



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Hillsborough County Sheriff

Complainant

v.

AFSCME Local 3657, Hillsborough County
Sheriff's Department Employees

Respondent

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Case No: G-0012-10

Decision No. 2007-010

APPEARANCES

Representing the County:

Carolyn M. Kirby, Esq., Legal Counsel

Representing the Union:

Joseph L. Delorey, Esq., General Counsel, AFSCME Council 93

BACKGROUND

Hillsborough County Sheriff's Office (hereinafter "County") filed an unfair labor practice complaint on February 16, 2006 alleging that the AFSCME Local 3657/Hillsborough County Sheriff's Employees (hereinafter "Union") committed an unfair labor practice in violation of RSA 273-A:5 II (a), (d), and (g)¹, by demanding fact-finding at a time not provided for by statute. More specifically, the County states that after engaging in numerous good faith bargaining sessions for a successor contract, the parties participated in mediation on October 27, 2005 but were unable to reach an agreement. According to the County, the parties met again on December 5, 2005 at which time the Union indicated that it intended to proceed to fact-finding. The County alleges that it advised the Union that the County was prepared to continue negotiations and asserted that its participation in fact finding was not required at that time based

¹ During the course of the pre-hearing conference, counsel for the County amended the complaint by substituting the reference to subsection (f) with subsection (g).

upon the applicable statute. Nonetheless the Union filed for the appointment of a fact-finder and has refused to negotiate with the County. The County maintains that the Union has failed to seek fact-finding in accordance with RSA 273-A:12.

The Union filed its answer denying the County's charge on March 16, 2006. According to the Union, it filed for fact-finding on or about November 29, 2005. The Union asserts that said filing was consistent with the applicable statute (RSA 273-A:12) and consistent with the time frame established by the County's filing of its budget submission date. It maintains that its actions are in compliance with the provisions of RSA 273-A:12 and that the charge should be dismissed.

A pre-hearing conference was conducted on May 31, 2006. Thereafter an evidentiary hearing was convened at the offices of the Public Employee Labor Relations Board in Concord on June 13, 2006 at which both parties were represented by counsel, presented witnesses and exhibits and had the opportunity to cross-examine witnesses. The Board held the record open to allow the parties to submit legal memoranda in support of their respective positions. Following acceptance of the parties' memoranda, deliberations ensued and the product of those deliberations is embodied in this written decision. In due course, the Board then reviewed all filings submitted by the parties, considered and weighed the credibility of all witnesses and of all relevant evidence and determined the facts that follow. However, before this decision was written, Member Seymour Osman died and his vote was not recorded and therefore is not included in this written decision. While this order was pending, the County filed a Motion to Stay Fact-Finding on October 20, 2006, requesting that fact finding be stayed until this decision issued. The Union filed its objection on November 16, 2006.

FINDINGS OF FACT

1. The Hillsborough County Sheriff's Department (hereinafter the "County") is a public employer within the meaning of RSA 273-A.
2. AFSCME Council 93, Local 3657 (hereinafter the "Union") is the certified exclusive representative of certain employees of the Hillsborough County Sheriff's Department pursuant to a bargaining unit certification issued December 7, 1976, and later modified.
3. The Union and the County are parties to a Collective Bargaining Agreement (hereinafter "CBA") dated July 1, 2003 through June 30, 2005 and which is on file with the Public Employee Labor Relations Board.
4. The County and the Union participated in good faith negotiations to reach a successor agreement through approximately eleven (11) negotiation sessions occurring from October 2004 through December 2005.
5. The County and the Union participated in mediation on October 27, 2005 with the assistance of a neutral third party but were unable to reach agreement on a successor CBA.

6. On November 28, 2005 the Union filed a Petition for Appointment of Fact Finding, and filed an amended copy on November 29, 2005.
7. The County and the Union met again on December 5, 2005 for negotiations. The session did not result in an agreement.
8. The County and Union met again on December 13, 2005 at which time the Union informed the County that it had decided to proceed to fact-finding rather than make any further proposals or counter proposals.
9. The County filed its complaint against the Union on February 16, 2006 which was answered by the Union in its filing of March 16, 2006.
10. The "budget submission date", as required by RSA 273-A:3 IV, on record with the PELRB indicates that date as being June 30th.
11. The County maintains that its "budget submission date" is May 10th.
12. RSA 273-A:12, "Resolution of Disputes", provides in relevant part,

I. Whenever the parties request the board's assistance or have bargained to impasse, or if the parties have not reached agreement on a contract within 60 days, or in the case of state employees 90 days, prior to the budget submission date, a neutral party chosen by the parties, or failing agreement, appointed by the board, shall undertake to mediate the issues remaining in dispute. If the parties so choose, or if mediation does not result in agreement within 45 days, or in the case of state employees 75 days, prior to the budget submission date, a neutral party chosen by the parties, or failing agreement, appointed by the board, shall make and report findings of fact together with recommendations for resolving each of the issues remaining in dispute, which findings and recommendations shall not be made public until the negotiating teams shall have considered them for 10 days.

13. RSA 273-A:3, "Obligation to Bargain", provides in relevant part,

"Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession."

DECISION AND ORDER

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate claims between the duly elected "exclusive representative" of a certified bargaining unit comprised of public employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I).

In this case, the County has complained that actions of the Union violated prohibitions contained within RSA 273-A:5,II, to not (a) constrain, coerce or interfere with employees exercising their rights; (d) refuse to negotiate in good faith with the public employer; nor to generally (g) fail to comply with the provisions of RSA 273-A and its accompanying administrative rules. By reason of these alleged violations of the statute, we accept jurisdiction of the County's complaint.

DISCUSSION

The relevant facts of this case are straight forward and, for the most part, agreed upon by the parties. They were parties to a collective bargaining agreement (CBA) that was to expire on June 30, 2005. The parties began negotiations in or about October 2004 and over a period of time extending to December 13, 2005 the parties met approximately eleven times in an attempt to resolve their differences and reach agreement on the terms of a successor CBA. The parties were unsuccessful. The parties participated in mediation on October 27, 2005 employing the services of a neutral third party. Mediation was also not successful and the parties remained in dispute. On November 28, 2005 the Union filed a "Petition for Appointment of Fact Finding", an action allowed to a party under certain circumstances. Notwithstanding the petition, the parties also reconvened for a negotiation session on December 5, 2005 and adjourned without success but with an agreement to meet again on December 13, 2005. On December 13, 2005 the Union caucused after being informed by the County's negotiator that there was no change in the County's position on the continuation of merit pay. At the conclusion of the Union caucus, the Union negotiator informed the County that they were not going to continue any negotiations. Instead, they elected to proceed with their previously filed request for fact finding.

Both parties have the obligation to deal in "good faith" while involved in the collective bargaining process. Much is spoken about good faith, but when the voices go silent, there is no definitive consensus on a particular action or set of actions that can be universally distinguished as being undertaken in good faith or undertaken lacking such good faith. The statute provides:

"Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession." RSA 273-A:3.

We have examined the conduct of the parties in attempting to reach agreement on a successor CBA. The parties met eleven times over a period of in excess of a year. The parties employed mediation unsuccessfully and met for the purpose of negotiating twice following mediation. That the County would like to continue to negotiate given the history of numerous meetings and significant passage of time does not make the Union's decision to cease to do so an act lacking good faith. Both negotiators are learned and experienced. Collective bargaining is not a new process to either the County or the Union. We believe that the Union reasonably concluded that the reality was that the parties were unable or unwilling to resolve outstanding issues. Given the history of failed negotiation sessions, impasse, and mediation and taking the totality of the parties' conduct into consideration, we do not find that the Union violated its obligation to bargain in good faith.

Having found in that manner, we keep that same history and conduct in mind as we address the County's second allegation, *i.e.* that the Union filed for fact finding in an untimely manner. The Public Employee Labor Relations Act establishes a scheme whereby, following unsuccessful negotiations for a successor collective bargaining agreement, either party may elect to request participation in mediation assisted by a third party mediator and, in the event mediation is unsuccessful, elect to move to the statutorily prescribed "next step" of entering into a formal fact finding process. Neither of these actions prohibits or prevents the parties from also continuing to meet in an attempt to resolve their differences between themselves.

The specific provision addressing this scheme in the event parties cannot reach agreement reads, in relevant part, as follows:

I. Whenever the parties request the board's assistance or have bargained to impasse, or if the parties have not reached agreement on a contract within 60 days... prior to the budget submission date, a neutral party chosen by the parties, or failing agreement, appointed by the board, shall undertake to mediate the issues remaining in dispute. If the parties so choose, or if mediation does not result in agreement within 45 days... prior to the budget submission date, a neutral party chosen by the parties, or failing agreement, appointed by the board, shall make and report findings of fact together with recommendations for resolving each of the issues remaining in dispute.

In addition to the County's allegation of the lack of good faith on the part of the Union that we have dealt with above, the County also charges that the Union's petition for fact finding, also referred within the labor relations community as a "demand for fact finding", without waiting until 45 days prior to the County's budget submission date constituted an unfair labor practice by violating the provisions of the statute. The parties differ as to what the County's budget submission date is, either June 1st or May 15th. However, the parties stipulate that the

Union action complained of by the County occurred in excess of 45 days prior to either date and we therefore do not discuss this discrepancy further.

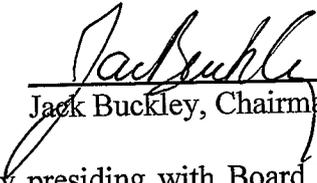
Immediately we are struck by what we believe to be an interpretation by the County that is misplaced in that it appears to ascribe a presumption to the application of the statute in such a way as to be at odds with the overall purpose of the statute. We interpret RSA 273-A in a manner that encourages the resolution of disputes between public employers and their employees. This, in our opinion, is the best manner by which we can achieve the purposes of the Public Employee Labor Relations Act. To interpret the temporal reference to "45 days ...prior to the budget submission date" as appears in RSA 273-A:12 to prohibit parties obviously unsuccessful in negotiating their differences from moving forward to the next step in the process that the legislature has determined to be the path to resolution of labor disputes is, as we've said, misplaced under the facts of this case. To accept such a limiting and restrictive interpretation would cause parties that otherwise had negotiated in good faith, and have become exhausted by the give and take of negotiations transpiring over eleven meetings and stretching in excess of a year, to watch valuable time pass because they are prohibited from bringing to bear on the dispute the expertise of a fact finder, a valuable step in dispute resolution. It is a step to be used under the negotiation circumstances existing between these two parties, not avoided.

The County and, for their part, the Union are both aware that the involvement of a mediator or a fact finder is not immediate even when appointed by the PELRB. There are schedules of representatives, witnesses and the neutral third party that must be cleared. There is decision-making time necessary for the fact finder to make its determinations. There is time allowed for distribution of the findings of fact and time necessary for the consideration of the fact finder's recommendations by the respective ratifying bodies. We do not see how unnecessarily compressing the time allowed for fact finding, when all previous steps undertaken by the parties have failed and a dispute obviously survives, could have been the intent of the legislature or of the experts it consulted in drafting this law. Good faith of both parties is required not only in the bilateral negotiations at the table, but also in cooperating with the mediation and fact-finding steps in the statute. See 273-A:3. Metaphorically, the parties' negotiation failure lay before them like an injured person in need of medical care. There was, and there is, no need to deny or delay that person the needed care, in this instance, in the form of a fact finder. When negotiation circumstances that exist between parties would cause a temporal reference in one provision of the statute to be applied in such a way as to be contrary to the very purpose for which the provision exists, that is, to resolve disputes through a progressive scheme, we find such an application of the law in error.

We therefore deny the County's complaint and order the parties to immediately participate in fact finding. And with the issuance of this decision we dismiss the Union's subsequent Motion to Stay Fact-Finding as moot.

So ordered.

Signed this 22nd day of January, 2007.



Jack Buckley, Chairman

By majority vote. Chairman Jack Buckley presiding with Board Member Richard Molan also voting. Board member Seymour Osman participated in these proceedings but died before the final decision was circulated for approval.

Distribution:

Joseph L. DeLorey, Esq.

Carolyn M. Kirby, Esq.