State of New Hampshire

Public Employee Labor Relations Board

Rye Educational Support Staff Association, NEA-New Hampshire

v.

Rye School District

Case No. E-0221-1
Decision No. 2018-200

Appearances: Lauren Snow Chadwick, Esq., NEA-NH, Concord, New Hampshire for the Rye Educational Support Staff Association, NEA-NH

Michael S. Elwell, Esq., Soule, Leslie, Kidder, Sayward & Loughman, Salem, New Hampshire, for the Rye School District

Background:

On April 12, 2018, the Rye Educational Support Staff Association, NEA-New Hampshire (Association) filed an unfair labor practice complaint with this board under the Public Employee Labor Relations Act. The Association alleges that during the course of 2017 negotiations, which began in September, the District engaged in surface bargaining[1] and did not make a genuine good faith effort to reach an agreement. In particular, the Association claims the District improperly delayed the start of negotiations, including mediation, unreasonably failed to agree to the Association's proposed ground rules, unjustifiably failed to provide benefit cost information in a timely manner, inappropriately recycled District bargaining proposals from 2015 and 2016, adopted a "take it or leave it" bargaining position, and effectively failed to respond to

[1] Superficial negotiation.

Association bargaining proposals. The Association charges this conduct constitutes a prohibited practice in violation of RSA 273-A:5, I (a), (e), (g), and (h).

The Association requests that the board find that the District committed an unfair labor practice and order the District to: 1) engage in good faith negotiations, including, among other things, following ground rules; 2) respond in writing to the Association's proposals; 3) meet at reasonable dates and times; and 4) cease and desist from offering "take it or leave it" proposals.

The District denies the charges. According to the District, the 2017 negotiations were scheduled and conducted on a timeline similar to prior years, and while the District's general bargaining objectives remained the same as in prior years, it duly responded to Association's proposals during 2017 bargaining and provided requested information in a reasonable and timely manner. The District requests that the PELRB dismiss the complaint.

This case was originally scheduled for hearing on June 8, 2018, but the hearing was rescheduled at the Association's request to July 17, 2018. Both parties have filed post-hearing briefs, and the decision is as follows:

Findings of Fact

1. The District is a public employer within the meaning of RSA 273-A:1, X.

2. The Association is the certified exclusive bargaining representative for all District educational support personnel, including but not limited to assistants, secretaries, custodians, aides, food service employees, educational associates and clerks. See January 29, 1992 Certification of Representative and Order to Negotiate, Case No. M-0762.

3. The term of the parties' most recent collective bargaining agreement was July 1, 2013 to June 30, 2016 (2013-16 CBA). Joint Exhibit 1.

4. On June 18, 2017, Association president Sharry Sparks contacted the District school board and proposed opening negotiations on August 29, 30 or 31, 2017. These dates coincided with the first three days of the District's 2017-18 school year. These negotiations would be the parties' third attempt to negotiate a successor contract to the 2013-16 CBA.

5. On September 6, 2017, District Superintendent Salvatore Petralia proposed initial meeting dates of September 15 or 22, 2017 at 7:00 a.m., dates which were consistent with the date when the parties commenced bargaining in prior years.

6. On September 11 and 13, 2017, Association President Sparks responded to the Superintendent to confirm the September 22 date and to propose meeting at 4.15 p.m. instead of 7:00 a.m. This was acceptable to the Superintendent and the school board. Sparks also requested a list of employees in the bargaining unit, and stated that "[a]s in the past we will need the date of hire, current rate of pay and benefits." The Association did not follow up on this request until October 10, 2017.

7. On September 22, 2017, the parties met for 20 minutes. During this time they discussed changes to ground rules used in the 2016 negotiations (see Exhibit 15) to permit the Association's proposed use of a local resident as a consultant. The District's bargaining team resisted, and ultimately the Association withdrew this proposal in a subsequent bargaining session. The parties also established October 10 and 17 as the next two bargaining dates, with October 30 as a tentative third date. The parties did not engage in any substantive negotiations.

8. The existing ground rules established the sixth bargaining session as target date for a tentative agreement, and also called for 90 minute bargaining sessions "unless the parties both agree to a longer session."

9. The October 10, 2017 negotiations lasted from 4:15 p.m. to 5:00 p.m. During this time the Association proposed and discussed several additional changes to ground rules 4, 8, 10, 11, and 14. The Association also inquired about the insurance information requested on September 11, and the District represented that the information would be provided before the next session. Neither the Association nor the District exchanged any substantive proposals, and the session concluded after the parties agreed to cancel the October 17 date and meet again on October 31 at 4:15 p.m.

10. On October 16, 2017, the District emailed a spreadsheet (Joint Ex. 13) to the Association, which listed employees, compensation information, and a tally of employee insurance participation by position. On October 17, 2017, the Association requested additional insurance information which the District provided later that same day. See Joint Ex. 14.

11. The October 31, 2017 bargaining session began at 4:15 p.m. Prior to the session the parties had worked on a written version of the ground rules, final agreement was reached on the ground rules at the outset of the session, and both parties signed the updated ground rules. See Joint Ex. 17. The Association presented its first written proposal, which consisted of two language requests, and a "3% increase in salaries based on a salary scale, currently being compiled by (Association) negotiating team, and will be provided by the next session." Joint Ex. 18. The Association also asked for additional insurance data indexed by employee name. After District HIPAA concerns were resolved, the District provided the requested additional insurance information on November 2, 2017. See Joint Ex. 20.

12. At the November 6, 2017 bargaining session the District presented its written proposals. See Joint Ex. 23. The District proposals bore similarities to the District's December 2016 proposal (Joint Ex. 46) from the prior year's unsuccessful negotiations. There were

differences as well, including the proposed effective date of percentage changes to Section 19-1.5 HMO insurance; language changes to the suspension or discharge provision; and differences in the wage proposals.

13. The next bargaining session took place on November 13, 2017. Earlier in the day the Association circulated a wage scale schedule. See Joint Ex. 24, 25, 26. This proposed schedule was part of Association efforts to reestablish a wage scale schedule in the parties' collective bargaining agreement. A prior version of a wage scale had been included in earlier contracts but had been eliminated. The Association candidly acknowledged that creating a wage scale to cover all unit employees resulted in a wide range of steps and pay, that the version for year one was costly, and that a more "workable" version needed to be developed.

14. The District treated the November 13, 2017 wage scale as a bargaining proposal which included the following cost increases over the five years of the proposal: Year 1 – 17.76%; Year 2 – 5.92%; Year 3 – 5.13%; Year 4 – 4.93%; and Year 5 – 5.01%. The Association considered the November 13, 2017 wage scale as a first step in what would hopefully prove to be a collaborative effort to incorporate a wage scale into the next contract.

15. On November 13 the Association responded to the school board's November 6, 2017 proposals on health insurance issues, and rejected the school board's proposed language changes in the areas of discipline, transfers, and bumping rights. The Association did not fully explain the reasons for its position on the language proposals.

16. At the next bargaining session, held November 28, 2017, the parties did not have any meaningful discussions about pending proposals and responses. At one point the Association characterized the school board's bargaining position as "take it or leave it," something the school

board disputes. After approximately 30 minutes, the Association declared impasse, proposed two mediators, and talked about pursuing an unfair labor practice complaint.

17. On November 30, the school board proposed two alternative mediators, and on December 11, 2017 the Association agreed to one of them (Gary Altman).

18. On December 12, Altman proposed January 9, 2018, and possibly January 2, 2018, as mediation dates. On December 13, the parties agreed to 10:00 a.m. on January 9, 2018. Approximately one week later, when the Association realized January 9 was the deadline to submit cost items for the 2018 annual school district meeting deliberative session, the Association asked to reschedule the mediation to the January 2 date. The District did not agree, and noted that it was still possible to meet the applicable January 9 deadline as long as the parties promptly ratified any tentative agreement reached in mediation.

19. The January 9, 2018 mediation began at 10:00 a.m., and the parties made progress in a number of areas, including on wages and some health insurance issues. The school board withdrew one of its language proposals, but the Association would not agree to the school board's remaining language proposals. The Association ended the mediation at approximately 3:00 p.m., and several hours later notified the school board it would be in touch regarding fact finding.

20. Superintendent Petralia attended the district meeting deliberative session later that day. At one point he stated that fact finding was being considered, and that negotiations were fluid. The Association later criticized these comments as an inaccurate representation of the status of negotiations, since mediation had concluded without an agreement and the Association had not yet determined whether it would proceed to fact finding.

21. On February 18, 2018, the Association proposed the parties resume negotiations with the aim of submitting cost items to a special district meeting, the holding of which could be voted upon at the same time as the annual meeting vote scheduled for March 13, 2018. The Association also asked the school board to make "counters to your original proposals."

22. The school board declined to resume bargaining on this basis, since the timeline would not work given the March 13, 2018 meeting date. The school board also declined to update its original proposals as requested.

23. On March 6, 2018 the Association advised that it did not want to proceed to fact finding. However, by the end of May the parties had resumed negotiations, which were ongoing as of the date of the hearing in this case.

Decision and Order

Decision Summary

There is insufficient evidence to find that the District has committed an unfair labor practice in violation of RSA 273-A:5, I (a), (e), (g), and (h). 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

Under the Public Employee Labor Relations Act (Act), it is a prohibited practice for any public employer:

> (a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;
> (b) To dominate or to interfere in the formation or administration of any employee organization;

(c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization;
(d) To discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under 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;
(f) To invoke a lockout;
(g) To fail to comply with this chapter or any rule adopted under this chapter;
(h) To breach a collective bargaining agreement;
(i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule.

See RSA 273-A:5, I. The Association claims the District has delayed bargaining, failed to provide employee information in a timely manner, recycled old bargaining proposals, and has otherwise failed to negotiate in good faith as required by law, all in violation of sub-sections (a), (e), (g), and (h).

We evaluate failure to bargain in good faith claims under RSA 273-A:3, which provides as follows:

Obligation to Bargain.

I. 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. (Emphasis added).

Relevant factors in our analysis of the District's "effort to reach agreement" include, for example, matters like cooperation in scheduling, duration of bargaining sessions, cooperation in the exchange of information necessary to formulate and understand bargaining proposals, the level of communication and discussion during negotiations, and the attitude and demeanor of negotiators.

The scheduling and duration of bargaining sessions were covered by the parties' prior ground rules and were included, without change,[2] in the modified 2017 version. These call for at least six 90 minute bargaining sessions, with additional dates and time as may be agreed upon. Although not formally readopted until October 31, 2017, these ground rules provisions still serve as a useful yardstick by which the parties' conduct can be measured. The record reveals that the duration of the first two sessions was woefully inadequate (20 minutes and 45 minutes). In our judgment, this resulted in an unnecessary delay in the resolution of the ground rules, which, together with the decision to begin meeting on September 22, delayed the start of substantive bargaining by approximately six weeks. There is insufficient evidence to show that the premature conclusion of the first two bargaining sessions was the result of any improper conduct by the District. If anything, the record reflects the Association was content with the amount of time devoted to the first two bargaining sessions and never pushed to have those sessions extended in order to settle the ground rules.

As to the overall schedule, the parties were following a fairly relaxed timetable given the looming January 9, 2018 deadline for submission of cost items to the school district meeting deliberative session. Although the District did not agree to begin bargaining during the first three days of school (which is not, by itself, unreasonable), the District did propose September 15 and 22. The Association chose September 22 instead of September 15. There was a decidedly lethargic pace to the bargaining, with a second date of October 10, and a third date of October 31. Again, there is a lack of evidence establishing that the District is to blame for the long intervals between the first three bargaining dates, or that the Association was pushing for a more vigorous schedule. The end result was that the amount of time available to reach a tentative agreement given the January 9 date was substantially reduced.

[2] None were proposed to these particular ground rules.

As to the Association's outstanding request for employee information, the Association should have been more diligent in following up on this request if the absence of such information impaired its formulation of proposals and responses to District proposals. Instead, nearly three weeks passed before the Association followed up on its original request. Upon receipt of the clarifying follow up request, the District responded in a timely and appropriate way. There was no evidence that the District was deliberately delaying or had acted in bad faith when responding to the Association's information requests.

Additionally, we find nothing out of the ordinary with respect to the District's level of communication and discussion during negotiations or the attitude and demeanor of District negotiators. The record indicates that all participants conducted themselves in an appropriate and professional manner. Clearly the Association was frustrated and disappointed by the District's bargaining position. This is not uncommon in difficult negotiations when progress seems unlikely. It is exactly at this point that a professional mediator should become involved. A mediator will hopefully employ skills and techniques carefully calibrated to help the parties find common ground, develop a unified view of outstanding bargaining proposals, and thereby coax them past any impediments to a tentative agreement. Indeed, even though mediation occurred at the eleventh hour, the parties did resolve a number of matters at mediation. However, perhaps sensing the increasing difficulty of reaching a tentative agreement, obtaining necessary ratification approvals, and then submitting cost items to the District meeting, all within a matter of hours, the Association ended the mediation at approximately 3:00 p.m. The record reflects that at this point the District was willing to continue on, and clearly believed a tentative agreement was still possible.

The Association has also drawn our attention to the manner in which the Superintendent characterized the status of negotiations at the District meeting. Perhaps the Superintendent could have used more precise language, but his choice of words, on their own, or in combination with the entire 2017 bargaining history, does not prove a violation of the cited sub-sections of RSA 273-A:5, I. Likewise, the fact that the 2017 negotiations were the parties' third failed attempt to settle a new contract is not, by itself, enough to prove an unfair labor practice. It is, however, clear evidence that the parties are having difficulty addressing important issues in bilateral negotiations. This means the Association should be more vigilant throughout the process in terms of scheduling, session duration, follow up communications, and the like. This should put the Association in a stronger position to avoid repeating the events of 2017 and early 2018, where the time to reach a tentative agreement ran out, and bargaining collapsed as a result. Of course, it is axiomatic that we expect the District to cooperate fully in scheduling and completing ongoing negotiations in a productive and timely manner.

In accordance with the foregoing, the Association's complaint is dismissed.

So ordered.

October 24, 2018

/s/ Peter Callaghan
Peter Callaghan, Esq., Alternate Chair

By unanimous vote of Alternate Chair Peter Callaghan, Esq., Board Member Carol Granfield, and Board Member Richard J. Laughton, Jr.

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