



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**INTERNATIONAL CHEMICAL WORKERS UNION COUNCIL
UFCW, LOCAL 1046C**

V.

CASE NO. M-0738-9

**MERRIMACK COUNTY NURSING HOME
AND COUNTY OF MERRIMACK**

DECISION NO. 2009-069

APPEARANCES

Representing: International Chemical Workers Union Council/UFCW, Local 1046c
Randall Vehar, Esq., ICWUC/UFCW Legal Department
Akron, Ohio

Representing: Merrimack County Nursing Home and County of Merrimack
Warren D. Atlas, Labor Relations Advisor
Bedford, Massachusetts

BACKGROUND

The case involves the termination of Melissa Foote's employment with the Merrimack County Nursing Home ("County") effective November 22, 2002. Ms. Foote challenged the termination through the collective bargaining agreement grievance process, and on December 4, 2004 an arbitrator ordered her reinstatement without back pay or other lost benefits, and also conditioned her return to the County's employment upon Ms. Foote's completion of anger management and abuse/neglect training programs. Because the County refused to comply with the arbitrator's award the International Chemical Workers Union Council/UFCW, Local 1046c

("Union") filed an unfair labor practice charge. The County contended that the arbitrator's award violated public policy and exceeded his authority under the parties' collective bargaining agreement and therefore was void and unenforceable and claimed that the Union's demand for reinstatement constituted an unfair labor practice. The Union prevailed on its unfair labor practice charge, and the presiding hearing officer ordered Ms. Foote's reinstatement with back pay. *See* PELRB Decision No. 2006-038. The County appealed, and on August 23, 2007 the court affirmed in part, vacated in part, and remanded the case for further proceedings. *See Appeal of Merrimack County*, 156 N.H. 35 (2007).

On September 24, 2007 the PELRB scheduled an adjudicative hearing for November 7, 2007. The parties' joint motion to continue the November 7, 2007 hearing was granted, and the hearing rescheduled to December 19, 2007. On December 10, 2007 the parties filed a joint motion to postpone the December 19, 2007 together with a request that they file a status report on or before January 15, 2008. In this joint motion the parties state Ms. Foote was reinstated to her employment on or about November 6, 2007 and with respect to back pay that the "parties now are focusing their attention on calculating the amount that Foote would have earned, considering possible overtime, weekend and holiday premium hours, etc., less her interim earnings." The parties also stipulate in their joint motion that in the event they cannot reach agreement on back pay then the back pay issues will be submitted to the PELRB for determination and all other remanded issues will be deemed resolved by the parties upon the PELRB's decision.

Ultimately the parties did not reach agreement on the amount of back pay, and on January 31, 2008 the PELRB scheduled a hearing on the back pay issues for March 5, 2008. The parties' joint request to reschedule the March 5, 2008 hearing was granted and the hearing was

rescheduled to June 11, 2008. During a June 2, 2008 conference call with the PELRB the parties agreed to submit the case for decision without a hearing through the submission of stipulated facts and exhibits as well as the filing of briefs. Accordingly, the June 11, 2008 hearing was cancelled, and stipulated facts and exhibits were scheduled for submission by June 30, 2008, opening briefs by June 30, 2008, and reply briefs by July 18, 2008. *See* PELRB Decision No. 2008-118.

As to the back pay issues, the Union claims Ms. Foote is entitled to the amount of \$107,771.21, representing the sum the parties agree Ms. Foote would have earned had she been reemployed with the County as of December, 2004, the date of the arbitration award, through November 6, 2007, the date she was actually reinstated. The Union claims the County is not entitled to any reduction in the back pay award on account of Ms. Foote's interim earnings as a Wal-Mart employee because the County was obligated to raise the issue of such a deduction as an affirmative defense and failed to do so. The Union also seeks attorney fees and costs because it contends it was unnecessarily required to obtain orders to enforce the arbitration award and/or to enforce the back pay award.

The County contends that the deduction of interim earnings in a back pay computation is always proper and therefore Ms. Foote's interim earnings as a Wal-Mart employee in the amount of \$82,938.19 are a proper deduction in the computation of a back pay award. The County also argues that the Union has acknowledged the appropriateness of such a deduction and waived any objection to such a deduction, as reflected in pleadings and the documentation contained in the stipulated record, JT 0001-0329.

FINDINGS OF FACT

1. The County of Merrimack, State of New Hampshire ("County") is a "public employer" within the meaning of RSA 273-A:1, X.
2. The International Chemical Workers Union Council, United Food & Commercial Workers Union, Local 1046C ("Union") is the board certified exclusive representative for certain County employees at the County Nursing Home.
3. Ms. Foote was reinstated to her employment with the County on November 6, 2007.
4. The parties agree that Ms. Foote would have earned \$107,771.21 had she been a County employee during the December, 2004 through November 6, 2007 time period and that she earned \$82,938.19 as a Wal-Mart employee during this time period. *See* JT-0218 and the parties' briefs.
5. The parties' agree that Ms. Foote back pay award would be \$24,833.02 if her Wal-Mart earnings are deducted. *See* JT-0218 and in the parties' respective briefs.
6. The County has acknowledged since June 30, 2008, if not earlier, in filings submitted with the PELRB that Ms. Foote is owed at least \$24,833.02 in back pay. According to filings on record with the PELRB, the County has not paid to Ms. Foote the undisputed amount of her back pay.

DECISION AND ORDER

DECISION SUMMARY

The award of back pay to Ms. Foote should include a deduction for her interim earnings at Wal-Mart and therefore Ms. Foote is awarded back pay in the amount of \$24,833.02. The pendency of these proceedings does not excuse the County's failure to at least pay to Ms. Foote the undisputed amount of back pay the County concedes is owed to her. However, RSA 273-A does not provide the PELRB with the authority to assess attorney fees or costs as requested by

the Union, either with regard to the County's delay in paying the undisputed amount of back back, or on account of the alleged delay in the reinstatement of Ms. Foote to her employment with the County. Accordingly, the Union's request for the award of attorney fees and costs is denied, and no finding is made as to whether the Union should receive an award of attorney fees or costs.

JURISDICTION

The PELRB originally exercised its jurisdiction in this matter as reflected in PELRB Decision No. 2006-038 and continues to have jurisdiction of this dispute in accordance with the court's decision in *Appeal of Merrimack County*, 156 N.H. 35 (2007).

DISCUSSION

The main issue in this case is whether Ms. Foote's interim earnings as a Wal-Mart employee should be deducted as part of the back pay calculation. RSA 273-A:6, VII authorizes the reinstatement of an employee with back pay, but does not state how a back pay award is computed. Likewise, in his decision awarding Ms. Foote back pay, the presiding hearing officer did not state whether interim earnings should or should not be deducted in the back pay calculation. However, the deduction of Ms. Foote's interim earnings as a Wal-Mart employee is in accord with the general principle recognized in New Hampshire law that a claimant has a duty to use reasonable efforts to mitigate damages, and the PELRB has previously deducted such earnings in a decision upheld on appeal. *See Appeal of Barrington Education Association*, 121 N.H. 949 (1981). Thus, applicable PELRB precedent involving the application of RSA 273-A:6, VII and New Hampshire law governing damage claims indicates that such deductions are generally proper.

Appeal of Barrington does not address whether the County must raise such a deduction as an “affirmative defense” or some other special pleading before such a deduction can be included in a back pay computation in PELRB adjudicatory proceedings. The Union’s arguments that such a pleading is required and that the County has failed to comply with such pleading requirements are not persuasive for several reasons. First, the County’s failure to formally plead the interim earning deduction as an affirmative defense is not necessarily fatal since PELRB rules do not impose special pleading requirements for “affirmative defenses” in the same way as, for example, the New Hampshire Superior Court. *See* Superior Court Rule 28 (Special Pleas and Brief Statement). There is otherwise no authority outside PELRB rules requiring that the deduction be formally raised in this manner in PELRB adjudicatory proceedings. Second, the County did in fact place the Union on notice of its intent to deduct Ms. Foote’s interim earnings in the back pay computation. This was clear over six months before the case was submitted for decision. Third, the Union was not only aware of this intention but willingly supplied the County with most, if not all, of the documentation the County used to compute Ms. Foote’s earnings as a Wal-Mart employee. Finally, in their December 10, 2007 Joint Motion to Continue the December 19, 2007 hearing the parties urged the PELRB to grant their motion because they were actively working on the back pay calculation, including a deduction comprised of Ms. Foote’s interim earnings, and the parties stated they anticipated coming to agreement and concluding the remaining issue in the case on that basis. The December 10, 2007 Joint Motion does not reflect any Union objection to or disagreement with the deduction of Ms. Foote’s interim earnings. Subsequent documents contained in JT 0001 to JT 0329 reflect the party’s ongoing exchange of information and back pay calculation, including the deduction of Ms. Foote’s interim earnings.

Eventually the Union did object to the deduction, but by that time the County had provided the Union with fair notice of its intent to seek the deduction in computing back pay. The Union was also fully aware of the factual basis for the amount of the deduction the County intended to include in the back pay computation. In these circumstances, given the absence of any formal pleading requirement imposed by PELRB rules or other applicable authority, the County satisfied any obligation it had to provide the Union with notice about a deduction for interim earnings and is entitled to have such earnings included in the computation of the back pay award. In accordance with the foregoing, all of the Union's requests to prevent such a deduction are denied.

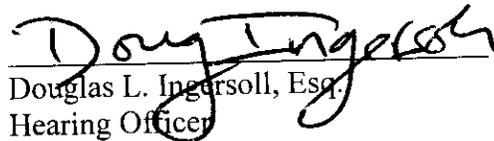
The Union has also requested the award of attorney fees and costs, essentially contending that it was unnecessarily required to obtain orders to enforce the arbitration award and/or enforce the back pay award. The record does reflect that at least since June 30, 2008 the County has acknowledged that Ms. Foote is owed \$24,833.02 in back pay but has not paid this undisputed amount. It may be that the County's delay implicates the provisions of RSA 275, but the administration and enforcement of that law is beyond the jurisdiction of the PELRB. Ms. Foote is free to pursue her remedies, if any, before the New Hampshire Department of Labor or other tribunals. The PELRB does not have authority to assess attorney fees or costs under the provisions of RSA 273-A, nor does it have authority to award attorney fees or costs in the same manner as the superior court might under *Harkeem v. Adams*, 117 N.H. 687 (1977) and its progeny. Accordingly, the Union's requests for the award of attorney fees and costs is denied. I make no findings about whether the award of attorney fees and costs would be proper were such an award available, except to note the County has conceded since at least June 30, 2008 that back pay in the amount of \$24,833.02 is due Ms. Foote.

The parties's pending motions are ruled upon as follows:

1. The Union's May 9, 2008 Motion for Protective Order and/or to Quash Notice of Depositions and to Strike any Effort to Belatedly Raise Any Affirmative Defenses. This motion was mooted when the County withdrew its deposition requests and it is otherwise denied.
2. The County's June 2, 2008 Motion to Strike Union's Reply in Further Support of its Motion to Strike Affirmative Defenses is moot and otherwise denied.
3. The Union's June 30, 2008 Motion for an Order Striking the County's Belated Affirmative Defense, For an Order Directing the County to Pay Melissa Foote Back Pay with All Appropriate Legally-Required Deductions and Legally-Required Related Payments, and for an Order Awarding Costs and Fees to the Union for it Having to Pursue and Obtain (1) Enforcement of the Arbitration Award and/or (2) Enforcement of the Back Pay Award is granted in part. Ms. Foote is awarded back pay in the amount of \$24,833.02. The Union's motion is otherwise denied in accordance with this decision.
4. The following motions are mooted by this decision: a) the Union's July 9, 2008 Motion for Interim Relief; b) the County's July 14, 2008 Motion to Dismiss the Union's Motion referenced in the preceding paragraph number three; c) the County's July 14, 2008 Motion to Dismiss the Union's Motion for Interim Relief; and d) the Union's August 21, 2008 Motion to Strike.

Ms. Foote is awarded back pay in the amount of \$24,833.02. In accordance with the parties' stipulation reflected in their December 10, 2007 Joint Motion to Continue, all other issues remanded by the court are deemed resolved.

So ordered.
April 9, 2009


Douglas L. Ingersoll, Esq.
Hearing Officer

Distribution:
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