# STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**United Steelworkers of America, AFL-CIO, CLC**
**(Manchester Water Works, Local 8938)**

**v.**

**City of Manchester**

**Case No. G-0058-19**
**Decision No. 2014-183**

**Appearances:**

Vincent A. Wenners, Jr., Esq.,
Manchester, New Hampshire for the Complainant

Thomas I. Arnold, III, Esq.,
Deputy City Solicitor,
City of Manchester, New Hampshire for the Respondent

**Background:**

On March 26, 2014 the United Steelworkers of America, AFL-CIO, CLC, Manchester Water Works, Local 8938 (Union) filed a complaint with the Public Employee Labor Relations Board (PELRB) charging that the City of Manchester committed an unfair labor practice in violation of the Public Employee Labor Relations Act, 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) and (h)(to breach a collective bargaining agreement). The complaint arises from recently completed contract negotiations and the timing of health insurance plan change notice requirements

imposed by federal law[1] relative to contract ratification by the Board of Mayor and Aldermen (BMA). According to the Union, the City's 60 day notice was invalid because it was provided before the BMA approved the tentative agreement. The Union also claims the City's 60 day notice was an improper communication with employees. The Union maintains that the 60 day notice was ineffective and that the City was not entitled to begin collecting increased employee contributions to health insurance premiums in November, 2013 or to implement the health insurance plan benefit changes on December 1, 2013. The Union claims the City's conduct constitutes breach of contract, impermissible direct dealing, and an improper unilateral change in the terms and conditions of employment, all in violation of RSA 273-A:5, I (a) and (h). As relief, the Union requests that the PELRB order that the City return all increased health insurance premiums deducted from employees' wages since November 1, 2013 and refund all increased co-payments and deductible payments until the City has complied with the 60 day notice requirement imposed by federal law.

The City denies the charges and has filed a motion to dismiss. The City claims that it provided the 60 notice to employees pursuant to federal law, that it did not actually implement any negotiated changes in the health insurance benefit until after the tentative agreement was fully ratified, that the PELRB lacks jurisdiction to interpret, apply, rule on or enforce the Patient Protection and Affordable Care Act; and that the PELRB lacks jurisdiction over the Union's breach of contract claim because any alleged contract violation is subject to the grievance procedure, which includes final and binding arbitration.

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[1] The 60 day notice of material changes in insurance plans required by the Patient Protection and Affordable Care Act (60 notice requirement).

The undersigned conducted a hearing on the complaint on June 10, 2014 at the offices of the PELRB in Concord. Both parties have submitted post-hearing briefs by the July 25, 2014 deadline, and the decision in this case is as follows.

**Findings of Fact**

1. The Manchester Water Works Board of Water Commissioners (WWB) is a public employer within the meaning of RSA 273-A:1, X.

2. The Manchester Board of Mayor and Aldermen (BMA) is the City of Manchester local legislative body.

3. United Steelworkers, AFL-CIO, CLC, Local 8938 (Union) is the exclusive representative of certain employees of the Manchester Water Works.

4. During the summer of 2013 bargaining teams from the WWB and the Union met approximately eight times to negotiate a successor contract to the collective bargaining agreement which expired June 30, 2013. (Joint Exhibit 1)(2010-13 CBA). By September 13, 2013 the bargaining teams had negotiated a tentative agreement (the September 13, 2013 tentative agreement) which is summarized in Joint Exhibit 2.[2] The September 13, 2013 tentative agreement required ratification by the WWB and the Union and cost approval by the BMA to become final and effective.

5. The September 13, 2013 tentative agreement included changes to unit employees' health insurance benefit such as an increase to 17.5% in the employee's share of premium expense which the parties agree constituted "material changes" to the existing health insurance benefit.

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[2] The parties had reached an earlier tentative agreement which was rejected by the Union for reasons that are not relevant here.

6. The September 13, 2013 tentative agreement also included a 1.0% COLA salary increase for 2013-14 effective upon ratification and also for 2014-15.

7. During bargaining the parties discussed the possibility of making any changes to the 2010-13 CBA retroactive to July 1, 2013, including any COLA wage adjustments and changes to the health insurance benefit. City negotiators noted that making any changes to the health insurance plan retroactive could not be done given the federal 60 day notice requirement and also pointed out it would be beneficial to employees to delay the tentative changes to the health insurance benefit, which included increases in the employee share of premium expense and increases in employee co-pays. Based on these discussions, both parties understood that a 60 day notice was required by federal law. However, the parties did not agree on a specific date on which the 60 day notice would be given. There is no reference to the 60 day notice requirement in the September 13, 2013 tentative agreement nor is there any specific description of how or when changes to the health insurance benefit would take effect, other than the general statement in paragraph 11 of the tentative agreement that the contract would be "effective upon ratification through June 30, 2015."

8. The union ratified the tentative agreement on September 23, 2013. The WWB ratified the tentative agreement on September 26, 2013.

9. The BMA, in its capacity as the local legislative body, approved the cost of the tentative agreement in a two-step process at its October 1 and October 15, 2013 meetings. Joint Exhibits 4 and 5.

10. On September 26, 2013, after the WWB ratified the tentative agreement, but before tentative agreement was fully ratified and approved, the City issued a written notice (Joint Exhibit 7) to bargaining unit employees that changes in the health insurance would be effective

December 1, 2013 and increased payroll deductions to cover the increase in employee contribution to health insurance costs would begin in November. The September 26, 2013 notice included the following:

*To USW Collective Bargaining Unit*

*Thank you for ratifying the collective bargaining agreement. The Board of Mayor and Aldermen will be considering final approval in October.*

*The contract includes negotiated modifications to the health insurance plan during Plan Year 2014. The City of Manchester must provide a 60-day notice prior to the effective date of the modification. Please consider this letter as notice that the modifications will be effective December 1, 2013.*

*.....*

*A special open enrollment period will be held for USW covered employees from October 21 to October 25 to enable those who wish to make changes to their health plan selection to do so.*

*The open enrollment period will be confirmed once the BMA gives final approval of the contract. Please do not hesitate to contact me if you have any questions....*

*Please be prepared to see increased payroll deductions for your health plan cost sharing beginning in November to cover the new negotiated plan costs in December.*

11. After the tentative agreement was fully ratified the City increased employee payroll deductions in November, 2013 to cover the change to employee premium contribution and the changes in the health insurance plan were implemented beginning on December 1, 2013, consistent with the September 26, 2013 Notice (Joint Exhibit 7). The City also implemented the COLA increases referenced in the September 13, 2013 tentative agreement effective as of October 15, 2013.

12. On December 4, 2013 the Union president emailed the BMA and claimed the Union had not been given a proper 60 day notice, and stated as follows:

*Section (4) NOTICE OF MODIFICATIONS and (e) Preemption was (sic) violated.*

*The Human Resources department sent out notices before the final ratification vote of the BMA. As a result of this the insurance premiums were deducted prematurely.*

13. The carrier that provides the health insurance plan will only implement changes effective on the first of the month. The City collects the employee share of premium expense approximately 30 days in advance (i.e. employee share of premium payments due in November are collected from employees by payroll deduction in October).

14. Per Joint Exhibit 1, the parties are subject to a grievance procedure which concludes in final and binding arbitration.

## Decision and Order

**Decision Summary:**

The City's motion to dismiss any claim based upon alleged non-compliance with the Patient Protection and Affordable Care Act and breach of contract is granted. The PELRB lacks jurisdiction to adjudicate whether the City has satisfied any notice requirements imposed by the Patient Protection and Affordable Care Act. Likewise, the PELRB lacks jurisdiction over the Union's sub-section (h) breach of contract claim because that claim is subject to the grievance procedure. However, the City's motion is denied as to the Union's complaint that the City has committed an unfair labor practice complaint in violation of RSA 273-A:5, I (a).

**Jurisdiction and City's Motion to Dismiss:**

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6. In its motion to dismiss the City argues that the Union is, in substance, claiming a violation of federal law and a breach of contract. The City argues that claims based on federal law are beyond the PELRB's jurisdiction and likewise the PELRB lacks jurisdiction over any breach of contract claims filed under RSA 273-A:5, I (h) because they are subject to the contractual grievance procedure, which includes final and binding arbitration. I agree that the

PELRB lacks jurisdiction over any federal law and breach of contract claims and the City's motion to dismiss these claims is granted.

It is axiomatic that the PELRB's jurisdiction is limited to the adjudication of claims alleging violations of the provisions of RSA 273-A. To the extent the Union is claiming that a violation of the federal law 60 day notice requirement is also a violation of RSA 273-A that claim must fail. There is nothing in the provisions of the Act which allows for a finding that proof of a violation of the federal law 60 day notice requirement also proves a violation of RSA 273-A.

Additionally, to the extent the Union claims that the City's conduct constitutes a breach of the parties' collective bargaining agreement in violation of RSA 273-A:5, I (h), the PELRB also lacks jurisdiction. Such claims are subject to the grievance procedure, which includes final and binding arbitration. See *Appeal of Silverstein*, 163 N.H. 92 (2012). However, the PELRB does have jurisdiction over the Union's sub-section (a) claim, and to the extent the City has moved to dismiss that claim the motion is denied.

**Discussion:**

Given the foregoing dismissal order, the remaining issue for decision is whether it was an unfair labor practice in violation of RSA 273-A:5, I (a) for the City to send employees a notice on September 26 which, while referencing the need for BMA "final approval" of the contract, informed employees of implementation dates of negotiated changes to the employee health insurance benefit. A related aspect of this issue is whether the City also violated sub-section (a) when it began collecting the increased employee premium contribution in November and implemented the health insurance plan changes on December 1. A review of all the circumstances leads to the conclusion that the City's actions did not constitute an unfair labor

practice in violation of RSA 273-A:5, I (a), regardless of whether the City's conduct is characterized as an interference with employee rights or improper direct dealing.

In *Appeal of City of Portsmouth* 140 N.H. 435, 437-38 (1995), the court reversed a PELRB finding that a public official's critical comments about the union and its leadership published in a local newspaper constituted an interference with employee rights in violation of RSA 273-A:5, I (a).

> The issue before us is what speech constitutes "interference" within the meaning of RSA chapter 273-A. Although we resolve this case on nonconstitutional grounds, we recognize that the first amendment is a significant factor in our construction of the statute. In a case presenting questions of statutory interpretation similar to those before us, the Michigan Court of Appeals found the purposes of the statute embodying the organizational rights of public employees best served by permitting the free flow of information from both union and employer. *Local 79, Serv. Emp. v. Lapeer Cty. Gen. Hosp.,* 314 N.W.2d 648, 651 (Mich.Ct.App.1981). In addition, that court assumed, without deciding, the existence of a constitutional right to engage in union activities, but reasoned that there was "no infringement thereof merely by virtue of a public employer's expression of its views on union representation, absent intimidation, coercion, or misrepresentation." Id. at 652. The court concluded, "Manifestly, fair comment on the question of union representation does not abridge an employee's freedom of association." Id. We find the Michigan court's decision helpful in establishing the contours of "interference" under RSA 273-A:5, I(a) and (b).

*Appeal of City of Portsmouth* 140 N.H. at 437-38. The court concluded that the public official's statements were not an interference with employee rights because the statements "did not contain elements of 'intimidation, coercion, or misrepresentation.'" *Id.*

In *Appeal of Town of Hampton,* 154 N.H. 132 (2006) the court provided the following overview of direct dealing claims:

> It is a prohibited practice for a public employer to refuse to negotiate in good faith with the exclusive representative of a bargaining unit. RSA 273-A:5, I(e). Accordingly, a public employer must refrain from negotiating with any union member who is not designated as an exclusive representative. *Appeal of Franklin Education Assoc.*, 136 N.H. 332, 335 (1992). "Dealing directly with employees is generally forbidden because it seriously compromises the negotiating process and frustrates the purpose of [RSA chapter 273-A]." Id. (citation omitted.) However, the mere act of communication by an employer with its

employees is not a per se unfair labor practice under RSA 273-A:5. *Appeal of AFL-CIO Local* 298, 121 N.H. 944, 946 (1981).

In *Hampton*, after negotiations over police detail work failed to result in an agreement, the police chief had posted a response on the police department's official bulletin board to the union president's version and discussion of the negotiations which the union president had emailed to all police department personnel. The court reversed the PELRB's finding of an unfair labor practice, explaining that the police chief's bulletin board posting, made after negotiations had concluded, was "in response to arguably inflammatory and allegedly inaccurate comments that Henderson had disseminated throughout" the department, was a response "to perceived misinformation," and was not direct dealing in violation of RSA 273-A:5, I (e).

In the present case, the record reflects that the City issued the September 26, 2013 notice for administrative purposes (i.e. to inform unit employees about health insurance plan changes at least 60 days before they go into effect). There is no evidence that the City engaged in "intimidation, coercion, or misrepresentation" through its issuance of the notice, and likewise there is no evidence that the City otherwise issued the notice in order to interfere with employee rights under the Act or that the notice had that effect. The fact that final BMA approval of the tentative agreement was still pending is clearly stated at the beginning of the notice. It is certainly true that by issuing the notice on September 26, before the BMA had voted on cost approval, the City was attempting to minimize the delay between full ratification and the implementation of cost saving changes to the employee health insurance benefit, but this by itself is not an improper act or an illegitimate objective under the Act. At the time the notice was sent the WWB and the Union had already ratified the tentative agreement, and unit employees were therefore already on notice about the nature and extent of the negotiated changes to their health insurance benefit. The referenced effective dates in the notice do not and ultimately did not

conflict with the tentative agreement's provision that it would only become effective upon ratification. There is also no evidence suggesting that it was the City's intent or plan to implement the actual changes to the health insurance benefit in the event the BMA did not give its approval. In fact, the City did not implement any of the negotiated health insurance benefit changes until after the contract was fully ratified. In summary, there is insufficient evidence to establish that the City interfered with the rights of unit employees within the meaning of RSA 273-A:5, I (a).

With respect to Union allegations of direct dealing it appears that such a claim should have been filed under sub-section (e) in accord with *Appeal of Town of Hampton*. Further, even assuming that a charge of direct dealing is actionable under sub-section (a), there is insufficient evidence to sustain the charge. As stated in *Appeal of Town of Hampton*, the "mere act of communication by an employer with its employees is not a per se unfair labor practice..." Here, the City issued the September 26 notice for legitimate administrative reasons, as discussed. It was not negotiating with or attempting to negotiate with employees.

In accordance with the foregoing there is insufficient evidence upon which to find that the City has committed an unfair labor practice in violation of RSA 273-A:5, I (a). The Union's request to suspend the implementation of the changes to the employee health benefit and return employees to the status quo in place prior to the implementation of those changes pending the issuance of a new federal law 60 notice is denied. The complaint is dismissed.

So ordered.

July 31, 2014

Doug Ingersoll

Douglas L. Ingersoll, Esq.
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