



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Wayne Georgiana

v.

Manchester Professional Firefighters, Local 856, IAFF

Case No. G-0199-2
Decision No. 2013-143

Appearances:

Richard E. Molan, Esq., Molan Milner Krupski, Concord, New Hampshire for the Manchester Professional Firefighters, Local 856, IAFF

Wayne Georgiana, Pro Se, Nashua, New Hampshire

Background:

Wayne Georgiana is a firefighter employed in the Manchester Fire Department and is a member of the Manchester Professional Firefighters, Local 856, IAFF (Union). He filed an unfair labor practice complaint charging that the Union breached its duty of fair representation because the Union agreed with the Department to delay by one month the implementation of a collective bargaining agreement provision (Article 11.3 (B)) and because the Union failed to support his related grievance. Mr. Georgiana charges that the Union violated RSA 273-A:3, II (a)(notice of intent to bargain to be given 120 days before budget submission date); 273-A:5, II (f)(breach of collective bargaining agreement); 273-A:6, (I)(relating to PELRB jurisdiction over unfair labor practice charges), and Articles 25.3 (Union meetings with Fire Chief) and 40 (termination and renewal of agreement) of the collective bargaining agreement. *See* Georgiana post hearing brief.

Mr. Georgiana requests that the PELRB find that the Union breached its duty of fair representation, order the Union to send Mr. Georgiana's grievance to arbitration and to cease and desist from entering into verbal agreements modifying the ratified CBA, and issue a letter of admonishment.

The Union denies the charges and claims that it did not violate its duty of fair representation and that it acted in the best interests of the membership. The Union says the delay in implementation of Article 11.3 (B) was necessary to avoid further layoffs and it was duly approved by the Union's Executive Board and ratified by a unanimous Union vote. The Union filed a motion to dismiss on the ground that the Union's Executive Board acted within its authority at all times, that Mr. Georgiana, along with other union members, ultimately ratified the Union Executive Board's actions, and that Mr. Georgiana failed to exhaust administrative remedies provided in the Union's Bylaws. Mr. Georgiana objects to the Union's motion to dismiss.

The undersigned held a hearing on the complaint on April 15, 2013 at the offices of the PELRB in Concord. Both parties have submitted post-hearing briefs, and the decision in this case is as follows.

Findings of Fact

1. The Union is the certified exclusive representative of certain employees of the City of Manchester Fire Department, including Wayne Georgiana. Mr. Georgiana has been a member of the Union for over ten years. During the relevant time period Jeff Duval was serving as Union President.

2. The City of Manchester Fire Department is a public employer within the meaning of RSA 273-A. James Burkush is the Chief of the Department.

3. The Union and the City of Manchester Fire Department are parties to a collective bargaining agreement covering the period July 1, 2010 to June 30, 2013 (Joint Exhibit 1)(CBA). In February of 2012 the Union ratified an extension of the CBA which included Union concessions and the staffing provisions set forth in Article 11.3 (B) scheduled to take effect on July 1, 2012 (Joint Exhibit 2). Article 11.3 provides as follows:

11.3 Payment for Overtime Duty

11.3 (A) Except as provided for in Section 11.2 above or 11.3 (B) below, employees who work additional hours shall be compensated by the payment of one and one half (1 1/2) times their regular hourly rates for hours worked. Overtime coverage for shifts shall be split into one (1) ten-hour (10) day unit and one (1) fourteen-hour (14) night unit. Distribution of overtime to cover a 24-hour shift shall follow the current procedure as listed herein with the following exceptions:

- (1) The first employee listed in the overtime book shall be offered the opportunity to work either unit of the 24- hour shift.
- (2) When either unit of the 24-hour shift has been filled, the remaining unit shall be filled by offering the overtime opportunity to the next employee listed at the top of the overtime book.

11.3 (B) Firefighters, Fire Lieutenants and Fire Captains as set for in paragraph 11.1 (A) shall be assigned by the chief, his deputy or his designee for a four (4) week cycle. Said staffing shall be maintained for the four (4) week cycle.

- (1) Paragraph 11.3 (A) notwithstanding, if a four (4) week cycle has forty-six (46) or more Firefighters, Fire Lieutenants and Fire Captains as provided for in paragraph 11.1 (A) Firefighters, Fire Lieutenants and Fire Captains shall be paid straight time for the first 44 hours of additional hours worked over their regularly scheduled hours in the four (4) week cycle. Any additional hours will be paid at one and one half (1 1/2) times their regular hourly rates.
- (2) If the Department has more eight (188) Firefighters, Fire Lieutenants and Fire Captains as provided for in paragraph 11.1 (A), the number of Firefighters, Fire Lieutenants and Fire Captains per four (4) week cycle required for the Department to pay said Firefighters, Fire Lieutenants and Fire Captains in accordance with 11.3 (B) (1) shall increase by one (1) for each four (4) Firefighters, Fire Lieutenants and Fire Captains over one hundred and eighty-eight (188). For example if the Department has one hundred and ninety-two (192) Firefighters, Fire Lieutenants and Fire Captains then the four week cycle must have forty seven (47) Firefighters, Fire Lieutenants and Fire Captains for the Department to pay Firefighters, Fire Lieutenants and Fire Captains in accordance with 11.3 (B) (1). If the Department has one hundred and ninety-six (196) Firefighters, Fire Lieutenants

and Fire Captains then the four week cycle must have forty eight (48) Firefighters, Fire Lieutenants and Fire Captains for the Department to pay Firefighters, Fire Lieutenants and Fire Captains in accordance with 11.3 (B) (1)

(3) For the purpose of maintaining the set staffing level for the four (4) week cycle the Fire Chief, his deputy or his designee shall have the right to make mandatory overtime assignments on the basis of reverse seniority (except where the designated Firefighter is already scheduled to work the following shift) from the shift going off duty.

(4) Nothing in paragraph 11.3 shall be interpreted or construed as a representation or guarantee of minimum staffing at any number or level within the Fire Department.

4. Article 25.3 of the CBA relates to frequency, manner and content of Union meetings with the Fire Chief, and its full text is set forth in Joint Exhibit 1. Article 25.3 provides in part as follows:

Three representatives of the Association shall meet with the Chief...once a month to discuss matters of mutual concern, including those matters necessary to the implementation of this agreement. A written agenda shall be submitted by the Association to the Chief...

5. Article 40 of the CBA relates to the duration of the CBA and describes the procedure for cancellation or termination notices, continuation of the CBA and requests to negotiate changes. The full text of Article 40 is set forth in Georgiana Exhibit 48.

6. In the spring of 2012 the Department recalled to work nine firefighters who were previously laid off. The Union acknowledges that the Department recalled these employees earlier than necessary. Also, in this time period certain Department employees began taking advantage of a retirement incentive of approximately \$13,000.

7. By late spring the Department had determined that payment of the retirement incentives would result in unanticipated expenditures in fiscal year 2013. Chief Burkush recognized that as a result the Department's budget would not support the number of personnel for July, 2013 required under Article 11.3 (B) and he met with Union President Jeff Duval to discuss the situation.

8. Both the Chief and the Union President recognized that the Department would have to immediately proceed with further layoffs to address the budget problem absent some other solution. The layoffs would likely have been of one to two months duration and involved some of the recently recalled firefighters. Union leadership wanted to avoid further layoffs and understood that it was necessary to move fairly quickly in order to avoid the anticipated layoffs.

9. By early June Union leadership and the Chief had agreed to a one month delay in the implementation of staffing level requirements as specified in Article 11.3 (B) which avoided the need for any further layoffs.

10. The minutes (Union Exhibit 9) relating to the new business portion of the agenda at the June 6, 2012 Union Executive Board meeting include the following:

Staffing Levels – After discussions with the administration, the negotiating committee and some of the executive board we have decided that as of July 1st we will not hold the department to the contract. We will begin to hold the department to the contract as of Aug. 1st. We will also make suggestions that junior members be assigned to stations and can be moved on a weekly or daily basis. Discussions and concerns about how this is new and uncharted territory for all of us.

11. Union President Duval updated the union membership on the status of his discussions and agreement with the Chief by email near the end of June (Union Exhibit 10), and included the following concerning staffing levels in July:

Lastly, because the City and Department brought back our 9 laid off brothers earlier than retirements required, we have agreed that the fire line shift number will not need to exceed 46 per shift even though we will have more than 192 line personnel during the month of July. But with the retirements effective at the end [of] July, the number per shift will increase if there are 192 or more.

12. In late June and in July of 2012 Mr. Georgiana began questioning Union representatives about the adjustment to the Article 11.3 (B) effective date (Union Exhibit 11). He questioned the validity of the Union leadership's agreement with the Department providing for a one month delay in the implementation of Article 11.3 (B). He insisted the Department should comply with

Article 11.3 (B) effective July 1, 2012 notwithstanding the agreement between the Union leadership and the Department and the reasons for that agreement.

13. Mr. Georgiana asked the Union to pursue an Association grievance based upon the Department's alleged non-compliance with Article 11.3 (B) during July of 2012, but the Union declined, citing the agreement made with the Department to delay the implementation of Article 11.3 (B). For the same reasons the Union also did not support Mr. Georgiana's personal grievance.

14. The Union Executive Board approved the delay in implementation of Article 11.3 (B) at its July 6, 2012 meeting, as reflected in the minutes:

Potential grievance - A member [Wayne Georgiana] wants to file an association grievance based on our membership is over 190 and not maintaining 47 on all shifts. [sic] Meeting with the attorneys to discuss further actions. This member did contact the IAFF, for what we can only assume. Motion by McGahey to reaffirm position on not hold the Dept. to 47 on duty per shift, due to members being rehired from laid off status, in good faith bargaining with the City and the Dept. for the month of July. 2nd by Higgins, unanimously passed by the E-Board.

15. The Union membership unanimously ratified the contract delay in September, 2012 (Union Exhibit 15). Minutes of that meeting include the following:

Staffing – July 1st staffing levels did not stay at 47 per shift, but we did not hold the Dept. to the time and a half pay for overtime. If we had there would have been 7 lay-offs to get our number down to 190, until retirements could occur. This was an agreement between the union leadership and the Dept. administration. This is the first union meeting with a quorum so it can now be voted on by the membership. Georgiana stated that Attorney Molan gave his opinion on the union by-laws, and this information was not delivered until just before the grievance committee meeting. President Duval states that the leadership does have the authority to negotiate in good faith with the Dept. Pres. Duval explains how the situation came about, and that we didn't anticipate the BMA hiring all of our members that were let go. This created a budgetary problem with salaries. Motion to affirm the agreement with the union leadership and the executive board had with the Dept. administration on not requiring the staffing to maintain at 47 per shift, and that OT would be paid at straight time, until Aug. 1st...Motion passed unanimously.

16. Because the Union did not support his grievance Mr. Georgiana was unable to bring the matter to grievance arbitration. Georgiana Exhibits 5-10 contain emails and correspondence during the July 5, 2012 to September 10, 2012 time period relating to these interactions.

Decision and Order

Decision Summary

The record does not support a finding that the Union violated its duty of fair representation given the circumstances presented in this case. The complaint is dismissed.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

In *Appeal of Eric Johnson*, 169 N.H. 598 (2013) the court summarized and discussed a union's duty of fair representation as follows:

"[A] union breaches the duty of fair representation when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith." *Marquez v. Screen Actors*, 525 U.S. 33, 44 (1998); *see O'Brien*, 106 N.H. at 256-57 (relying upon federal law when discussing breach of duty of fair representation); *cf. University System v. State*, 117 N.H. 96, 99 (1977) (suggesting that newly created PELRB look to decisions of the National Labor Relations Board (NLRB) for guidance). "[U]nder the arbitrary prong, a union's actions breach the duty of fair representation only if the union's conduct can be fairly characterized as so far outside a wide range of reasonableness that it is wholly irrational or arbitrary." *Marquez*, 525 U.S. at 45 (quotations omitted). "This 'wide range of reasonableness' gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong." *Id.* at 45-46. "A union's conduct can be classified as arbitrary only when it is irrational," meaning that "it is without a rational basis or explanation." *Id.* at 46.

On judicial review of a union's performance, a court may not substitute its own view of the merits of a bargain for that of the union. *Air Line Pilots*, 499 U.S. at 78. "Any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for effective performance of their bargaining responsibilities." *Id.*

.....

“Moreover, there is no requirement that unions treat their members identically as long as their actions are related to legitimate union objectives.” *Vaughan v. Air Line Pilots Ass’n, Intern.*, 604 F.3d 703, 712 (2d Cir. 2010). A union has the discretion to “balance the rights of individual employees against the collective good, or it may subordinate the interests of one group of employees to those of another group, if its conduct is based upon permissible considerations.” *Postal Workers (Postal Service)*, 345 N.L.R.B. 1282, 1285 (2005). “If a union resolves conflicts between employees or groups of employees in a rational, honest, and nonarbitrary manner, its conduct may be lawful..., even if some employees are adversely affected by its decision.” *Id.*

Applying these guidelines to the present case, I find that the record does not support a finding that the Union acted toward Mr. Georgiana in an arbitrary manner, a discriminatory manner, or in bad faith, either when Union leadership reached an agreement with the City to delay the implementation of Article 11.3 (B) or when the Union declined to support Mr. Georgiana’s grievance. The Union’s conduct did not violate its duty of fair representation.

The record reflects that the Union negotiated in good faith with the Department when it obtained the contract extension which included the staffing levels specified in Article 11.3 (B), scheduled to take effect on July 1, 2012. This did not mean, however, that the Union could not subsequently agree in June, given the circumstances presented, to defer the implementation of Article 11.3 (B) by one month in order to avoid layoffs. By June of 2012 there were legitimate budgetary issues which both the Department and the Union understood would require further and immediate layoffs unless an alternative arrangement was made. Union leadership acted promptly and responsibly by meeting with Department officials in June and coming to agreement. Timing issues meant that Executive Board approval was not obtained until early July, and formal unanimous ratification by Union membership until early September. The evidence reflects that at all times the Union leadership acted in good faith in working with the Department to find an alternative to additional layoffs, and in obtaining the approvals of the Executive Board and Union membership. In short, the Union did not violate its duty of fair representation when it agreed to delay the implementation of Article 11.3 (B).

Mr. Georgiana also claims the Union violated its duty of fair representation when it declined to support either an Association grievance or his personal grievance that the Department had violated Article 11.3 (B) staffing requirements in July. However, this claim is dependent upon a finding that the Union improperly agreed to delay Article 11.3 (B). As already stated and explained, I have concluded that the Union's agreement with the Department concerning the implementation of Article 11.3 (B) was legitimate and did not violate its duty of fair representation. Since the Union acted in good faith in agreeing to the delay and did not, in the process, violate its duty of fair representation, it was justified in refusing to support or assist Mr. Georgiana's grievance charging that, in substance, the Department had improperly failed to implement Article 11.3 (B) on July 1, 2012. The Union reasonably concluded that the Georgiana grievance could not be prosecuted in good faith, as the grievance was directly contrary to the Union's agreement with the Department. The evidence in the record does not support a finding that in making the decision not to proceed with the grievance the Union acted toward Mr. Georgiana in an arbitrary manner, a discriminatory manner, or in bad faith.

Based upon the foregoing the Union's pending motion to dismiss is denied as moot and the complaint is dismissed.

So ordered.

August 20, 2013


Douglas L. Ingersoll, Esq.
Executive Director/Presiding Officer

Distribution:

Mr. Wayne Georgiana
Richard E. Molan, Esq.

