



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Robin Mongeon, et al.; New Hampshire	*	<i>Corrected Caption 2-5-09</i>
Hospital Supervisors (Diane Allen, et al.); and	*	
New Hampshire Hospital Supervisors (Sheila	*	
Gagnon, et al)	*	
	*	
Complainants	*	Case Nos. S-0439-1
v.	*	S-0394-3
	*	S-0394-4
	*	
<i>Thomas S. Burack, DES Commissioner</i>	*	
<i>and</i>	*	
<i>Gary Smith, President, SEA/SEIU Local 1984</i>	*	
	*	Decision No. 2009-018
Respondents	*	
	*	
	*	
	*	

APPEARANCES

For the Complainants: Robin Mongeon, P.E. Department of Environmental Services
Diane Allen, New Hampshire Hospital
Sheila Gagnon, New Hampshire Hospital

For the State of New Hampshire: Rosemary Wiant, Esq. and Michael Brown, Esq.

Office of Attorney General, Department of Justice

For the SEA/SEIU Local 1984: Glenn R. Milner, Esq., Molan Milner, & Krupski, PA, Concord

BACKGROUND

On March 21, 2008 certain employees of the State Department of Environmental Services (“complainants”) filed an unfair labor practice alleging the State of New Hampshire, Department of Environmental Services (“State”) and the SEA/SEIU Local 1984 (“SEA”) committed an unfair labor practice in violation of RSA 273-A:5,I (a) and (g) and RSA 273-5,II (a) and (g), respectively, by charging the complainants an unlawful agency fee. The complainants contend they are supervisors within the meaning of RSA 273-A:8, II and are improperly included in the same bargaining unit they supervise. On April 11, 2008 Mr. Evans, one of the complainants, withdrew his complaint reducing the number of complainants to nine.

The complainants request as remedies that the PELRB 1) determine that all the charging parties are supervisors pursuant to RSA 273-A:8, II; 2) determine that the Department of Environmental Services’ bargaining unit as certified May 6, 2004 is unlawful pursuant to RSA 273-A:8, II; 3) order the respondents to cease and desist collecting agency fees from the charging parties as the fee is unlawful and 4) order the respondents to refund all agency fees collected from the charging parties beginning August 18, 2006.

On April 4, 2008 the State filed its answer by denying the unfair labor practice charge. On April 7, 2008 the SEA filed its answer denying the unfair labor practice. Both the State and SEA filed a motion to dismiss the complaint as untimely. At the prehearing the State and SEA clarified that they dispute whether any of the complainants are supervisors under RSA 273-A:8, II. See Decision 2008-106.

The two later filed matters now consolidated, Case Nos. S- 0394-3 and S-0394-4 were filed April 28 and May 12, 2008, respectively and involve claims and issues similar to those raised in Case No. S-0439-1 concerning agency fees, but relating specifically to NH Hospital employees. Subsequently Mr. Souther, originally a complainant in Case No. S-0394-3, withdrew his complaint.

On May 13, 2008 the State and SEA filed answers in Case No. S-0394-3 and the State filed a motion to dismiss. On May 27, 2008 the State and SEA filed answers in Case No. S-0394-4. The State filed a motion to dismiss on June 6, 2008. The answers and arguments raised in the motion are similar to those raised in Case No. S-0439-1.

A prehearing conference was held on June 9, 2008 for all three cases. See Decision 2008-119. One of the issues raised by the complainants is the population of the existing bargaining unit comprised of state supervisory employees in certain departments and agencies (“supervisors’ bargaining unit”). The supervisors’ bargaining unit was certified in 1980 and amended in 1996 and 1997.

An interim prehearing memorandum and order was issued July 29, 2008. See Decision 2008-148. The State and SEA filed a mutually agreed list of all the positions covered by the existing supervisors’ bargaining unit. The list does not represent a change of the positions covered by the existing certification. It is a detailed statement of the positions already covered by the existing supervisors’ bargaining unit certification. All three unfair labor practice complaints were consolidated and then proceeded to a final prehearing and hearing.

On August 6, 2008 an order was issued re: Population of Existing State Supervisors' Bargaining Unit. See Decision No. 2008-150. In accordance with order Decision No. 2008-148 the populations of existing state supervisors' bargaining unit "shall be posted in locations calculated to inform all employees of the various state departments and agencies covered by the supervisor's bargaining unit for at least 30 days beginning August 11, 2008."

The State filed a partially assented to motion seeking to delay the posting until after the hearing on all three unfair labor practice complaints. The State contends that an earlier posting is premature as the composition of the state supervisory unit remains a topic of litigation. The Motion was denied in an order issued August 14, 2008 as the posting requirement is to ensure affected public employees are duly informed in a timely manner of the current composition of the state supervisors' bargaining unit. In light of the pending matters the detailed list of employee positions was jointly prepared by the public employer (State) and the exclusive representative of SEA/SEIU Local 1984.

At a final prehearing conference held on August 22, 2008 the State submitted a filing confirming the list had been posted. The positions covered by the list include many, but not all, of the individual complainants participating in these cases. The complainants maintain objections to payment of an agency fee and to the composition of the supervisors' bargaining unit and the SEA's representation of that bargaining unit. The complainants' allegations in all three consolidated cases are denied by the State and SEA-SEIU, Local 1984. See Decision No. 2008-173.

A hearing on the motions to dismiss and the merits was scheduled for conduct on September 30, 2008 before the PELRB at its offices in Concord. At that time, the board

convened, the parties appeared, were represented and presented evidence through offers of proof. The parties had previously submitted an agreed stipulation of facts which appear below as Findings of Facts #1- 17. The PELRB first heard the parties on the SEA and State Motions for Dismissal. After the PELRB took the Motion to Dismiss under advisement the parties proceeded to present additional offers of proof related to the merits of the complaints. No cross-examination was required or requested by any party. At the conclusion of the parties' oral presentations, the complainants requested leave to submit legal memoranda. Their request was granted and the record left open for submission of complainants' (Mongeon and Gagnon) briefs until October 15, 2008 (Allen did not elect to submit anything further in memorandum form) and until October 22, 2008 for any reply briefs to be submitted by the State or SEA/SEIU. Briefs were submitted and the record was closed on October 22, 2008 with the submission of a response by the SEA/SEIU.

After considering the parties' offers of proof and all submissions, according appropriate weight to such representations, the parties' stipulated facts and joint exhibits, the PELRB finds as follows:

FINDINGS OF FACTS

1. The Preamble to the Collective Bargaining Agreement, 2007-2009 ("CBA") includes a Supervisory Unit in the list of state departments covered by the CBA.
2. A Supervisory Unit was certified as a bargaining unit in 1980.
3. No separate subunit contract exists for the supervisory unit, pursuant to Article 4.3 of the CBA.
4. On or about July 1, 2008 the State and the SEA filed a notice of reorganization, populating the Supervisory Unit with approximately 1,290 public employees.

5. The Mongeon complainants are considered supervisory within the meaning of RSA 273-A:8, II and appear on the list of employees that the State and the SEA used to populate the Supervisory Unit.
6. The Allen complainants are considered supervisory within the meaning of RSA 273-A:8, II and appear on the list of employees that the State and the SEA used to populate the Supervisory Unit.
7. The State and the SEA consider four of the Gagnon complainants to be supervisory within the meaning of RSA 273-A:8, II and are included in the Supervisory Unit. Those four complainants are Donald Ficken and Winona Vachon (who are SEA members and pay dues rather than the agency fee) and David Levesque and Rebecca Lorden. The State and the SEA do not consider the remaining 10 Gagnon complainants to be supervisory. The Gagnon complainants consider all 14 complainants to be supervisory.¹
8. None of the complainants have been designated by the State as being “confidential” or human resources employees.
9. On June 6, 2006, the New Hampshire Hospital complainants received a letter from Michael P. Nolin, Department of Environmental Services. The letter stated, “Employees may choose to join the SEA and pay the full dues amount or not become a member and pay an agency fee.”
10. On August 14, 2006, the Mongeon complainants were notified of the agency fee provision in the CBA via a memorandum from Karen Hutchins, Human Resources Administrator for the Department of Health and Human Services. The memorandum indicated that the employees could choose to join the SEA and pay dues or choose not to join and pay an agency fee.

¹ Sheila Gagnon’s position was reclassified on or about September 17, 2008 from Business Administrator II to Business Administrator III. It is the same position number (No. 18358).

11. Section 5.8.1 of the Collective Bargaining Agreement (“CBA”) states, “Any full-time employee who is not a member of the Association shall be required to pay a fee to the Association as a condition of employment.”
12. The CBA states, “Employees who are exempt from the definition of employee contained in RSA 273-A or designated by the Employer as human resources employees shall not be counted as eligible bargaining unit employees and shall be exempt from the fee requirement.” CBA § 5.8.1 (b).
13. The SEA began collecting the agency fee on August 18, 2006, which showed up in paychecks starting September 15, 2006.
14. Via memorandum dated January 17, 2008, SEA President, Gary Smith issued a Hudson notice to all non-union members regarding the agency fee. The memorandum states that non-union members are “obligated to pay an agency fee.” The memorandum also states, “This notice supplants any prior notices that you may have received from NHSEA-SEIU on this subject.”
15. Between November 16, 2006 and February 1, 2007, a group of 30 state employees (the “Wright” complainants) filed an unfair labor practice complaint against the State and the SEA. The complaint alleged that they were being unlawfully charged an agency fee pursuant to RSA 273-A:8, II, which provides, “Persons exercising supervisory authority involving the significant exercise of discretion may not belong to the same bargaining unit as the employees they supervise.” See P. Wright, D. McMenemy et al. and F. McGarry et al, Case Nos. S-0433-1, S-0433-2, S-0434-1, S-0435-1.
16. The Wright complainants settled their action with the SEA and the PELRB dismissed the cases in an order dated December 12, 2007.

17. As a result of the settlement and effective with pay period ending November 8, 2007, the Wright complainants no longer pay the agency fee as a condition of employment and the State no longer deducts the agency fee from their pay.

DECISION AND ORDER

SUMMARY

The complainants in these three cases all are subject to payment to the SEA/SEIU of an agency fee that began to be collected from their paycheck by the state, as their employer, in 2006. The complainants allege these two respondents have committed unfair labor practices related to the collection of an agency fee. However on motion of the respondents these matters are dismissed because complaints were not filed until 2008 where the controlling statute contains a limitation on actions of six months.

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A:6) provides that the Public Employee Labor Relations Board (PELRB) has primary jurisdiction to adjudicate claims of improper labor practices as defined in RSA 273-A:5, I and II. The Complainants in each of these three consolidated cases allege that the respondents have violated various provisions of RSA 273-A:5, I and II thereby placing these matters within the jurisdiction of the PELRB.

DISCUSSION

These three complaints of improper labor practices matters have been consolidated to facilitate their adjudicative processing within the PELRB and now for hearing. The complaining parties, Mongeon et al. (S-0439-1), Allen et al. (S-0394-3) and Gagnon et al. (S-0394-4)

collectively referred to as the “complainants” have filed complaints of unfair labor practices against the State of New Hampshire acting through its Department of Environmental Services (Mongeon) and the New Hampshire Hospital (Allen, Gagnon) as well as against the State Employees Association, Service Employees International Union Local 1984 (SEA/SEIU). Each of the complainants understands that these complaints do not constitute a petition to decertify, petition to modify or petition to certify a bargaining unit and that the PELRB has not acted administratively in any manner to allow the complaints to be amended or converted from complaints to either of the above-referenced petitions.

In brief these complainants and responses raise issues calling into question the status of SEA/SEIU as an exclusive bargaining representative for both supervisory and non-supervisory employees; the authority for the State to collect an agency fee and transfer the same to the SEA/SEIU; and the timeliness of the filing of the complaints. Because of its dispositive nature, we first address the motions to dismiss filed by the State and the SEA/SEIU.

Both the State and SEA/SEIU urge the board to dismiss the complaints by reason of their untimely filing. Specifically the respondents ask the board to apply the limitation on unfair labor practice complaints filed with it as found in RSA 273-A:6,VII which provides: “The board shall summarily dismiss any [unfair labor practice] complaint ... which occurred more than 6 months prior to the filing of the complaint”. The filing dates for the complaints before us are Mongeon et al. on March 28, 2008; Allen et al. on April 21, 2008; and, Gagnon et al. on May 12, 2008. The Board has applied this limitation strictly on actions in the past by first determining what it has long referred to as the “triggering event” and allowing six months to pass before closing the filing window. (See *Hollis/Brookline Cooperative School Board v. NEA-NH*, PELRB Decision#

2007-173; see also *Portsmouth Police Officers, IBPO Local 402 v. City of Portsmouth*, PELRB Decision # 96-086).

The record presented in these matters reveals that the so-called Mongeon complainants (Case #S-0439-1) filed their complaint with the PELRB on March 21, 2008. Of the three cases, this was the earliest filing date. The Allen complainants filed on April 28, 2008 (Case #S-0394-3); the Gagnon complainants filed on May 12, 2008 (Case #S-0394-4). These complaints rely in the first instance on the allegation that the SEA and the State acted improperly, under the provisions of RSA 273-A:5, I and II, in “charging”, and by reasonable inference, collecting an agency fee thus rendering the agency fee collection illegal. The parties agree that the effective date of the agency fee contribution was August 18, 2006 with the actual deduction appearing in their paychecks dated September 15, 2006 due to the method by which the state pays its employees. To avoid duplication we have selected the earliest filing date from among the three groups of complainants which is March 21, 2008 for the Mongeon group.

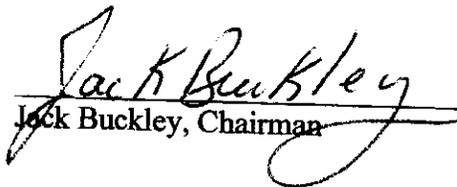
Under the provisions of RSA 273-A:6, VII the action giving rise to the charge, the so-called “triggering event,” has to have occurred later than September 21, 2007. From among all of the various dates that the parties have provided to the board, we find that the latest possible relevant date on which the triggering event could reasonably be said to have occurred would be the date of the actual collection, September 15, 2006. Subsequent actions in furtherance of this collection or undertaken as part of the processing of the complaints before us do not toll the limitations on actions filed under RSA 273-A:6 as it governs complaints of improper labor practices delineated under RSA 273-A:5, I and II. This remains true notwithstanding the complainants’ reliance on the memorandum from the SEA/SEIU president dated January 18, 2009. This so-called “Hudson” notice (*Chicago Teachers Union, Local No. 1 AFT, AFL-CIO v. Hudson* 475 U.S. 292, 310; see also *Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 874;

Davenport v. Wash. E. L. Ass'n, 551 U.S. 177; 127 S. Ct. 2312, 2376-77; 168 L. Ed. 2d 71 (2007)) relates to the calculation of the amount of an agency fee and provision for disputed amounts collected to be put in escrow. It does not constitute the triggering event as we have determined it to be here nor does it revive it. Therefore, while the effects of the actions alleged by the complainants continue beyond 2006, the triggering event for purposes of this case could not be said to have taken place within the six month window mandated by the statute. As we find for this earliest filed Mongeon complaint, we also find for the other two groups of complainants.

In making this determination we therefore must dismiss the complaints in all three cases consolidated before us for adjudication. Further, by ruling that these complaints were not timely filed, we do not reach the merits of the allegations raised by the complainants other than to state that the instant proceedings involve solely statutory complaints alleging unfair labor practices. While the board's jurisdiction extends to other proceedings we have not been requested to undertake any such proceedings. And finally, the board's jurisdiction does not extend to claims that either the federal constitution or this state's constitution has been violated.

So ordered.

This ~~2nd~~ day of February, 2009.


Jack Buckley, Chairman

By unanimous decision. Jack Buckley presiding. Members Carol Granfield and E. Vincent Hall present and voting.

Distribution: