



**STATE OF NEW HAMPSHIRE**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**AFSCME LOCAL 2715, HILLSBOROUGH  
COUNTY NURSING HOME EMPLOYEES**

**COMPLAINANT**

**v.**

**HILLSBOROUGH COUNTY NURSING HOME**

**RESPONDENT**

**CASE NO. G-0046-13**

**DECISION NO. 2010-008**

**APPEARANCES**

Representing: AFSCME Council 93, Local 2715,  
Hillsborough County Nursing Home Employees  
Karen Clemens, Esq., Associate General Counsel, AFSCME Council 93,  
Boston, Massachusetts

Representing: Hillsborough County Nursing Home  
Carolyn M. Kirby, Esq., Legal Counsel  
Goffstown, New Hampshire

**BACKGROUND**

AFSCME Local 2715, Hillsborough County Nursing Home Employees ("Union") filed an unfair labor practice complaint against the Hillsborough County Nursing Home ("County") on August 19, 2009 and an amended complaint on October 5, 2009. The Union claims the County violated RSA 273-A:3 and RSA 273-A:5, I (a), (b), (e), (g), and (i) on account of: 1) a March 11, 2009 staff meeting during which the elimination of the Unit Aide position was discussed, among

other things; 2) the County's failure to provide the Union with a list of attendees at the March 11, 2009 staff meeting; 3) the County's failure to communicate directly with the Union about the impending elimination of the Unit Aide position; 3) subsequent contacts between management and employees holding the Unit Aide position; 4) the conduct of a Nurse Leadership meeting on June 3, 2009 and related contacts with a bargaining unit employee about possible service on a Quality Circle; 5) the County's failure to copy Union President Paula Martel on a September 3, 2009 communication from Nursing Home Administrator Bruce Moorehead to AFSCME Staff Representative Steve Lyons; and 6) the County's elimination of the Unit Aide position effective October 1, 2009 and the placement of former Unit Aides in other positions before the completion of impact bargaining.

As relief, the Union requests that the PELRB: 1) find that the County has failed in its obligation as a public employer to bargain in good faith and is guilty of improper labor practices; 2) order the County to cease and desist dominating, and interfering with, the employee organization; 3) order the County to forthwith bargain in good faith; 4) order the County to post the PELRB's decision; 5) issue a cease and desist order requiring the County to return to the status quo pending completion of impact bargaining; and 6) order the County to make the Union whole for any and all costs and expenses incurred in pursuing this complaint.

The County answered the amended complaint on October 8, 2009 and generally denies the charges. The County contends that it has the right to structure its workforce under RSA 273-A and to communicate with employees about matters that are not mandatory subjects of bargaining. The County requests that the PELRB dismiss the charges and award attorney's fees and costs.

The Board held a hearing in the above captioned matter on October 20, 2009 at the offices of the PELRB in Concord at which time the parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The record was held open until November 16, 2009 in order to allow the parties to file post-hearing briefs. Both parties have filed briefs, and the record is closed. The parties' stipulated facts are incorporated in the Findings of Fact<sup>1</sup> set forth below.

#### FINDINGS OF FACT

1. AFSCME Local 2715 is the certified representative for a bargaining unit composed of certain Hillsborough County Nursing Home Employees as described in PELRB Decision No. 2003-076.

2. Hillsborough County is a public employer within the meaning of RSA 273-A:I, X.

3. The certified bargaining unit includes the position of Unit Aide.

4. The certified bargaining unit includes the position of Licensed Nurse's Assistant ("LNA").

5. The Union and the County are parties to a collective bargaining agreement effective July 1, 2007 through June 30, 2008.

6. The parties' collective bargaining agreement recognizes Unit Aide as a position in the bargaining unit.

7. Bruce Moorehead is the administrator of the Hillsborough County Nursing Home.

8. During the fall of 2008 and continuing into early 2009 the County considered and ultimately determined that the County Nursing Home would receive a better rating under the Federal Five Star rating system by the elimination of the unlicensed Unit Aide position and the addition of an equal number of LNA positions.

---

<sup>1</sup> The parties' stipulations are set forth in Findings of Fact 1-3, 5-6, 8, 14-15, 18-19, and 21.

9. The change under consideration contemplated that a Unit Aide who transitioned into one of the new LNA positions would receive a pay increase according to the wage schedule applicable to LNA's contained in the parties' collective bargaining agreement.

10. The County decided to eliminate the Unit Aide position and create an equal number of new LNA positions subject to obtaining necessary approval for the related budget changes. The County formal budget process commenced in March 2009, with department head budget submissions due by month's end, and concluded with the county delegate's June 18, 2009 vote.

11. On March 11, 2009 a General Staff Meeting was held with both bargaining unit employees and non bargaining unit employees in attendance.

12. The March 11, 2009 General Staff Meeting was scheduled by Mr. Moorehead on relatively short notice. According to Mr. Moorehead, he prepared notes for the March 11, 2009 staff meeting the previous week but did not decide until March 11 to hold the meeting on that day. A sign in sheet documented the names of employees attending the meeting, and at the meeting Mr. Moorehead informed attending employees of the planned elimination of the Unit Aide position.

13. Paula Martel was the president of AFSCME Local 2715 (the "Union") in March, 2009. She did not work on March 11, 2009 and was not informed by the County in advance about the March 11, 2009 meeting. She later learned about the meeting and requested meeting minutes, which were not provided as none were kept. She also requested a copy of the attendance sheet, which Mr. Moorehead withheld from her but at hearing acknowledged he should have provided.

14. The County never formally informed or notified Ms. Martel or any other representative of the Union of the planned elimination of the Unit Aide position and the

corresponding increase in the number of LNA employees. Mr. Moorehead considered that the March 11, 2009 General Staff Meeting constituted notice to the Union.

15. The parties agree that as a result of the planned elimination of the Unit Aide position the Union had the right to demand impact bargaining over the change on account of, among other things, the distribution of Unit Aide duties and responsibilities amongst other bargaining unit positions.

16. During the time period shortly after the March 11, 2009 meeting Mr. Moorehead privately spoke with Charles Foss, a Unit Aide, to inquire if Mr. Foss was interested in one of the LNA positions. Obtaining the necessary license to become a LNA would require that Mr. Foss successfully complete a requisite course, but at no expense to him or to other Unit Aide employees seeking to obtain LNA credentials.

17. Mr. Moorehead sent a memo to Charlie Foss and Mary Cameron regarding LNA training.

18. Mr. Moorehead sent a memo to Susan Nason and Kevin Poulin regarding LNA training.

19. Although the County wanted Mr. Foss to become an LNA and continue working with residents residing in the A-1 Alzheimer's unit, Mr. Foss declined and ultimately exercised his contractual "bumping" rights to obtain a different bargaining unit position.

20. On June 11, 2009 AFSCME Staff Representative Steven Lyons sent a letter to Mr. Moorehead regarding the elimination of Unit Aide positions. The letter demanded the administration to cease and desist direct dealing with employees, refusing to recognize the exclusive representative and refusing to bargain in good faith regarding the elimination of the

Unit Aide position, (and) requested to bargain over the elimination of the Unit Aide positions and stated that the correspondence was a notice of intent to file an Unfair Labor Practice charge.

21. On June 18, 2009 the Hillsborough County Delegation approved the FY 2010 budget.

22. The FY2010 budget included funding necessary to replace the existing Unit Aide positions with an equal number of LNA positions.

23. Hillsborough County and AFSCME Local 2715 have been impact bargaining.

24. The parties met to impact bargain on June 22, August 10, and September 25, 2009. A bargaining session originally scheduled for September 2, 2009 was rescheduled to September 25, 2009 at the Union's request. Steve Lyons, staff representative for AFSCME Council 93, has been providing service to the Union as part of his duties since 2004 and has acted as chief negotiator for the Union at these bargaining sessions. Attorney Thomas Flygare has acted as chief negotiator for the County. At the time of hearing the parties had scheduled another bargaining session for early November, 2009.

25. During the summer of 2009 the Union discovered that in connection with the assignment of Unit Aide job duties to other bargaining unit employees the Assistant Director of Nursing obtained and reviewed the Unit Aide "cheat sheet" from a bargaining unit employee. The cheat sheet is a reference document maintained by Unit Aides which summarizes their understanding of their job duties and responsibilities.

26. At the first bargaining session the Union requested information about the basis for the County's decision to eliminate the Unit Aide position. Although the County formally took the position that its decision was not subject to bargaining, the County agreed to provide such information as the Union represented that it would be helpful to the bargaining process. The

Union also requested that the County consider the Union's ideas on the allocation of Unit Aide duties, a subject the parties reviewed at the second bargaining sessions, although the County again formerly took the position that the allocation of such duties was not subject to the bargaining process and constituted a management right.

27. At times during the first and second sessions the County informed the Union that the parties needed to move forward with impact bargaining. The parties began the process of considering the Union's monetary proposals at the third bargaining session, although several issues remained outstanding as of the time of hearing.

28. Since 2003 the County has used a "quality circle" to address certain workplace issues. In general, a quality circle is a discussion group of employees selected to address a particular subject and develop ideas and possible solutions as necessary.

29. In June 2009 Kathleen Covert, a RN and the Director of the Nursing Department, began organizing a quality circle of management employees to consider the distribution of Unit Aide job duties amongst other employees. Ms. Covert considered having a particular bargaining unit employee participate in the contemplated quality circle. However, a bargaining unit employee was never actually selected to participate in the contemplated quality circle and the quality circle was never held.

30. The County eliminated the Unit Aide position effective October 1, 2009 and declined the Union's requests to delay or extend this implementation date pending the completion of impact bargaining.

## DECISION AND ORDER

### DECISION SUMMARY

The Board finds that the County failed to meet its good faith obligations and committed unfair labor practices in violation of RSA 273-A:5, I (a), (e) and (g) because of: 1) the County's communication of the elimination of the Unit Aide position at the General Staff Meeting and its concurrent failure to properly notify the Union of the planned change in circumstances where the planned change entitled the Union to demand impact bargaining; and 2) the County's refusal to provide Union representatives with a list of bargaining unit employees in attendance at the staff meeting. The Board does not find that the County's remaining conduct about which the Union complains violated the provisions of RSA 273-A:5, I.

### JURISDICTION:

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I. Jurisdiction is proper in this case as the Union claims the County's conduct violates RSA 273-A:5, I (a), (b), (e), (g), and (i).

### DISCUSSION:

Upon consideration of the evidence the Board finds that the County has committed an unfair labor practice and violation RSA 273-A:5, I (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter); (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations); and (g)(to fail to comply with this chapter or any rule adopted under this chapter).

The County's obligation to bargain in good faith includes the obligation to provide clear, meaningful, and timely communication to the Union about matters which directly affect the

bargaining unit and give the Union the right to demand impact bargaining. Instead of providing Union representatives with direct notice of the planned elimination of a bargaining unit position the County scheduled and conducted, on short notice, a General Staff Meeting at which Mr. Moorehead, the Nursing Home Administrator, presented the planned change directly to bargaining unit and non-bargaining unit employees. Union representatives were excluded from this presentation, as neither the Union president nor AFSCME Council 93 staff representative Steve Lyons attended the meeting or were notified in advance that the meeting was taking place. The County also failed to provide Union representatives with direct notice of the change after the March 11, 2009 General Staff Meeting, and Union representatives were left to learn of the planned change from other sources.

In evaluating the County's conduct it is worth noting that the elimination of the Unit Aide position was the product of considered deliberation dating from late 2008 to early 2009, and was not a spur of the moment decision which required an immediate communication to the general employee population at a staff meeting scheduled on short notice without concurrent communication to Union representatives. The County's deliberate disregard of the interests of Union representatives in a matter like the elimination of a bargaining unit position and the resulting redistribution of job duties among other bargaining unit employees cannot be condoned. The Board views the County's actions as a thinly veiled effort to interfere with the right of Union representatives to represent the interests of the bargaining unit in a timely and effective manner, and the County's decision to communicate exclusively and solely with the general employee population on the subject as interfering with and undermining the right of bargaining unit employees to relevant and timely representation from their certified representative. The County failed to provide any plausible explanation for its actions, a matter of

particular concern to the Board when the record reflects that the County's plan to proceed with the proposed elimination of the Unit Aide position was established significantly before March 11, 2009. The County's withholding of such information from Union representatives is repugnant to its good faith obligations, which plainly contemplate more direct, timely, and candid communication with the Union than occurred in this case. As a result, the Board concludes that the County has committed an unfair labor practice and violated RSA 273-A:5, I (a), (e) and (g).

A closely related issue is the County's failure to provide a list of attendees at the March 11, 2009 staff meeting. The Board finds that the County's failure to provide the requested information also constituted an unfair labor practice. This conduct represented a continuation of the County's disregard for and interference with the right of the bargaining unit exclusive representative to information necessary to fulfill its statutory obligation to represent bargaining unit employees likely to be affected by the planned elimination of the Unit Aide position. At a minimum, the County should have provided Union representatives with a list of bargaining unit employees in attendance at the disputed staff meeting. This information would have facilitated the Union's ability to communicate with and effectively represent bargaining unit employees who attended the March 11, 2009 meeting and also would have reassured bargaining unit employees that Union representatives were fully informed, engaged, and prepared to address the developing situation in a manner consistent with their interests. Instead, the County's actions continued to deliberately and unnecessarily keep Union representatives out of the information "loop." During the hearing Mr. Moorehead acknowledged that information about employee attendance should have been shared with the Union, but this after the fact recognition of the County's obligations does not excuse the County's non-compliance with applicable statutory

provisions as the County refused to provide the requested information at the time in question. Accordingly, the Board concludes the County committed a further unfair labor practice and violated RSA 273-A:5, I (a) by interfering with its employees in the exercise of rights conferred by RSA 273-A, which include the right to meaningful and timely communication with their duly certified representative about a matter as fundamental as the elimination of a bargaining unit position and the likely consequence of such action.

As to the Union's remaining claims the Board finds the evidence is insufficient to establish any additional violation of RSA 273-A:5, I. The Union complains that Mr. Moorehead's contacts with Unit Aides about their interest in an LNA position and the Assistant Director of Nursing's contacts with a Unit Aide about the "cheat sheet" outlining the duties of Unit Aides constituted improper direct dealing. However, on the record in this case the Board views these disputed contacts to be in the nature of the kind of communications between an employer and bargaining unit employees that are acceptably incidental to the orderly and efficient administration of the workplace and concludes that they do not rise to the level of statutory violations. In *Appeal of Franklin Education Assoc.*, 136 N.H. 332 (1992), the court interpreted the concept of direct dealing to mean that an employer is obligated to negotiate with the exclusive representative and also to "refrain from negotiating with anyone other than the association's exclusive representative." *Id.* at 335. Accordingly, an employer who negotiates directly with bargaining unit employees has violated its duty to bargain in good faith. However, the concept of direct dealing is not so broad as to preclude all direct contact between an employer and bargaining unit employees concerning the workplace. The Board finds that Mr. Moorehead's disputed communications with Unit Aides about their possible interest in other positions were limited and appropriate given the circumstances, and the evidence is insufficient

to establish that these communications constituted negotiations with someone other than the exclusive representative. Likewise, it was apparently common knowledge that Unit Aides maintained a “cheat sheet” to which they sometimes referred to review the scope of their job duties and responsibilities. The record does not reflect that the “cheat sheet” constituted confidential information for negotiations, and it was not improper for the Assistant Director of Nursing to obtain and review this information in order to facilitate the distribution of those duties to other bargaining unit employees.

The Board also finds that the evidence is insufficient to establish that the County has failed to fulfill its obligation to impact bargain or that a cease and desist order should issue to prevent the scheduled elimination of the Unit Aide position until impact bargaining is complete. The relevant budget items were approved on June 18, 2009, and the parties first met to impact bargain on June 22, 2009. The parties met again on August 10, and were scheduled to meet on September 2, but that meeting was moved to September 25 at the request of the Union negotiator. By the time of hearing, the parties had addressed and resolved most of the impact bargaining issues, and the parties were scheduled to meet again in early November, 2009 to address the few remaining issues. The actual process of impact bargaining was somewhat delayed in the bargaining sessions on account of information and explanations requested by the Union, which included discussions about how the County intended to distribute Unit Aide duties among other bargaining unit employees. In the circumstances of this particular case the Board finds that the County satisfied its obligations to impact bargain in good faith, and is entitled to proceed with the scheduled elimination of the Unit Aide position even though the parties still needed to reach agreement on several outstanding issues as of the time of hearing.

The remaining issues are the County's failure to copy the Union president on a written communication to AFSCME Council 93 staff representative Steve Lyons and the possible inclusion of a bargaining unit employee in a contemplated quality circle. The Board concludes the evidence is insufficient to sustain either of these claims. The quality circle matter relates to the Union's complaints about the possible inclusion of a bargaining unit employee in a proposed quality circle to consider matters such as the distribution of Unit Aide duties among other employees. However, ultimately a bargaining unit employee was not included in a proposed quality circle and the involved parties did not even proceed with the quality circle in question. The County's failure to provide the Union president with a copy of written communications between the County and AFSCME Council 93 staff representative despite her prior request is of more concern to the Board, especially given the County's communication failures about the planned elimination of the Unit Aide position. However, in the circumstances the Board finds that the County's omission is more attributable to inadvertence and oversight than conduct in violation of RSA 273-A:5, I. The Board presumes that the County has implemented measures necessary to avoid a recurrence of similar problems in the future, as including the Union President on such communications is reasonable and appropriate.

In accordance with the foregoing the Union's complaint is sustained in part and denied in part. The County is ordered to cease and desist from interfering with the Union in its representation of bargaining unit employees. In the future the County shall provide all material and relevant information like the planned elimination of a bargaining unit position directly to Union representatives, including the Union president and the AFSCME Council 93 staff representative in a timely manner. The County shall post the findings and decision of this Board

for thirty business days in a conspicuous place or places in the workplace where it will be readily available to all bargaining unit employees. The Union's request for all other relief is denied.

So ordered.

Signed this 5th day of January, 2010.

  
Doris M. Desautel, Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Members Carol M. Granfield and Kevin E. Cash also voting.

Distribution:

Karen Clemens, Esq. and Carolyn Kirby, Esq.