Appeal to NH Supreme Court withdrawn on January 15, 1999, NH Supreme Court Case No. 98-043.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

LEBANON SUPPORT STAFF/NEA-NEW HAMPSHIRE Complainant	
v.	CASE NO. M-0585:6
LEBANON SCHOOL DISTRICT Respondent	DECISION NO. 97-098

APPEARANCES

Representing Lebanon Support Staff/NEA-NH:

Steven R. Sacks, Esq., Counsel

Representing Lebanon School District:

Bradley F. Kidder, Esq., Counsel

Also appearing:

Paul A. Mason, Lebanon School District
John Fontana, Lebanon School District
Sarah Root, NEA-NH
Paula Dutille, Lebanon Support Staff
Faye Bruce, Lebanon Support Staff
Joseph Maccarone, Local 3697
Lorie M. McClory, Valley News

BACKGROUND

The Lebanon Support Staff/NEA-New Hampshire (LSS) filed unfair labor practice (ULP) charges against the Lebanon School District (District) on June 27, 1997 alleging violations of RSA

273-A:5 I (a), (e), (h) and (i) resulting from privatizing of food service functions after the District sought and obtained concessions during bargaining for not doing so. The District filed its answer on July 11, 1997. The Board then heard this case on September 18, 1997 after continuances sought by and granted to the parties for a hearing on August 21, 1997. The parties agreed to submit post-hearing briefs which were received on October 17 and 20, 1997, respectively at which time the record was closed.

FINDINGS OF FACT

1. The Lebanon School District is a "public employer" of support staff personnel in the categories of food service, custodial and paraprofessional staff within the meaning of RSA 273-A:1 X.

2. The Lebanon Support Staff, NEA-New Hampshire, is the duly certified bargaining agent for the Lebanon Support Staff bargaining unit, consisting of food services, custodial and paraprofessional employees.

3. The District and the LSS are parties to a collective bargaining agreement for the period July 1, 1997 through June 30, 1998 which was revised as of February 10, 1997 and signed by the parties on February 12, 1997 as to the cover page and on February 21, 1997 on the final page of the fifteen (15) page document. Joint Ex. No. 1. Article 18 of that CBA provides that it "represents the total and final resolution of all matters between the parties and changes shall be amended only by written agreement between the parties." The recognition clause is inclusive of "food service personnel" and Article 13 of the agreement has an eleven step wage scale for food service employees which starts at $5.40 and maximizes at $12.64. The "Management Rights" clause of the contract states that "the parties agree that the powers, discretions, and authority which by law are vested in the Board and Superintendent shall not be unlawfully delegated." Also, "the association agrees that, except as specifically abridged or limited by the provisions of this agreement...all the rights, powers and authority of the [District]

and its agents to manage, direct or supervise all of [its] operations...and all its employees in all its phases and details shall be retained by the [District] and its agents."

4. The parties reached agreement on the 1997-98 CBA after nearly a year of negotiations. The LSS chief negotiator, Paula Dutille, made reference to the minutes of negotiations on June 19, 1996 (Assn. Ex. No. 3, p. 2) where board member Sandy Player "reminded that the LSS had said they'd forego raises when they met with the Board's negotiating term in February 1996, if privatization was pulled from the table." Previously, the school district warrant for the 1996 annual meeting (Assn. Ex. No. 1, dated February 15, 1996) called for an expenditure of $67,971, representing what the district would save if they were to privatize. Voters at the District meeting on March 9, 1996 voted the appropriation to avoid privatization. (Assn. Ex. No. 2) Dutille said the parties next met for negotiations, now focused on a 1997-98 CBA, on November 5, 1996. Minutes of that session (Assn. Ex. No. 5) make no reference to privatization being raised by either side. On the same date, November 5, 1996, the parties signed negotiations ground rules which provided, in part, "The parties will have until the third meeting (excluding the Ground Rules Session) to finalize their list of concerns. Beyond that time, new issues will be added only by mutual consent." (Assn. Ex. No. 6.) Privatization was not raised in the minutes of negotiations on December 11, 1996. (Assn. Ex. No. 7) nor in the Board's priority list of that same date (Assn. Ex. No. 8). Dutille testified that the LSS did not raise privatization on December 11, 1996 because the Board had showed no interest in it and because the LSS considered this matter resolved by action of the voters.

5. The parties met for another negotiating session on January 2, 1997 at which a proposal involving food service employees was discussed, i.e., all wage steps below $7.00 would be eliminated.

Privatizing was not mentioned in those minutes. (Assn. Ex. No. 9.) Thereafter, they agreed to meet for negotiations again on January 9, 1997, the minutes of which were not introduced. The next reported negotiation session after January 9, 1997 was January 20, 1997, by which time three negotiating sessions had passed without evidence that either side mentioned or sought negotiations on privatization. Inquires about settlement were raised at the January 20, 1997 meeting. (Assn. Ex. No. 10.)

6. The next negotiating session was held on January 28, 1997 at 3:50 p.m. The Board, through Paul Mason, made its latest proposal which made no reference to privatizing and noted that language needed "to be resolved by February 9th or no money will be put in the budget." (Assn. Ex. No. 11.) Later on January 28th, the school board met at 7:10 p.m. During that meeting, a board member moved that the administration contact Marriott School Services "to develop the cost savings for development of a warrant article." This was passed unanimously by the board. (Board Ex. No. 23.) When the Board next met on January 30, 1997, it was advised by "the administration that Marriott School Services are still interested in talking about privatization" and that the food service program, according to board member Tenney, had a $100,000 deficit. (Board Ex. No. 24.)

7. By the February 3, 1997 negotiating meeting, Dutille raised the issue of privatization with Mason. (Parenthetically, we note that the District's reference to this inquiry, at page 2 of its brief, refers to it as "discussing" rather than "negotiating.") Dutille said there had been a food service meeting on the prior Wednesday, January 29th, with the business manager when "he told them it was not in the works, and then on Friday morning they were told at another meeting that the food service program was going to be put out to privatization." (Assn. Ex. No. 12 and Board Ex. No. 25) Mason, at

different points in the minutes of that meeting, is reported to have said, "A one year contract may put privatization off for one year. The board will then have a year to study it and we can go back to the table" and "...I know we discussed in negotiations that privatization would not be pursued." Mason acknowledged in his testimony that the minutes represented "in general tenor what was said" but that the key item of the meeting was an agreement on insurance which, due to savings it generated, was responsible for funding other benefit changes, inclusive of the $400 and $250 lump sum payments to unit employees. Dutille disagreed with this premise, having testified that the whole bargaining unit approved the package, inclusive of changes in insurance, to save jobs for food service workers and avoid privatization.

8. The parties next met to negotiate on February 7, 1997 as noted in Assn. Ex. No. 12 and Board Ex. No. 25. At that meeting, the Board gave a two year "package proposal" to the LSS which changed the health insurance plan, adjusted sick and personal days and modified contract language. (Assn. Ex. No. 13.) None of these changes addressed privatization. According to Dutille's testimony, the LSS agreed to take the Board's monetary proposal, health insurance changes and language items to the membership on February 10, 1997. She testified that the LSS ratified on February 12, 1997. Coincidentally, the Board met on February 12, 1997 (Board Ex. No. 26) at 7:10 p.m. and, after a non-public session on negotiations, voted unanimously to put a note on the warrant to see if the voters would approve the LSS 1997-98 CBA inclusive of the $400 full-time and $250 part-time lump sum payments. Likewise, Joint Ex. No. 1, the 1997-98 CBA cover page, was signed on February 12, 1997. The minutes (Board Ex. No. 26) also reflect where Mason moved the Board's ratification of the 1997-98 LSS CBA, which passed unanimously. There was a note in the minutes, after unanimous passage, that the "Board will continue to look into the possibility of privatization of the food service program."

9. The 1997-98 LSS CBA ratification article appeared on the 1997 Annual School District Meeting warrant (Board Ex. No. 30) dated February 17, 1997 and was passed in the two-meeting format of Senate Bill 2 on March 15 and April 8 of 1997. After contract execution and voter approval, the school board met again on April 10, 1997. It heard a report that Marriott Food Service did not want to pursue to its previous bid for privatization. The Board then proceeded to vote, 6 to 2, to solicit bids to be returned by May 1st with a Finance Committee recommendation to the Board on May 14th. (Board Ex. No. 31). The Board met on May 14, 1997 and was told the Finance Committee recommended, by a 3 to 0 vote, privatization, specifically with Taher, Inc. Thereafter, the Board voted, 6 to 3, to privatize with Mason and two others voting in the negative. The minutes reflect Mason's concerns as to how this would impact upcoming negotiations. (Board Ex. No. 33.) In testimony before the PELRB, Mason stated that the food service worker jobs "were not on the line when we negotiated the settlement."

10. Faye Bruce, a special education aide and LSS negotiating team member, testified that she read the priority list of negotiations topics dated December 11, 1996 (Assn. Ex. No. 8, discussed in Finding No. 4, above) which, because it made no reference to privatization, caused her to comment to Mason that the negotiations process would not need to address that topic and that Mason said it was not going to be an issue. (See also Assn. brief, p.6).

11. The Lebanon School District produced its July, 1995 to June, 1996 Annual Report in time for it to be mailed to voters on or about March 1, 1997, according to Superintendent Fontana, which is after the parties signed the 1997-98 LSS CBA. See Board Ex. No. 34, which was submitted to the PELRB only in part. On cross examination, Superintendent Fontana testified that page 5 of the report referenced the conclusion of

negotiations for the 1997-98 LSS CBA and, elsewhere, included the warrant for FY 1997-98 which included funds, i.e., from the savings generated by changes in the insurance program, sufficient to permit food service operations to be run by the District for the coming school year. Conversely, page 4 of Board Ex. No. 34 contained a titled paragraph which said, in part, "The school board is still considering the privatization of the food service program for 1997-98 as the district continues to fund over $100,000 of the program's expenses."

12. Paula Dutille testified that the affected employees learned of the privatization in May of 1997 and that fourteen (14) jobs were lost. Ten of the laid-off employees are now working for the subcontractor, Taher, Inc. They are doing the same work in the same facilities, but for a different employer with working conditions. We note the CBA has a reduction in force (RIF) article and find that what occurred in the District was not a lay-off because neither the work nor the jobs were eliminated; they merely are being performed by many of the same employees, but for another employer.

DECISION AND ORDER

The chronology of events is very compelling in this case. It is uncontested that food service workers constitute a class of employees covered by the CBA. The parties agreed to a FY 1997-98 CBA in February of 1997 (Finding No. 3). The District issued a warrant on February 17, 1997 (Finding No.9) to cover the costs of the 1997-98 agreement, the costs of which were approved by voters in the two meeting format on March 15 and April 8, 1997. All of this occurred prior to the time the school board had a bid for and voted to approve a contract with Taher, Inc. on May 14, 1997 (Finding No. 9). The complained of "lay-offs," a misnomer under Finding No. 12, occurred thereafter.

The ink was dry on the parties' 1997-98 CBA in February of 1997. Absent lack of funding approval, the parties are entitled to rely upon its contents once negotiated and ratified. Even if one were to look to the latter funding approval date of April 8,

1997, that, too, occurred before the District struck its deal with Taher, Inc. Under Appeal of City of Franklin, 137 N.H. 723, 730 (1993), once the legislative body "approves a CBA, it has no choice but to fund whatever benefits the teachers decide to enjoy pursuant to its terms." Here, the warrant was presented by management and the expenditures was funded by the voters. The obligation to abide by the CBA had attached.

The District would have us find (brief, p. 11) that the LSS is bound by its "clear waiver" to adhere to the decision to subcontract and that Hillsboro Deering School Custodians/AFSCME Local 2715 v. Hillsborough Deering School District, Decision No. 96-081 (November 8, 1996) does not apply. We disagree with both propositions. The "clear waiver" argument is not supported by the testimony, either as to there being a waiver or that it was clear. Likewise, we disagree as to the applicability of the Hillsboro decision, *supra*. There is a difference in the facts of the two cases, namely, that the breach of contract or making of an inappropriate rule which would invalidate a CBA occurred mid-term to the CBA in Hillsboro while actions with the same consequences in this case occurred after negotiation, execution and funding of the CBA but before its July 1, 1997 effective date. This is a distinction without a difference. In either instance, the integrity of the bargaining process was compromised by the after-the-fact decision to subcontract. The signing and funding of the 1997-98 CBA marked a point after which the LSS could, and properly did, have a reasonable expectation that subcontracting, whether it continued to be discussed by the District or not, was no longer an issue for the period of time covered by the 1997-98 agreement. Our discussion in the Hillsboro decision, *supra*, p.5, is equally as applicable here:

> RSA 273-A:5 I (i) makes it a prohibited practice for a public employer to adopt any rule relative to the terms and conditions of employment which "would invalidate any portion of an agreement entered into by a public employer making or adopting such law, regulation or rule." This is exactly what resulted when the District decided to subcontract mid-term to the CBA in June of this year and, for, all intents and purposes, unilaterally repudiated its contract with the Union. The subcontracting decision is further exacerbated by the fact that the same job functions are still being done on behalf of the District, in some cases by the same individuals, under totally new, unilaterally-imposed and non-negotiated working conditions, through subcontractors of the District, thus permitting the District to abrogate and ignore the terms of its CBA with the Union. This is a

> usurpation of duly negotiated terms and conditions of employment. It is violative of RSA 273-A:5 I (i) and is contrary to the legislative intent of Chapter 490 of the Laws of 1975.
>
> We see the actions of the District which led to subcontracting, the focus of this complaint, as unlawfully "shifting the balance of power guaranteed by RSA 273-A" in favor of the District. If this subcontracting were permitted, the CBA between the parties would not merely be impaired, it would be meaningless. Such shifting of the balance of power is to be avoided. Appeal of Franklin Education Association, 136 NH 332 at 337 (1992) and Appeal of Milton School District, 137 NH 240 at 245 (1993) vis-à-vis maintaining the status quo. This is not to say that the District can never properly decide to subcontract; it does mean that it cannot decide to subcontract during the negotiated term of a CBA in order to accomplish existing work agreed to be or formerly or customarily performed by bargaining unit employees.

In Fall Mountain Regional Education Support Personnel Association, Decision No. 97-041 (April 4, 1995) we said that a "[u]nilateral change mid-term to the heart of the bargain cannot be condoned as an acceptable exercise of managerial prerogative. Concessions were made by both parties during negotiations for the CBA and the balance created by this process must be maintained." Both of these principles apply here. Regardless of how "mid-term" is interpreted and whether it was contained in the prior sentence or not, managerial prerogative cannot be used to invalidate a CBA or to shield a violation of RSA 273-A:5 I (a). Appeal of Keene State College Educ. Assn., 120 NH 32, 35 (1980). This is as true here as it was in Fall Mountain because the parties have engaged in the give and take of negotiations to arrive at their contract. In this case we know that that give and take extended across the breadth of the bargaining unit as to concessions in health insurance in order to avoid privatizing the food service function (Finding No. 7). To allow subcontracting after this bargaining process fails to maintain the balance contemplated by that process because the remaining non-food service workers of the bargaining unit would have been inappropriately induced to make concessions over a subject which, by subcontracting, become worthless. Simply said, it is bad faith bargaining [RSA 273-A:5 I (e)] to induce concessions in other areas, notably health insurance, in order to continue a school sponsored food service program and then renege on the no-privatization pledge after the CBA is signed but before it is

effective and before the next funding cycle, already approved, commences.

Finally, we look to the impact on workers. As in Hillsboro (same work, some of the same workers, different employer) and Fall Mountain (same work, same number of workers, same employer, different job titles), the Lebanon food service workers maintain the same job functions performed by a majority of the same employees working for a different employer, the subcontractor, for different terms and conditions of employment than those found in the CBA. Given these elements of similarity, we conclude that there has been no true reduction in force, that this is a case of impermissible subcontracting of unit work as of July 1, 1997 in violation of the parties' 1997-98 CBA (it would also be a violation under the prior CBA if the effective date with Taher, Inc. were earlier) and that the District, by subcontracting, has inappropriately attempted to repudiate its contract with the LSS relative to food service workers.

Collectively, the District's conduct is violative of RSA 273-A:5 I (a), (e), (h) and (i). The District is directed to CEASE and DESIST from committing these violations forthwith and to restore the food service workers to the *status quo ante* under the applicable terms of the CBA for the remainder of its duration. Food service workers laid off as the result of subcontracting or who, as employees of Taher, Inc., earn less in wages and benefits than as employees of the District shall be made whole under the terms of the CBA for the remainder of its duration. Nothing contained herein is intended to prohibit the parties from reopening their CBA for mid-term negotiations or to prohibit the District for announcing its intent to subcontract at the conclusion of the current CBA.

So ordered.

Signed this 5th day of NOVEMBER, 1997.

EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members E. Vincent Hall and Seymour Osman present and voting.