



Corrected decision

## State of New Hampshire

### PUBLIC EMPLOYEE LABOR RELATIONS BOARD

PORTSMOUTH SCHOOL DEPARTMENT,  
S.A.U. 52

Petitioner

v.

ASSOCIATION OF PORTSMOUTH  
TEACHERS, NEA-NEW HAMPSHIRE

Respondent

CASE NO. T-0251:4

ASSOCIATION OF PORTSMOUTH  
TEACHERS, NEA-NEW HAMPSHIRE

Petitioner

v.

PORTSMOUTH SCHOOL DISTRICT,  
S.A.U. 52, TIMOTHY MONAHAN, In  
his capacity as Superintendent  
and, RICHARD PECUNIS, In his  
capacity as Agent

Respondents

CASE NO. T-0251:5, 6 & 7

DECISION NO. 86-65

### APPEARANCES

Representing the Association of Portsmouth Teachers, NEA-NH:

James Allmendinger, Esquire, NEA-NH Staff Counsel

Representing the Portsmouth School Department and its Agents:

Robert P. Leslie, Esquire, Counsel

Representing the City of Portsmouth:

Robert P. Sullivan, Esquire, City Attorney

### BACKGROUND

These four cases arise out of negotiations in the City of Portsmouth between the School Department and its teachers, represented by the Association of Portsmouth Teachers, affiliated with the New Hampshire Education Association. The parties

entered into negotiations for an agreement to succeed the existing collective bargaining agreement. Previous collective bargaining agreements have been in a similar format since at least 1976. The parties negotiated and when they were unable to reach agreement, mediation was commenced under provisions of RSA 273-A:12. The mediation also failed to resolve an agreement. The School Board then requested the Public Employee Labor Relations Board provide factfinders under the provisions of statute. On April 22, 1986 the Public Employee Labor Relations Board provided a list of factfinders to both parties. On May 5, 1986 the Portsmouth School Department returned its selection. After inquiries by the School Department on the status of factfinding to the Public Employee Labor Relations Board and given the answer that the Association had not submitted its selection of factfinders as of May 19, 1986, the Portsmouth School Department filed unfair labor practice charges in case T-0251:4 alleging that the union had failed to comply with statute, namely the provisions of RSA 273-A:12 resulting in a violation of RSA 273-A:5 II. The union responded that under the provisions of the contract in effect and previous contracts (Article 12, Section 5), the parties had agreed upon arbitration and that under provisions of contract Article 12, Section 6, "The findings of the arbitration shall be binding on the Board and the ASSOCIATION."

The Association brought unfair labor practice charges against the School District alleging that the School District had failed to follow the provisions of the contract for arbitration and that this constituted a violation of RSA 273-A:5 I (a), (g) and (h). The union sought the Board to order that the employer abide by the collective bargaining agreement procedures for reaching a new agreement. These were the charges involved in Case T-0251:5.

On or about March 21, 1986, the School District submitted a budget to the City Council of Portsmouth under the normal procedures for municipal budgeting and school budgeting. This budget was submitted notwithstanding the fact that the terms of the new contract had not been agreed upon nor had resolution procedures been initiated. The union brought unfair labor practice charges in case T-0251:6 alleging that this submission by the School District constituted a breach of its obligation to bargain in good faith under RSA 273-A:3 and RSA 273-A:5 I (e). The union sought an order that the School District notify the City Council that the District's budget was not final and might be amended upon completion of negotiations. The School District responded that it was required by statute to submit its budget, that notwithstanding this fact everyone on the City Council knew the status of negotiations and that there was no precedential value in the submission of the budget since supplemental appropriations could be made.

Finally, while all of these matters were pending, and at the start of the 1986 - 1987 year, certain teachers were hired for the first time in the City of Portsmouth School District. These new teachers were hired at salary levels under a salary schedule proposed by the School Board but not adopted by the parties in

negotiations, The School Board was accused of unfair labor practices by the Association in case T-0251:7 which stated that the adoption of these salary levels for new teachers constituted an unfair labor practice and violated RSA 273-A:5 I (a), (c), (e), (g) (h) and (i). The union sought the issuance of a cease and desist order prohibiting the School Board from hiring at salaries other than those negotiated between the parties and an order requiring the School Board to place those teachers newly hired "off step" to be paid as are all continuing employees, in conformance with the salary schedule in place and under negotiation until such time as a new agreement is reached.

The School District has not responded to those charges as of the hearing leading to this decision although the PELRB allowed the union to present evidence in seeking a temporary cease and desist order pending full hearing.

The PELRB held a hearing at the Little Harbor School in Portsmouth, New Hampshire on Thursday, September 11, 1986 at which it considered all of the unfair labor practice charges brought by either party against the other in cases T-0251:4-5-6 and the request for temporary orders in case 7.

At the hearing, the parties entered into certain stipulations of fact, presented evidence and presented written submissions. All of the cases will be considered in this decision.

#### FINDINGS OF FACT

The parties entered into stipulations of fact at the hearing. The facts in this case are basically uncontested. The School Board admits that in the predecessor contracts since at least 1976 the provision for binding arbitration resolving issues for successor contracts has been contained and not deleted or negotiated away. The parties agree that there was an attempt this year by the employer to remove the interest arbitration provision but it has not been deleted. The parties agree that the provisions of the arbitration sections of the contract are being complied with without prejudice pending a decision of this Board. The parties agree that on May 16 the School Board submitted its budget to the City Council, that the City Council is the legislative body of the City of Portsmouth and that the City Council and the School Board cannot have known the outcome of negotiations when the budget was adopted by the City Council in the spring of 1986. The parties agree that within the line items of the budget, the School Board retains the authority to transfer funds and that one of the line items is teachers' salaries. The parties also agree that the School Board budget line for salaries has more funds appropriated than the last offer of the School Board at the table. The parties agree that the terms and conditions of employment have an impact on the prudential affairs of the School District. The parties agree that the Association of Portsmouth Teachers declared impasse

in February 1986, a mediator was thereafter appointed by the PELRB and there was failure to agree during the tenure of the mediator.

In addition to the stipulated facts, evidence at the hearing demonstrated that the teachers in Portsmouth were and are shocked and dismayed by the failure of the School Board to comply with the binding arbitration provisions.

The Board finds that the facts stipulated are indeed the facts of the matter. Indeed, there appears to be very little difference of opinion on the facts of the case which is primarily a question of law.

#### RULINGS OF LAW

The basic question involved in cases 4 and 5 is whether the provisions of the contract calling for binding arbitration for resolution of disputes on successor contract terms is legal. This issue can most basically be stated as whether it is legal under law for the School Board to delegate its authority under a contract to an arbitrator to bind the School Board (it being conceded by all parties that binding arbitration cannot bind the legislative body, in this case the City Council). There is no dispute that the contract containing binding arbitration and its predecessors were agreed to by the School District. Counsel for the School District states that the agreement to that provision was a mistake but that notwithstanding the agreement, there was no authority to agree to an illegal provision and the provision for binding arbitration was indeed illegal. Another aspect of the question is whether the provisions set forth in RSA 273-A:12 for mediation and arbitration are exclusive or whether the parties can arrive at different procedures, not including the mediation and fact finding provision set forth in statute.

RSA 273-A:12 V states the following:

"Nothing in this chapter shall be construed to prohibit the parties from providing for such lawful procedures for resolving impasses as the parties may agree upon; providing that no such procedures shall bind the legislative body on matters regarding cost items. The parties shall share equally all fees and costs of such procedures."

It should be noted that the contract provisions in question provided for equal sharing of fees.

The Board finds that the provisions of RSA 273-A:12 V contemplated alternate dispute resolution procedures. Therefore, the mediation and fact finding procedures set forth in the statute are not exclusive should the parties agree upon alternate procedures which are lawful and which do not bind the legislative

body. Both sides concede in this case that the legislative body, the City Council, cannot be bound and therefore the question exists as to whether the binding arbitration provision for contract terms is legal. There is no prohibition anywhere outlawing such a procedure and the clear meaning of the statutory provision allows no other conclusion than that the legislature contemplated that parties would negotiate alternate mechanisms for dispute resolution. Such a provision is consistent with the statutory intent that parties be able to make agreements on subjects and that such agreement is preferable to legislative dictate. Therefore, the unfair labor practice request of the School District in case 4 is unfounded since the Association was within its rights to insist upon compliance with the contract procedures. Likewise, the complaint by the union in case 5 that the School Board had failed to comply with contract terms is well founded and the Board finds an unfair labor practice by the School Board, violating RSA 273-A:1 (e), (g) and (h).

In case 6, the union has complained that the submission to the City Council was an unfair labor practice because the budget was submitted prior to agreements being reached. This complaint is unfounded. Evidence produced and the agreement of the parties was that the City Council knew of the context of negotiations, there was no suggestion in the submission of the budget that it could not be changed, that line item transfers could not be made, that supplemental appropriations could not be requested or that clarification could not be given to the City Council re-enforcing the fact that negotiations were not complete. The Board cannot find an unfair labor practice complaint because of the compliance by the School Board with budgetary requirements especially in light of the fact that all relevant political bodies were aware of the status of negotiations. Counsel for the City voluntarily suggested that it would be possible for the City Council to be reminded of the status of negotiations and the Board commends this practice. Nevertheless, no unfair labor practice will be found of the budget submission.


On case 7, the Board took evidence and accepted argument on the need for a temporary cease and desist order pending full hearing because of the alleged hiring of teachers at rates proposed by the School Board but not adopted by the parties. The Board declined to issue a cease and desist order and, since no full hearing has been held, no final findings on that case can be made in this decision.

The School District through its attorneys has submitted requests for findings of fact and rulings of law in cases 5 and 6. The Board grants requests 1, 2, 3 and 7 and denies requests 4, 5, 6, 8 and 9 in the context of this decision and facts of this case and in light of the other findings of the Board listed above.

ORDER

Because of the findings above, the Board issues the following order:

1. The parties are ordered to proceed to arbitration under the contract provisions and to comply with the contractual requirements concerning the results of that arbitration.

  
Robert E. Craig, Chairman

Members Molan and Osman also voting. All concurred. Also present Executive Director Evelyn C. LeBrun and Board Counsel Bradford E. Cook.

Signed this <sup>30<sup>th</sup></sup>~~21~~st day of October, 1986.