State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME LOCAL 3657, CONWAY POLICE DEPARTMENT EMPLOYEES Complainant v. TOWN OF CONWAY and CONWAY POLICE COMMISSION Respondent	CASE NO. A-0511:9 DECISION NO. 93-50

APPEARANCES

Representing AFSCME, Local 3657:

Vincent Wenners, Esq., Counsel

Representing Town of Conway & Conway Police Commission:

David Hastings, Esq., Counsel

Also appearing:

Raymond E. Leavitt, Jr., Selectman
Robert F. Porter, Police Commissioner
Robert R. Tawney, Chief Negotiator, Town
Jim Somerville, Conway Town Manager
James C. Anderson, Staff Representative, AFSCME
Paula Foster, Conway Police Department
John P. Reed, Conway Police Department

BACKGROUND

Council 93, AFSCME, Local 3657 (Union) filed unfair labor practice (ULP) charges against the Conway Police Commission (Commission), subsequently joined with the Town of Conway and referred to collectively herein as "Town," on February 16, 1993 alleging violations of RSA 273-A:5 I (a), (e) and (g) resulting from layoffs which the Union characterized as punitive and coercive in nature.

These charges were filed five days after the PELRB directed the employer to cease and desist in such layoffs in Decision No. 93-15. That order issued under the PELRB's "public interest"

authority found at 273-A:6 III and was intended to "maintain the integrity of both the bargaining unit and the bargaining process until this additional layoff issue may be plead and heard on the merits." The Commission responded to these charges by filing an answer on February 24, 1993. Notwithstanding collateral pleadings and collateral proceedings occurring simultaneously in the New Hampshire Supreme Court (Docket No. 93-121) relative to Case No. A-0511:6 (Decision Nos. 93-15, 31 and 38), this case, rehearing in Case No. A-0511:6, and a new matter (Case No. A-0511:8) were all set for hearing by the PELRB on April 2, 1993.

FINDINGS OF FACT

1. The Conway Police Commission, established by New Hampshire Private Laws of 1969, Chapter 570, is a "public employer" of police officers and other employees of the Conway Police Department, as contemplated by RSA 273-A:1 X. Section 2 of Chapter 570 aforesaid grants to the Commission authority to appoint police officers, constables and superior officers, to fix the compensation for these employees, and "to make and enforce all rules and regulations for the government of the police force in the Town of Conway." The Conway Police Commission, and hence the operations of the Conway Police Department, is funded through the legislative body of the Town of Conway acting by and through its Board of Selectmen.

2. A.F.S.C.M.E., Council 93, Local 3657 is the duly certified bargaining agent for police officers and other employees of the Conway Police Department.

3. The parties have a collective bargaining relationship of more than six years' duration and which spans two collective bargaining agreements (CBA's). The last CBA has now expired (Dec 31, 1991), and the parties are attempting to negotiate a successor CBA, including two mediation sessions last September, fact finding in November, and another fact finding session set for April 8, 1993. Until the pending litigation involving these parties (specifically, Case No. A-0511:6), the Town took no role in the negotiations efforts, notwithstanding Findings No. 4 and 5, below.

4. At the 1992 Town Meeting a motion was made and passed to reduce the Town's cost for health care benefits (i.e., premiums) by fifty percent (50%) on an annualized basis. On July 28, 1992, the Town Manager presented a plan to accomplish reductions in health care costs to address the "Town Meeting mandate for 50% cost sharing

of insurance benefits." It provided that "the Police Commissioners should be required to provide a plan which provided a combination of reorganization and temporary layoffs. The bottom line must reflect a 50% reduction in Town benefits costs."

5. At the 1992 Town Meeting, Police Commission Chairman Robert Porter said that "the Police Budget does not have money in it to find the $72,000 without reducing personnel."

6. Special town meetings held after the 1992 Annual Town Meeting rejected tentative agreements for contracts involving two other bargaining units where the proposals did not reflect a 50% reduction in the specific benefits (insurance) line item. Thereafter, the Town, through its selectmen, negotiated settlements or tentative operating agreements for these units by negotiating a combination of higher contribution levels and/or higher deductibles. No such agreements were reached for the police department bargaining unit.

7. The two rejections referenced in Finding No. 6 caused the Commission to conclude there was voter inflexibility which would not permit the approval of any contract(s) which did not reflect a 50% reduction in the benefits (insurance) line item. On August 6, 1992, the Commission wrote a letter to bargaining unit employees telling them that they (the Commission members) were researching the 50% benefits reduction vote taken at the 1992 Town meeting and indicating that, "once we....understand the real effect of this vote, the Commission will undertake what we feel is the appropriate cause of action."

8. On September 22, 1992, the Commission directed two position eliminations effective January 1, 1993, namely the junior clerical position and the last hired patrolman. These actions were subject to an earlier ULP designated as Case No. A-0511:6 and Decision No. 93-15. They are of no ongoing consequence in this case except for a dispute as to whether they were caused due to a reorganization (Town's position and PELRB's conclusion in Decision No. 93-15) or due to a need to reduce operational costs, namely insurance premiums (Union's position). The letter from the Commission announcing these cuts said, "This action...is necessary because of the budget reduction guidelines imposed at the 1992 Conway Town Meeting."

9. The parties continued to negotiate, inclusive of the mediation sessions in September and the first fact

finding session in November. Results were not forthcoming; there was no movement on the insurance issue. On January 12, 1993 the Commission issued a memo to police department personnel saying, "if an agreement is not reached by January 15, 1993, this notice will serve as a two week layoff period for the following individuals." Six patrolmen and three dispatchers were named. Town witnesses claimed nine layoffs were required to achieve a 50% savings in insurance benefits while maintaining the coverage at the levels set in the expired CBA during the negotiations for a successor CBA. The notice indicated that, since the Commission requested a two week notice from employees, it was "giving a two week notice of layoff from this date effective January 29, 1993." It continued, "If an agreement is reached on or before January 29, 1993, layoffs will be averted."

10. An agreement, either on a successor contract or on a means of settling the insurance issue, was not reached on or before January 29, 1993. Layoffs were implemented on January 30, 1993 per Personnel Order 93-02 issued by then Chief William Scaletti. There followed a two week interval where eight employees (one of the designated dispatchers was not laid off) were laid off. They thereafter became subject to a cease and desist order issued by the PELRB on February 11, 1993 (Decision No. 93-15) and have since been recalled from layoff, said rehirings having occurred before the filing of this case on February 16, 1993.

11. Laid off employees were separated from employment. They received severance benefits which included cash payment for accrued benefits for such items as earned vacation days or holidays. The payment of the foregoing severance benefits cause rehired employees to return to work with no accrued vacation benefits, i.e., they had the equivalent of a forced vacation with pay at dates of the employer's choosing.

12. The nine announced (and eight implemented) layoffs created cost savings in excess of what would have been necessary to generate a 50% savings in the police department's health insurance costs. The position eliminations (Decision No. 93-15) generated savings of approximately $31,651 for the patrol position and $29,090 for the clerical position, inclusive of benefits. Given what was described as a $72,000 annual short-fall in funding for health insurance for 1992, lay-offs of nine employees generated more

cost savings, also on an annualized basis, than required to fund a $72,000 deficit. These lay-offs, while balancing the department's insurance line, created a surplus in the salary line.

13. Prior to and for the duration of 1992, the Commission, with the approval of the Selectmen, transferred funds from category (line) to category (line) in order to fund health insurance costs during negotiations. Selectman, and former Chairman, Ray Leavitt testified that the selectmen had changed line items in the past but felt that such flexibility was not possible for 1993 (prior to the 1993 Conway Town Meeting) given the vote at the 1992 Conway Town Meeting and notwithstanding savings which might be generated in other budget lines as the result of the negotiations process. He added that the Commission did not have a mandate from the selectmen that the only way a 50% savings could be recognized was by acceptance of a 50% co-payment plan on health insurance.

14. Commission Chairman Porter testified that the Commission had the authority to move funds within each of the five funding categories (e.g., labor, benefits, operations, vehicles and legal) but not from category to category, believing that the selectmen must approve inter-category transfers. No such restriction on the transfer of funds from category to category is noted either in the legislation creating the Commission (Finding No. 1) or in any documents presented to the PELRB for consideration relative to this case.

15. The 1993 Conway Town Meeting, held on March 20, 1993, restored funds for the health insurance program, in a status quo mode, which applies to bargaining unit employees, according to witnesses appearing for both the Union and the Town. The Union representative acknowledged that these employees are now "getting benefits under the old [expired] contract."

DECISION AND ORDER

The mandate of the PELRB is to oversee and enforce the provisions of RSA 273-A. One such means of enforcement is through the adjudication of unfair labor practices filed under RSA 273-A:5 and processed under RSA 273-A:6. RSA 273-A:5 I (a) declares it to be a prohibited practice (a ULP) if a public employer restrains, coerces or otherwise interferes with its employees in the exercise of rights conferred under Chapter 273-A. One of the conspicuous "rights" of Chapter 273-A is the obligation to bargain in good faith as recited at 273-A:3. Statutorily excluded from the definition of the obligation to bargain in good faith is the

compelling of "either party to agree to a proposal or to make a concession."

When we look at the circumstances of this case in terms of the PELRB's mandate, recited above, we cannot escape concern for the employer's announcing and implementing nine layoffs, especially when such layoffs would have generated more savings than were required to fund the deficiency in health insurance benefits. We credit the public employer for recognizing its responsibility to continue existing contractual benefits for the duration of the negotiations process, notwithstanding the expiration of the CBA on December 31, 1991. The PELRB's long-standing policy of continuing contract benefits (even after the expiration of a CBA) during negotiations is well known. See, for example, AFSCME v. Derry Public Works Department, Decision No. 85-70 (September 12, 1985) which continued the provisions of a grievance procedure beyond the CBA expiration date and Portsmouth Fire Fighters v. City of Portsmouth, Decision No. 82-70 (October 28, 1982) which found it to be a ULP under RSA 273-A:5 I (e) for management to change a term or condition of employment unilaterally after the expiration of a CBA.

The employer's conduct in announcing and implementing more layoffs than it would have taken to fund the deficit in health insurance benefits is suspect. This Board would be the first to acknowledge that the Commission/Selectmen had both the right and responsibility to determine its "functions, programs and methods," inclusive of the level of police and dispatch services to be rendered to the Town of Conway. RSA 273-A:1 XI. In making these determinations, the Commission/Selectmen are responsible for paying for the level of service they have decided to deliver. When their actions generate more funds than it would have taken to fund the deficit caused by continuing the existing health insurance benefit under the expired CBA, we must ask (1) why this was done, (2) what its intended impact may be on unit members, and (3) what its actual impact was on unit members. In the abstract, it appears that the broad swath of layoffs across the bargaining unit had the impact of imposing financial hardship on unit members for their failing to come to agreement on the issue of health insurance benefits. Two other bargaining units did capitulate rather than face this hardship. (Finding No. 6) That alone would suggest that the announced layoffs were intended to produce a similar result in this unit.

While there may be some room for argument based on these facts in the abstract, the circle is closed with the Commission's memo of January 12, 1993, promising to avoid layoffs if agreement was reached on or before January 29, 1993. (Finding No. 9) Whether by intention or impact, this is coercive and violative of RSA 273-A:3 I. Neither side can be forced into making such a concession. This Board spoke to a similar circumstance in A.F.S.C.M.E. et. al. v. City of Claremont, Decision No. 82-46 (July 8, 1982) where contracts with police, fire and municipal employees expired on

December 31, 1981. Thereafter and before new contracts were agreed upon, the City Manager gave notice that the City would not continue health insurance beyond March 1, 1982, unless new agreements were extended. We found that the employer could not reduce benefits while reasonable negotiations were being conducted or, failing that, seeking resolution through the impasse process as found in RSA 273-A:12. Absent that, we found violations of RSA 273-A:5 I (a), (d) and (e) in that case. We make similar findings in this case to the extent the employer's conduct is a complained of violation of RSA 273-A:5 I (a) and (e).

We believe these findings compatible with dicta provided in Appeal of Franklin Education Association, 136 N.H. 332 (1992) where an ultimatum was delivered to teachers who were directed to return their individual contracts without changes, additions or reservations. Failure to do so would be a voluntary relinquishment of rights to the position offered. Drawing on Franklin, we note that the New Hampshire Supreme Court cited the proposition found at 29 U.S.C.A. 158 (a) (5) that an employer has a duty "to give negotiations a fair chance to succeed and must consult and negotiate with [the] union before unilaterally changing conditions of employment." In this case, the 50% formula was imposed on bargaining unit members before either mediation or fact finding had occurred. While Franklin was primarily a "direct dealing" case, similar circumstances occurred here when voters attempted "direct dealing" with employees by imposing the terms of their health insurance package. Franklin speaks to the need not to thwart "the statute's purpose of requiring collective bargaining." In this case, it is the Selectmen/Commission who were responsible for dealing with and negotiating a CBA for unit employees. This was neither the duty nor the responsibility of the town meeting; its role was to approve or disapprove what had been negotiated. Not unlike Franklin, the statute's purpose of requiring collective bargaining is thwarted if the town meeting becomes its own negotiator. Closure either becomes impossible or everything leading to a town meeting vote is so tentative that negotiators for both sides are unsure of their authority. This would be contrary both to the notions of achieving settlement and the obligation to bargain in good faith.

Just as it is the Selectmen's/Commission's duty to negotiate on behalf of the Town, it is also their duty to control the operations of its departments. To do this, they collectively must have the authority to expend appropriated funds and to transfer funds from line to line to meet ongoing obligations as well as unexpected contingencies. To this end, we believe the joint actions of the Commission in recommending inter-line transfers and the Selectmen's approval thereof to meet on-going insurance obligations were correct and appropriate. As noted by the actions of the 1993 Conway Town Meeting, this preserved the flexibility necessary to design and respond to proposals during the negotiations process. Without this flexibility, the Town's agents

have insufficient authority to negotiate in good faith.

By way of remedy for our finding of ULP referenced above, we direct that all laid off employees, subsequently reinstated, be reinstated with full seniority and that they be allowed, for a period of up to six months from the date hereof, to repay any severance benefits (i.e., severance pay) in order to reinstate all or any fraction of the vacation time they were mandatorily required to take (or be paid for as a severance benefit) at the time of the layoffs.

So ordered.

Signed this 28th day of April, 1993.

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Alternate Chairman Jack Buckley presiding. Members Seymour Osman and Arthur Blanchette present and voting.