A New Era of Collective Bargaining

By Mark T. Broth, Esq.

Since its inception in 1975, New Hampshire's Public Employee Labor Relations statute, RSA Chapter 273-A, has seen few changes. The Legislature has been content to allow the Public Employee Labor Relations Board (PELRB) and New Hampshire Supreme Court to interpret the law and provide guidance to public employers and labor organizations on a broad variety of collective bargaining issues. However, during the last session, the Legislature passed two amendments to Chapter 273-A that may have profound implications for all public employers.

Prior to August 2008, RSA Chapter 273-A provided that a unit of employees seeking representation by a labor organization must consist of at least ten employees. RSA 273-A:8 (I) expressly provided that "In no case shall the...[Public Employee Labor Relations Board]...certify a bargaining unit of less than 10 employees with the same community of interest." The apparent purpose of this provision was to allow the public employer to avoid the expense and inconvenience that could result from requiring them to negotiate with numerous small bargaining units. Thus, even in a larger community with sufficient employees to meet the "ten employee sharing a community of interest" test in one or more operational units (for example, police departments, public works, teachers), the public employer could not be required to collectively bargain with residual groups of employees who did not satisfy the test. For that reason, many larger communities have small groups of unrepresented employees.

RSA 273-A:8 (I) also served to entirely insulate smaller public employers from the collective bargaining process. Except in the rare instances where the PELRB has certified (arguably in violation of the statute) bargaining units consisting of employees from across operational units, (such as a combined police, fire and public works employee unit), public employees in any single operational unit with fewer than 10 employees could not become a certified bargaining unit, and their employers could not be compelled to engage in collective bargaining.

This is not to say that public employers were prohibited from bargaining with small groups of employees; however, any such bargaining activity would be purely voluntary and outside the protections and processes described in RSA Chapter 273-A.

The 10-employee threshold has long been a battleground in the relationship between public employers and organized labor. Since 1975, labor organizations have repeatedly asked the Legislature to amend RSA Chapter 273-A and lower the 10-employee minimum. They have often noted that under the federal National Labor Relations Act, which governs labor relations in the private sector, employers can be required to bargain with certified units consisting of no more than two employees. Over the same period, the PELRB has adjudicated innumerable cases where labor organizations have sought to expand the definition of "community of interest" so broadly as to allow employees in small operational units to be incorporated into larger units in order to obtain representation. Examples of these types of units are dispatchers and clerical employees included in units of police officers, as well as supervisory fire and police personnel included in units of public works and town hall administrative employees.

The enactment of House Bill 1127, which went into effect on August 5, 2008, creates new opportunities for small groups of employees to belong to certified bargaining units. The new law amends RSA 273-A:8 so as to allow public employers, on a purely voluntary basis, to recognize a bargaining unit consisting of less than ten members. Subject to the approval of the governing body, the PELRB may, either through a so-called "card check" or supervised election, certify a bargaining unit as small as three employees.

Obviously, public employers may continue to enjoy the protection of the 10-employee minimum by refusing to approve a smaller bargaining unit. However, elected officials are subject to political pressures. The fight over the minimum size of bargaining units, long a battle fought out in the legislative arena, will now be an electoral issue at the local level. It is likely that organized labor will work hard to support candidates in some local elections who support recognition of smaller bargaining units and work against candidates who oppose such units. The net effect of this legislation may be to test organized labor's ability to encourage and support pro-bargaining candidates and to cause voters to consider whether additional collective bargaining relationships are a benefit or burden.

A perhaps unintended consequence of this new provision may be the breakup of some existing bargaining units. As

previously noted, the PELRB has occasionally certified units consisting of employees from several different operational units. Disparity of interests has made collective bargaining with such units a challenge. This language may allow labor and management to agree to break up these units into smaller units which share a community of interest and allow for less cumbersome bargaining.

It is also possible that this legislation may prove to be a mixed blessing. Some labor organizations are already under great strain to adequately serve the bargaining units that they currently represent. A proliferation of small units, each of which will require negotiation and contract administration services, would not only place further strain on those labor organizations but could also prove financially burdensome. The dues paid by a three-person bargaining unit might not even cover the travel expenses incurred by a union staff representative in traveling to negotiation sessions.

House Bill 1436

It is not uncommon for a public employer and a labor organization to be unable to reach agreement on a successor collective bargaining agreement before an existing agreement expires. RSA Chapter 273-A anticipated this problem. While banning strikes and lockouts, the economic weapons commonly used in the private sector, the statute provides a mediation and fact finding process intended to facilitate bargaining after a negotiation impasse. However, the statute is silent with regard to the rights of employees and obligations of employers during the interim period between contract expiration and agreement on a successor.

Through a series of decisions, the PELRB and New Hampshire Supreme Court have ruled that, after a collective bargaining agreement has expired, the public employer is required to maintain the “status quo” pending the ratification and funding of a new agreement. This obligation has been found to exist even in the absence of so-called “evergreen” clauses, which contractually provide for the extension of an agreement until replaced by a successor. Court and PELRB decisions have defined “status quo” as requiring the continuation of existing wages and benefits; however, employers were generally not required to give step increase or cost of living increases following contract expiration (although this could vary depending on specific contract language).

By enacting House Bill 1436, which took effect on July 15, 2008, the Legislature has codified the concept of “status quo” and, in doing so, has expanded the scope of that concept beyond what the PELRB and Supreme Court have previously established. The law amends RSA 273-A:12 by adding a new provision:

> VII. For collective bargaining agreements entered into after the effective date of this section, if the impasse is not resolved at the time of the expiration of the parties’ agreement, the terms of the collective bargaining agreement shall continue in force and effect, including but not limited to the continuation of any pay plan included in the agreement, until a new agreement shall be executed. Provided, however, that for the purposes of this paragraph, the terms shall not include cost of living increases and nothing in this paragraph shall require payments of cost of living increases during the time period between contracts.

In effect, this provision requires public employers to maintain an expired collective bargaining agreement in full force and effect beyond the expiration date and until such time as a successor agreement is reached. The provision has generally been interpreted as requiring employers to grant step increases after contract expiration; however, employers would not be required to grant general across the board or cost of living increases.

While there is an argument that this provision would not require post-expiration payment of step increases that are tied to a specific date or occurrence (for example, a contract provision that says that ‘employee will receive a step increase on October 1, 2008 and October 1, 2009’ might not fairly be read to require a post-expiration step increase on October 1, 2010), such provisions are rare. As a result, employees, even after contract expiration, can expect to receive what are, in some instances, sizeable step increases.

This new legislation will likely have a profound effect on collective bargaining. The risk of a delay in receiving a step and general wage increase is often labor’s biggest incentive to make concessions in bargaining. Guaranteed receipt of a step increase will certainly reduce the negotiating leverage of public employers and may make negotiations more difficult. The fiscal note attached to the law states the position of the New Hampshire Municipal Association and New Hampshire Association of Counties, both of which expressed concern that the law will lead to protracted labor negotiations.

The law will also make it more difficult for public employers to take advantage of the grace period contained in the recent New Hampshire Retirement System (NHRS) reform legislation. Under House Bill 1645, public employers, upon expiration of existing collective bargaining agreements, will be required to pay a surcharge to the NHRS to offset the impact of certain payments made to employees upon separation from employment, including the “cash out” of vacation, sick or other accrued benefits. Employers are exempt from the surcharge while their current labor agreements remain in effect. This grace period was apparently intended to provide employers with the opportunity to negotiate with labor organizations in an effort to limit the fiscal impact of such accrual systems. However, by requiring post-expiration payment of step increase, the Legislature has reduced the employers’ negotiating leverage and made it more difficult to negotiate any changes in existing employee

benefits.

It is likely that House Bill 1436 will be subject to legal challenge. In its 1990 decision in Appeal of Sanborn Regional School Board, the New Hampshire Supreme Court held that a public employer is only bound by a multi-year collective bargaining agreement to the extent that the legislative body is warned, when approving the cost items in the agreement as required by RSA 273-A:3, of the cost of each year of the agreement. To the extent that this legislation requires payments that were not "Sanbornized" by the legislative body, it may be unenforceable or constitute an unfunded mandate that is the financial responsibility of the State.

We are clearly entering into a new era of collective bargaining. As the majority of public employer budgets are consumed by payroll and benefit costs, careful attention must be given to the negotiation process so that the competing interests of employees can be realized.

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