NH Supreme Court affirmed in part, reversed in part this decision on May 20, 1993, Slip Op. No. 92-212, 137 NH 240 (1993).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

MILTON EDUCATION ASSOCIATION/ NEA-NEW HAMPSHIRE Complainant v. MILTON SCHOOL BOARD Respondent	CASE NO: T-0293:4 DECISION NO: 92-47

APPEARANCES

Representing Milton Education Association/NEA-NH:

James Allmendinger, Esq., Counsel

Representing Milton School Board:

Bradley F. Kidder, Esq., Counsel
Douglas P. McNutt, Esq., Counsel

Also appearing:

Virginia M. Banks, S. B.
David P. Seaward, S.B.
Sheldon Damon, S.B.
Thayer Wade, Supt.
Marianne Doane, M.E.A.
David L. Johnson, M.E.A.

BACKGROUND

On May 3, 1991, the Milton Education Association/NEA-NH, filed unfair labor charges against the Milton School Board alleging that it had violated RSA 273-A:5, I, (a), (e), (g), (h) and (i). The Board, through its counsel, Bradley F. Kidder, Esquire, filed an answer on May 15, 1991. The Association then filed a request for a Cease and Desist Order on June 24, 1991. The matter was then set for hearing and heard by the PELRB on August 1, 1991. The Board issued a decision (Decision No. 91-62) on September 11, 1991, which

found, inter alia, that an unfair labor practice had been committed, that the terms and conditions of employment of the teachers must be maintained in accordance with the existing agreement, that individual contracts issued to teachers containing terms inconsistent with the terms of the collective bargaining agreement must be rescinded, and that a cease and desist order should issue.

The Association, through counsel, James Allmendinger, Esquire, filed a notification and Motion for Enforcement on October 10, 1991. The employer responded with an Answer on October 21, 1991. This matter was then set for hearing and heard by the PELRB on February 25, 1992, as reflected in this document.

Alleging noncompliance with Decision 91-62, the Association sought a reissuance of individual contracts to include step increases for those teachers eligible to receive them and rescission of a memo dated September 5, 1991, from an elementary school principal which was allegedly contrary to Article VI of the collective bargaining agreement. By oral motion on the date of hearing the Association also sought to have the Board direct the employer to stop its attempts to deal directly with employees about benefits they might receive if they were to renounce or modify certain health insurance benefits or entitlements. This attempt was rejected by the Board inasmuch as it was not part of the Motion for Enforcement or any amendment thereto and did not afford the employer an opportunity to answer or to prepare its position prior to the date of hearing.

The employer reported that it had changed the individual contracts issued to teachers for the 1991-92 school year by bringing them to level funding and restoring health insurance benefits. Whit it acknowledged that some teachers had performed lunch duty, the Board alleged that those teachers were permitted a separate duty-free lunch break thereafter. There is an issue as to whether it was of equivalent duration to a "regular" duty free lunch period.

FINDINGS OF FACT

1. The Milton School Board is the public employer as defined by RSA 273-A:1, of teachers represented by the Milton Education Association.

2. The Milton Education Association/NEA-NH, is the duly certified bargaining agent of teachers employed by the Milton School Board.

3. There is a collective bargaining agreement (CBA) which exists between the parties for the period September 1, 1989 to August 31, 1991 (Assoc.

Ex. #2). Sometime between October 1, 1990 and October 15, 1990, management representatives proposed extending said CBA. This extension was accomplished by an addendum (Assoc. Ex. #1) to the duration clause of the CBA which reads, "This agreement shall automatically renew itself for successive terms of one year or until a successor agreement has been ratified." This addendum was signed by the parties on or about October 31, 1990, containing language as proposed by the Milton School Board and agreed to by the Association. It was not presented to or approved by voters at a regular or special District meeting.

4. Individual teacher contracts have been reissued since the PELRB issued Decision No. 91-62 on September 11, 1992 and are now level funded at 100% of school year 1990-91 compensation levels. Those compensation levels do not include step increases under the salary schedules of the CBA (Assoc. Ex. #2). Compensation changes because of increased qualification have continued to be paid from year to year permitting track progression.

5. Historically, steps on the salary scale have been synonymous with annual seniority progression, i.e., a step per year unless special circumstances or inadequate performance dictate otherwise. Exceptions to the practice of annual progression on the wage scale are specifically addressed in the CBA, e.g. Article XI, Section I, leave to care for a sick member of the immediate family without pay or increments; Article XII, Section B, leave for child care after which placement on the salary schedule will be at least the same as when the employee took the leave; and Article XIII, Section C, sabbatical leave after which the teacher shall advance two steps on the salary scale.

6. A Special District Meeting held on October 24, 1990, voted by 110 to 44 "to prohibit the Milton School Board from entering into any future binding negotiated agreement with the Milton Teacher's [sic] bargaining unit unless the voters of the School District shall have raised and appropriated by separate warrant article, a sum of money necessary to fund said proposal contract. Said money to have been raised and appropriated at the March meeting."

(Assoc. Ex. #2).

7. Health insurance benefits currently being provided to teachers are equivalent to the same level of benefits as was provided in the 1990-91 school year.

8. Article VI, Section C of the CBA provides, in pertinent part, "Teachers, as professionals, have duties....These duties do not include the supervision of students....Teachers who wish to may fill lunch duties and be compensated at the rate of $10 per duty...Teachers will not have supervisory duties beginning with the 1990-1991 school year."

9. "Duty" is defined under the contract as "Any period of time where teachers are required to supervise students and no academic instruction occurs."

10. During the 1991-92 school year, elementary teachers have been mandated to perform "duties" as defined in Item 9, above, either contrary to or without the compensation provided for in contract Article VI, Section C, recited in Item 8, above. This is contrary to Article VI, Section C and to past practice when lunch duties were performed by aides in the 1990-1991 school year.

11. Teachers were first asked to volunteer for "noon time supervisory responsibilities" in a memo from the elementary school principal dated September 5, 1991. There were no volunteers. That memo (Assoc. Ex. #3) provided:

> At the Teachers' Meeting on Sept 3rd, I requested that all staff members volunteer for noon time supervisory responsibilities, so that the load may be shared by all. Because there were no volunteers, non-contract staff were assigned to cover all duties.
>
> The sign-up sheet for the week of Sept. 9 - 13 is in the teachers' room. If no volunteers, and duties must be covered by the aides, then there are only two alternatives that can be taken.
>
> 1. All classroom teachers will be

required to remain with their students throughout the lunch period in the cafeteria. Playground duties will be covered by the aides.

2. All teachers will agree to allow the office to set up a rotating duty schedule. If this happens, it means that each staff member will have a fifteen minute duty for the week, every other week.

We find this to be violative of Article VI, Section C of the CBA.

12. Teachers at the elementary school were then assigned lunch duties as set forth by a memo from the elementary school principal dated September 27, 1991. It provided, in pertinent part:

> On Wednesday evening the School Board voted to change their previous position on noon recess. Beginning on Monday, September 30, the noon lunch procedure will be as follows:
>
> | | Cafeteria | Outside |
> |---|---|---|
> | Grade 5 | 11:30-11:45 | 11:45-12:15 |
> | Grade 4 | 11:30-11:45 | 11:45-12:15 |
> | Grade 3 | 11:55-12:10 | 12:10-12:40 |
> | Grade 2 | 11:50-12:10 | 12:10-12:40 |
> | Grade 1 | 12:15-12:30 | 12:30-1:00 |
>
> Classroom teachers will remain with their students through lunch. Students will dismissed to the playground and will be supervised by two aides. Teachers are to meet their classes when the bell rings and escort the children to the classrooms.
>
> Please arrive at the cafeteria at the scheduled time. I have tried to arrange the arrival times so that there is time and room for all to eat.

While this memo required teachers to remain with their students through lunch and presumably permitted some free time for a duty-free teacher lunch thereafter, that duty-free time was neither consistently available or of equivalent duration had the non-duty caveats of Article VI, Section C of the contract been observed. We find a violation of Article VI, Section C of the CBA.

13. There is no funding in the 1992 school budget to

pay for lunch duty costs incurred under Article VI, Section C of the CBA, as explained above.

14. The employer has attempted to control costs in the District by various means, including closing one elementary building, leaving positions unfilled, eliminating elements of athletic funding, reducing co-curricular activities, and attempting (unsuccessfully) several times to restore funding to meet its contractual commitments (November 2, 1991, Board Ex. No. 9; attempt to close two weeks early, January 14, 1992, Board Ex. No. 10; Budget Committee meeting January 25, 1992, Board Ex. No. 11; and Budget Committee meeting, January 30, 1992, Board Ex. No. 12).

DECISION AND ORDER

There are four elements for us to consider: step increases, health insurance benefits, lunch duty, and an allegation (made orally) that the employer was attempting to circumvent the bargaining agent by dealing directly with employees. We DISMISS any charge(s) as it relates to health insurance benefit because those benefits appear to be being provided at the levels contemplated under the CBA. (Finding No. 7, above). We also DISMISS any allegations made on the date of hearing that the employer or its agents attempted to deal directly with bargaining unit members by circumventing the bargaining agent because it was made on the date of hearing without opportunity for the employer to answer under Rule PUB 304.02 and did not exhibit any urgency suggesting that the time requirements should be waived.

On the matter of the step increases, we find the contract history, particularly the extension addendum of October 30, 1990, to be compelling. It was sought by the employer; the language was proposed by the employer; and the document was proposed by the employer and/or its agents/employees. Unrefuted testimony from Philip Mollica established that management wanted the contract extension to preserve a "stable environment" and that there was concern that "teachers would not stay." This Board must conclude, then, that there was a quid pro quo or "consideration" in the sense of both cause and inducement to convince each side to execute the contract extension. We also note that the extension was proposed more than a week (Finding No. 3, above) before the Special District Meeting of October 24, 1990 (Finding No. 6, above) yet District representative appear to have believed their authority unimpaired to execute the extension addendum (Assoc. Ex. No. 1) approximately a week later. (Finding No. 3, above). [We note that only one date appears on Assoc. Ex. No. 1; therefore, absent a showing to the contrary, we find execution of that document to have been contemporaneous by both parties.]

Turning to the language of the extension addendum, we find that it provides for automatic renewal "for successive terms of one year or until a successor agreement has been ratified." This means to us that the parties intended all the provisions of the CBA to remain in full force and effect for successive terms of one year or until replaced by a later agreement. The language of the extension is clearly an "automatic renewal" or "evergreen" clause such as has been considered by this Board in the past. For example, in Interlakes Teachers (Decision No. 86-52, August 7, 1986), we said, "The existing contract did not contain an automatic renewal clause which would have given everyone an automatic "step increase." This case is the converse of that, suggesting that the existence of the automatic renewal clause would be grounds for the step increases. This reasoning is also consistent with our decision in Newfound Area Teachers Association (Decision No. 91-109, December 16, 1991) after the Sanborn decision (133 N.H. 513, August 14, 1990) where we again noted that "the existing agreement did not contain an automatic renewal clause which would have given all of the teachers an automatic "step raise." Thus, our analysis, both before and after Sanborn, leads us to conclude that there is entitlement to step increases under the facts of the instant case.

Our conclusion is further affirmed by the date of execution of the extension addendum, after the Special District Meeting of October 24, 1990, suggesting to us that, if needed funds were not raised under the provisions of voter action taken on that date, the employer nevertheless obligated itself to find the funding required to meet its contract commitments for existing appropriations. Given that no affirmative defenses of ultra vires actions were raised, it is impossible for us to conclude otherwise. We find a violation of RSA 273-A:5 I (h), the remedy for which appears below.

Before leaving the issue of step increases, we note that the circumstances of this case differ from cases recently decided by this Board where the contract (CBA) integrity, in multi-year contracts, could not be sustained against the need for annual appropriations and voter approval therefor, namely Salem Police Relief Assn. (Decision No. 92-08, January 22, 1992) and Profile Federation of Teachers (Decision No. 92-06, January 22, 1992). Those cases hinged on the adequacy of the notice or warnings contained in a warrant article; this case did not.

As for the matter of lunch duties, there is an unequivocal violation of the provisions of contract Article VI, Section C as found and noted in Findings No. 10, 11 and 12 above. Our remedy, noted below, will be to direct the employer to cease desist or to compensate employees, retroactively and prospectively, consistent with the terms of the CBA.

ORDER

Based on the foregoing, the Board finds and orders as follows:

1. Allegations that provisions of the collective bargaining agreement were violated relative to health care benefits are DISMISSED for reasons set forth herein.

2. Allegations that the employer attempted to deal directly with unit employees, circumventing the duly certified bargaining agent, are DISMISSED, without prejudice, for reasons set forth herein.

3. The employer violated the collective bargaining agreement and the provisions of RSA 273-A:5 (I) (h) when it failed to include step increases in teacher compensation (to the extent eligibility would have permitted) for the 1991-92 school year. The Milton School Board is directed to place unit employees on the appropriate steps of the salary scale recognizing their years of service and consistent with past practice and understanding where each year of service, absent an extraordinary event(s), has been equated to a step on the salary scale. This compensation shall be retroactive to the commencement of the 1991-92 school year.

4. The employer violated Article VI, Section C of the collective bargaining agreement and RSA 273-A:5 (I) (h) when it required teachers to perform lunch duties and/or other duties and/or failed to compensate therefor, all as required by the foregoing contractual provisions.

5. The employer is directed to (1) rescind the memoranda of September 5, 1991 (Assoc. Ex. #3) and September 27, 1991 (Assoc. Ex. #4), (2) cease and desist from requiring unit employees to perform supervisory duties contrary to Article VI Section C of the contract, and (3) to compensate employees for duties they have performed or will