



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Teamsters Local Union 633

v.

State of New Hampshire, Department of Corrections

Case No. G-0109-10
Decision No. 2015-017

Appearances:

William R. Cahill, Jr., Esq.
Dumont, Morris and Burke, PC
Boston, Massachusetts for the Complainant

Michael K. Brown, Esq., Senior Assistant Attorney General
Rosemary Wiant, Esq., Assistant Attorney General
Concord, New Hampshire for the Respondent

Background:

On May 5, 2014 the Teamsters Local Union 633 (Union) filed an unfair labor practice complaint under the Public Employee Labor Relations Act (Act), claiming that the State of New Hampshire, Department of Corrections (State) committed an unfair labor practice in violation of RSA 273-A:5, I (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). The Union's complaint is based upon the State's meetings and communications with the Union pursuant to Article 18.8.5 (Health Insurance Exploratory Committee) of the parties' July 1, 2013 to June 30, 2015 Collective Bargaining Agreement (2013-15 CBA). This article establishes a health insurance task force and provides that "[t]he purpose of the Task

Force is to review healthcare options for unit employees to determine the feasibility of having unit employees enroll in a plan outside the State's current health plan offering." The Union claims the State has raised bogus legal impediments to the possible movement of bargaining unit employees to a Northern New England Benefit Trust (NNEBT) health insurance plan, a Teamsters health insurance product. As relief, the Union requests that the PELRB order the State to bargain in good faith within the guidelines of applicable law and the parties' 2013-15 CBA.

The State denies the charges. The State says it has satisfied its good faith bargaining obligations in general and its specific obligations under Article 18.8.5. The State says that it has no obligation to agree to provide health insurance benefits to State employees through the NNEBT and also that there are considerations which legitimately complicate and likely restrict the State's ability to proceed with the proposed NNEBT healthcare option. These include, according to the State, the Administrative Services Commissioner's statutory authority and duty to administer health insurance plans or contracts under RSA 21-I, the Request for Proposals (RFP) and Governor and Council approval process applicable to certain State contracts, the State's preference for a single health insurance benefit plan which covers all state employees, and the integration and coordination of an NNEBT option with existing State computer technology. The State also maintains that the PELRB lacks jurisdiction to review the State's interpretation of the Commissioner's RSA 21-I obligations. The State asks that the PELRB deny the Union's claims and dismiss the complaint.

A hearing was originally scheduled for June 26, 2014 but rescheduled to July 15, 2014 at the State's request.¹ The State's subsequent assented to motion to reschedule the July 15, 2014

¹ See June 9, 2014 pre-hearing order, Decision No. 2014-143.

hearing date was also granted, and the undersigned conducted a hearing in this matter on August 26, 2014. Both parties filed post-hearing briefs by the established deadline, and the decision in this case is as follows.

Findings of Fact

1. The State is a "public employer" as defined by RSA 273-A:1, X.
2. The Union is the certified exclusive representative for Corrections Officers and Corrections Officer Corporals employed by the State Department of Corrections. See PELRB Decision No. 2012-226 (October 4, 2012).
3. The parties' current CBA covers the time period from July 1, 2013 through June 30, 2015 (2013-15 CBA).
4. Under the prior CBA, the State provided health insurance benefits through the State's "self-insured" plan under which the State assumed the financial risk associated with the provision of benefits and the payments of claims. The State did, however, contract with a third party (Anthem) to administer this healthcare plan.
5. The Northern New England Benefit Trust (NNEBT) is a fully insured Teamsters health insurance plan which assumes the risk of providing benefits for covered claims in exchange for payment of a premium. The NNEBT fund counsel and director is Gabriel Dumont, who also works as an attorney for the Teamsters. The NNEBT utilizes the CIGNA health insurance network.
6. During negotiations on the 2013-15 CBA the Union proposed providing unit employees with a health insurance benefit through the NNEBT. The Union proposal also included having the NNEBT in the role of plan administrator. The Union remained firm about the details of its healthcare proposal throughout negotiations. The Union believes the NNEBT healthcare option is a less expensive healthcare option which provides better access to state healthcare networks.

7. While the State was intrigued by the potential cost savings of the NNEBT healthcare option, it also had concerns, questions, and reservations, such as:

- The State's preference for a single health insurance plan for all state employees
- The Commissioner's lack of administrative authority over the plan
- Whether the NNEBT option would cover all unit employees or whether employees would participate by choice
- How health insurance coverage will be addressed on retirement
- Interaction of State and NNEBT computer systems
- Negotiation over a specific healthcare provider or vendor, and not just the level of benefits
- Use of competitive bidding and the request for proposal process
- Governor and Council (G&C) approval

8. Ultimately the State did not agree to the Union's NNEBT proposal. However, in order to bring negotiations on the 2013-15 CBA to a close the parties did agree, in Article 18.8.5 of the 2013-15 CBA, to have further discussions about health insurance options as follows:

Health Insurance Exploratory Committee: The parties agree, in recognition of the ongoing challenge of assessing health insurance options, to establish a Task Force composed of not more than five (5) bargaining unit employees to be appointed by the union and five persons appointed by the Employer. The purpose of the Task Force is to review healthcare options for unit employees to determine the feasibility of having unit employees enroll in a plan outside the State's current health plan offering. The task force will begin meeting as soon as possible, but no later than September 1, 2013. The parties may re-open negotiations to issues related only to healthcare matters.

Both parties understood that the NNEBT health option was "a plan outside the State's current health plan offering" that would be reviewed under this provision.

9. The first meeting of the Task Force took place on September 17, 2013. The State again expressed its understanding that it could not legally go forward with the NNEBT option. The meeting concluded fairly quickly, and later that day Jeffrey Padellaro, a Union Business Agent, sent State Personnel Manager Matthew Newland the following email:

As a follow up to our Healthcare committee meeting today, this shall serve as [a] written request for that which was requested verbally. Specifically, the State has informed the Union that pursuant to legal restrictions the parties are unable to agree to move IBT 633 bargaining unit

members to an alternative healthcare plan.

Accordingly, please provide the statute that the State team is relying upon to reach that conclusion, as well as the explanation from the Attorney General's Office outlining same.

Once the above information has been received, we will convey our intention moving forward. In the interim, we reserve any and all rights and defenses while maintaining our position regarding Northern New England Benefit Trust.

10. Mr. Newland responded to Mr. Padellaro on September 25, 2013, stating that "[t]he statute is RSA 21-I which statutorily mandates the Commissioner of Administrative Service to administer State employee health insurance plans and the Commissioner cannot delegate this responsibility to a third party. Please let me know if you need anything further." On September 26, 2013 Mr. Padellaro responded "Thanks Matt. I will follow up on our end and get back with you."

11. On November 6, 2013 NNEBT fund counsel and director Gabriel Dumont emailed Senior Assistant Attorney General Michael Brown about the recent Padellaro/Newland communications. He included a copy of the Padellaro/Newland emails, discussed the relevant provisions of RSA 21-I, and in general expressed his opinion that the State could legally agree to an NNEBT healthcare option. Mr. Dumont concluded by stating that:

I am sending this email to you in the hopes that you or someone in your office can review and weigh-in on this matter to correct what I believe is an obvious misunderstanding of the Commissioner's obligations under RSA 21-I. I would be happy to discuss this issue further with you after you have had an opportunity to review the above and the underlying facts.

12. Mr. Brown responded the next day, stating "[t]hank you for your thoughtful email. We will review the information you have provided and take it into consideration. Be advised, however, we cannot render legal advice to anyone but our clients." It does not appear that there were any further substantive communications between Mr. Brown and Mr. Dumont on the subject.

13. A second meeting of the Task Force was held on March 11, 2014 but was similarly unproductive.

14. At some point Mr. Newland asked the Union whether it was seeking any legislative changes to address the State's conclusion that existing law required the Commissioner to act as plan administrator but it does not appear the Union pursued any legislation based upon its belief that none was necessary.

15. On April 9, 2014 Mr. Newland proposed meeting again in May, but also questioned "if there is a need to meet on this as we still have the differing views on the law." The parties did not schedule another meeting and the Union filed this unfair labor practice complaint on May 9, 2014.

16. The Task Force meetings were not "negotiations" on a successor collective bargaining agreement, and the Union did not request that the State reopen negotiations on healthcare matters.

Decision and Order

Decision Summary:

The evidence is insufficient to establish that the State has committed an unfair labor practice in violation of RSA 273-A:5, I (e). The Article 18.8.5 Task Force meetings were held to "determine the feasibility of other healthcare plans" and did not constitute collective bargaining under the Act. Even if the Task Force meetings are treated as collective bargaining negotiations the evidence is still insufficient to prove a violation. The complaint is dismissed.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged RSA 273-A:5 unfair labor practices per RSA 273-A:6, I and has jurisdiction over the complaint in this case. The State's RSA 21-I jurisdictional argument is addressed in the discussion section of this decision.

Discussion:

The obligation to bargain in good faith is described in RSA 273-A:3, I, which provides that:

It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. "Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.

The requirements of good faith bargaining provide an important and valuable legal framework within which negotiations are held. However, these good faith bargaining requirements are not universally or indiscriminately applicable to all non-negotiation meetings, discussions, and contacts between public employer and bargaining unit representatives that occur in the course of labor relations. In this case, the Union is complaining about the State's conduct during Task Force meetings. These meetings, and communications between the parties in preparation for and about such meetings, did not constitute "collective bargaining" under the Act and did not trigger the statutory good faith bargaining obligation imposed by RSA 273-A:3, I.

The Task Force was conceived in order to conclude negotiations on the 2013-15 CBA, and its stated purpose was to have discussions about the *feasibility* of other healthcare plans. These feasibility discussions were, at most, a prelude to the possible reopening of negotiations over the bargaining unit's healthcare plan (Article 18.8.5 provides that negotiations could be reopened in order to bargain over "issues related only to healthcare matters"). The evidence reflects that the Task Force met twice. A proposed third meeting did not happen, apparently because both the State and the Union believed it would not advance discussions about the feasibility of a different healthcare option like the NNEBT plan. There was no evidence that the parties advanced beyond meeting at the Task Force level to re-open negotiations over healthcare matters as provided in the last sentence of Article 18.8.5.

Even assuming it is appropriate to treat the Task Force meetings as collective bargaining under the Act, the Union's complaint is still without merit because there is otherwise insufficient

evidence to prove a violation. I reach this conclusion even though I am not persuaded by the State's argument that it is, in effect, legally prohibited from bargaining about a healthcare plan like the NNEBT option under RSA 21-I:27 and 28.

The State's position with respect to RSA 21-I is, in substance, that the PELRB lacks jurisdiction to review the State's interpretation of this law even though it has raised and relied upon RSA 21-I in this statutory unfair labor practice proceeding. The problem with the State's position is that it undermines the PELRB's clear statutory authority to resolve duly filed unfair labor practice complaints. There are also court decisions recognizing that in some cases the PELRB may be required to consider and review independent laws, including, for example in cases involving disputes over a public employer's obligation to bargain particular subjects. See *Appeal of State*, 138 N.H. 716, 722 (1994)(describing three part test to determine whether particular topic is mandatory, permissive, or prohibited subject of bargaining) and *Appeal of City of Nashua Board of Education*, 141 N.H. 768, 774 (1997)(PELRB may need to determine whether there is an independent law, constitutional provision, or valid regulation identifying particular topic as prohibited bargaining subject). I find that in this case the State's interpretation of the relevant provisions of RSA 21-I is subject to PELRB review as necessary to resolve the State's bargaining obligations and the Union's claim that the State has violated RSA 273-A:5, I (e). The State relied on this law in the course of its dealings with the Union prior to the filing of the complaint and continues to rely on this law in its defense of the Union's charge.

The State's RSA 21-I argument is akin to a claim that the NNEBT healthcare plan is a prohibited subject of bargaining given the State's assertions about the Commissioner's administrative obligations over health care contracts. Under *Appeal of State*, bargaining proposals or subjects fall into one of three categories: mandatory topics of bargaining, permissive

topics of bargaining, and prohibited topics of bargaining. The nature and extent of a party's obligation to bargain a particular proposal presented to it, and the corresponding right of the party making a particular proposal to pursue it, depend on whether the underlying subject matter concerns a mandatory, permissive, or prohibited subject of bargaining:

First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation.... Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy.... Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI. A proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.

In re Appeal of Nashua Police Commission, 149 N.H. 688, 691-92 (2003)(citing *Appeal of State*, 138 N.H. at 721-723).

The provisions of RSA 21-I at issue do not disqualify the NNEBT healthcare plan or similar options from consideration when bargaining over healthcare benefits. It is therefore improper for the State to assert that it cannot bargain over this particular species (NNEBT) of health insurance benefits and plans on the grounds that it is, in effect, a prohibited subject of bargaining.² RSA 21-I provides, in part, as follows:

21-I:13 Duties of Commissioner. – In addition to the powers, duties and functions otherwise vested by law in the commissioner of the department of administrative services, he shall:

....

² Health insurance benefits, including those offered in the form of the NNEBT healthcare option, qualify as a mandatory subject of bargaining under the 3 part *Appeal of State* test. They are not reserved to exclusive managerial authority by the constitution, by statute, or by statutorily adopted regulation; health insurance proposals primarily affect the terms and conditions of employment, rather than matters of broad managerial policy; and contractual provisions which provide health insurance do not interfere with public control of governmental functions contrary to RSA 273-A:1, XI.

21-I:13, IX. Administer all state employee benefit programs, other than those administered by the retirement system, as provided by RSA 21-I:28.

21-I:28 Contract. – The commissioner of administrative services shall be authorized to enter into permanent group life insurance contracts with an insurance company or companies, or other group licensed to do business in the state of New Hampshire. The commissioner of administrative services shall be authorized to enter into group hospitalization, hospital medical care, surgical care, and other medical and surgical benefits contracts with an insurance company or companies, third party administrators, or any organization necessary to administer and provide a health plan under the provisions of this subdivision. The commissioner of administrative services, shall administer contracts entered into to provide the health plan, and the coverage under the health plan, in order to determine which of various contracts would best serve the interests of the state employees and comply with the terms of the collective bargaining agreement.

While this law assigns certain administrative responsibilities to the Commissioner with respect to “contracts entered into to provide the health plan, and the coverage under the health plan,” it does not structure the Commissioner’s involvement in such contracts in a way that expressly or otherwise prohibits bargaining over fully insured plans like the NNEBT healthcare option. It does, however, provide that the State, acting through the Commissioner, “shall administer contracts” with two directives. The first is to determine which contractual option best serves the “interests of state employees,” and the second is to “comply with the terms of the collective bargaining agreement.” The second directive is nothing more than a restatement and affirmation of the law governing public sector collective bargaining. It means, in the context of this case, that the health insurance benefits to be provided are determined by collective bargaining, and not unilaterally by the Commissioner, and the Commissioner must adhere to the collective bargaining agreement when entering any contracts for the purpose of providing these benefits.

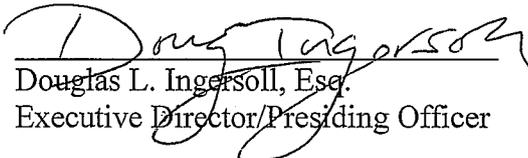
This does not mean, however, that the State violated its good faith bargaining obligations in this case. The State participated in two Task Force meetings and was willing to meet a third time, notwithstanding the potential futility of a third meeting. During the course of these meetings the State expressed legitimate reservations about moving from a single plan to the

provision of a separate, or additional, health care option. The State is also entitled to raise issues about the role of the Commissioner, wholly apart from the provisions of RSA 21-I, in administering a significant employee benefit program. The State also raised valid technology questions and concerns. Further, even if the State is amenable to a separate and fully insured health insurance plan which provides and delivers coverage in the manner of an NNEBT healthcare option, the State can still legitimately insist on the use of the competitive bidding and G&C process, provided, however, that the State's obligation to provide the negotiated benefit cannot be obviated or otherwise rendered illusory as a result.

Based on the foregoing I find that the evidence is insufficient to show that State violated its RSA 273-A:3, I good faith bargaining obligations. The Union's request that the PELRB find that the State committed an unfair labor practice in violation of RSA 273-A:5, I (e)(failure to bargain in good faith) is denied³. The complaint is dismissed.

So Ordered.

Date: 1/29/2015


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

Distribution: William Cahill, Esq.
Rosemary Wiant, Esq.
Michael K. Brown, Esq.

³I do not address whether the State violated its Article 18.8.5 obligation to consider the feasibility of alternative health insurance plans. The Union did not file a contract claim under RSA 273-A:5, I (h)(breach of collective bargaining agreement) but instead proceeded under section (e), as discussed in the decision. It should also be noted that section (h) claims are, in general, subject to the contractual grievance procedure and the PELRB's jurisdiction over such claims is limited. See *Appeal of Silverstein*, 163 N.H. 192 (2012).