalf of the DMEA. We therefore conclude that the September 19, 2005 letter is inadmissible in these proceedings and have not considered it in our deliberations.

Fifth, for the following reasons, the DMEA's Motion to Dismiss is denied and the City's complaint is sustained. While the parties' grievance procedure permits an individual aggrieved member to pursue a grievance through Step 3, only the bargaining unit may file for arbitration. (Finding of Fact, No. 7, above). It is apparent to us that the DMEA is not a party to the arbitration, but in fact that it has authorized Blaney, Whelan, and Parsons to proceed on their own under the CBA between the DMEA and the City.

Even though the October 4, 2005 letter reflects that the DMEA appointed Attorney Stern as "special counsel" to represent Blaney, Whelan, and Parsons with respect to their terminations, this did not result in the DMEA filing for arbitration. On the contrary, in each of the demands for arbitration filed with the American Arbitration Association on or about November 23, 2005, there is no reference to the DMEA. In fact, in reviewing the separate demands for arbitration that were filed on behalf of Blaney, Whelan, and Parsons, each respective employee is identified as the "claimant" and Attorney Stern signed the demands not as counsel, special or otherwise, to the DMEA, but as "Attorney for Claimant."

We further note that subsequent to the October 4, 2005 letter of appointment, there is no indication from Attorney Stern that he is representing the DMEA on the Blaney, Whelan, and Parsons grievances. In his October 5, 2005 letter to the City's counsel, he writes that he has been designated as counsel to "Dover Municipal Employees Association members Parsons, Blaney and Whelan," not specifically as counsel to the DMEA. In his October 13, 2005 letter to the City's counsel, Attorney Stern writes that he has obtained authorization from the union to act as

representative in the matter (Finding of Fact No. 14, above), but it is evident from the text of the letter that the authorization is not for union action, but merely for the employees to proceed on their own against the City. Indeed, Attorney Stern indicates in the letter that it pertains to the case of *Blaney, Parsons and Whelan vs. City of Dover*.

We find this arrangement to be contrary to the provisions of the parties' CBA, as well as RSA 273-A. As the New Hampshire Supreme Court has recently stated,

> RSA chapter 273-A reflects a legislative purpose of achieving labor peace by requiring collective bargaining between a public employer and an exclusive representative of all employees within the bargaining unit... Labor peace is enhanced by providing employees with a single voice when bargaining with their employer, and by eliminating the burden on the employer of facing conflicting demands from various employees within a single unit... We believe that the same underlying principle extends to all phases of arbitration proceedings initiated pursuant to a collective bargaining agreement between a public employer and an exclusive bargaining representative.

Dillman v. Town of Hooksett, Slip Opinion, No. 2005-564 (April 7, 2006) (citation omitted). Just as in *Dillman*, the arbitration provisions contained in the parties' CBA are not accessible to individual employees such as Blaney, Whelan, and Parsons, as it would serve to undermine the critical relationship between the public employer and the exclusive representative under RSA 273-A.

It is significant that the demand for arbitration form itself provides that "the named claimant, *a party to an arbitration agreement contained in a written contract*...hereby demands arbitration thereunder." (Emphasis added). This language brings into particular focus the lack of standing that Blaney, Whelan, and Parsons have as individuals to pursue their grievances in arbitration. The only parties in actuality to the arbitration agreement are the DMEA and the City. Thus, under the instant circumstances, the only appropriate claimant can be the DMEA but, as discussed above, thus far it has elected not to pursue the employees' claims.

We accept the DMEA's statement that:

> ...it is not saying that individual members may pursue grievances to enforce the Collective Bargaining Agreement outside the scope of their representation by the Association...[and that] it can assign [an] attorney to act on behalf of the Association, but always on behalf of the Association, not on behalf of individual members. Only the Association may bring a case to arbitration under the existing Collective Bargaining Agreement.

(Finding of Fact No. 17, above). However, this is not what has occurred in the instant case. We have no evidence that the bargaining unit is pursuing the Blaney, Whelan, or Parsons grievances to arbitration, only that the employees are doing so themselves. We agree with the City under the circumstances that it should not have to defend itself against individual bargaining unit members within the context of the contractual agreement to arbitrate that it has with the DMEA.

This decision should not be interpreted as saying that the DMEA cannot hire whomever it wishes to represent it. What we are saying is that, consistent with the Court's holding in *Dillman*, the DMEA cannot authorize individual members, or other third parties, to pursue recourse against the City under the terms of the arbitration provisions contained in its CBA with the City.

We therefore find that the DMEA committed an unfair labor practice, in violation of RSA 273-A:5 II (d), (f) and (g) by its actions in authorizing Blaney, Whelan, and Parsons to pursue their claims under the arbitration provisions contained in the parties' CBA and we order the DMEA to cease and desist in such authorization forthwith.

It is so ordered.
Signed this 6th day of June, 2006.

Doris M. Desautel
Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Members E. Vincent Hall and James M. O'Mara also voting.

Distribution:
Mark T. Broth, Esq.
Emmanuel Krasner, Esq.
Brian T. Stern, Esq.