State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, LOCAL 1984, FRANKLIN MUNICIPAL SERVICES DEPT. Petitioner v. CITY OF FRANKLIN Respondent	CASE NO. S-0380:7 DECISION NO. 1999-004

APPEARANCES

Representing State Employees Association:

Teresa DeNafio Donovan, Negotiator/Field Representative

Representing City of Franklin:

Paul T. Fitzgerald, Esq.

Also appearing:

James C. Pitts, City of Franklin, City Manager
Brian L. Waltos, State Employees Association
John Ahlman, State Employees Association
Alfred Elliott, City of Franklin
Bob DeSchuiteneer, State Employees Association

BACKGROUND

State Employees Association, Local 1984, on behalf of Franklin Municipal Services Employees, filed unfair labor practice charges against the City of Franklin pursuant to RSA 273-A:5 I (a), (e), (h) and (i) on August 6, 1998. The City

filed its response on August 21, 1998. The matter was first scheduled for a hearing on October 8, 1998, but was continued at the request of the City. The dispute was heard before the undersigned hearing officer on October 30, 1998. Prior to the hearing, the City submitted a Motion to Dismiss. Ruling was deferred on charges related to the City's failure to honor the monetary terms of the collective bargaining agreement. Questions regarding the provision of uniforms, tools and the subcontracting of two positions were referred for grievance processing. The record of the hearing remained open for the receipt of specified evidence and concluding briefs, the last of which was received on December 8, 1998.

FINDINGS OF FACT

1. The City of Franklin (City) employs workers in many occupations to operate its municipal government and so is a "public employer" within the meaning of RSA 273-A:1 X.

2. The State Employees Association, Local 1984, (Union) is the duly certified "exclusive bargaining agent for all full-time permanent employees of the Municipal Services Department" of the City of Franklin. RSA 273-A:1 IX. (Joint Exhibit No. 1, Article 1).

3. The City and the Union are parties to a collective bargaining agreement (CBA) that was signed by the parties on December 14, 1997. The CBA is for the period July 1, 1997, through June 30, 2000. (Joint Exhibit No. 1, Article XXII).

4. Under the CBA, the City retains managerial authority, powers, functions and rights except those specifically modified or abridged by this agreement. (Joint Exhibit No. 1, Article VII). Under the terms of this agreement, as of July 1, 1998, bargaining unit members became entitled to a 1% across the board raise and a merit step increase of 2.5% unless their work performance was unsatisfactory. These terms and percentages are set forth in Article X and appendices to the CBA, SEA Union Position Classifications (7000, 8000, 9000) and matrices of the CBA. (Joint Exhibit No. 1).

5. Article X of the CBA reads, in pertinent part:

10.1 All members of the bargaining unit shall receive wage compensation as determined by the attached matrix, Appendix A.

For the year commencing July 1, 1998, all bargaining unit members shall receive a general wage increase in the amount of 1% which shall become effective with the commencement of the first full pay period after July 1, 1998. This increase shall be in addition to any increase if the employee becomes to (sic) through the application of the Merit Pay Plan. This is a three year contract and it is understood that the contract will reopen in accordance with the provisions of RSA 273-A with reference to any wage increase for the final year of the contract beginning July 1, 1999.

10.3 The employees of the Municipal Services Unit shall be under the Merit Pay Plan as defined in the City Personnel Policies dated January 1, 1995 and shall move through the City pay scale as established, and as limited by such scale. Merit pay shall be based upon an annual evaluation of the employee which shall occur on or about the employee's anniversary date. All current employees of the Municipal Services Department hired prior to July 1, 1995, shall be assigned an anniversary date of July 1st. Any employee promoted from one position to another within the Department shall establish a new anniversary date which shall be the date of the assumption of their new duties.

The granting of merit raises, being a matter of management right and discretion, shall not be subject to the grievance procedure. However, an underlying personnel action report which is relied upon for the denial of a merit raise shall be subject to the grievance procedure. It is understood and agreed that in the absence of an adverse personnel action report, an employee shall be entitled to receive the merit increase discussed therein.

6. Section B of the City of Franklin Personnel Policy reads, in pertinent part:

Salary adjustments within established ranges in the approved budget shall not be automatic, but shall be based upon the merit system as recommended by the department head and approved by the City Manager.

Subject to approved fiscal year funding in an approved budget, all City full time employees and regularly scheduled part time employees may be awarded merit pay raises in the form of steps (normally one) within the appropriate labor grade, which shall primarily be based upon successful goal achievement as evidenced by the performance appraisals for the preceding anniversary year.

7. The City of Franklin is subject to a variable tax cap determined yearly in late February, which, in 1998, allowed a 2.3% increase in spending during the upcoming fiscal year. The Finance Committee reviews the budget then sends it to the City Council. City Manager James Pitts testified that, because the tax cap allowed only a small increase in spending, the City Council was not inclined to grant the merit raise requested.

8. On July 15, 1998, the City Manager sent a memorandum to all City employees on the subject of the fiscal 1999 budget informing them that no merit step increases would be given but that all employees would receive a 2% cost of living adjustment. (Union Exhibit No. 3). He felt no obligation to contact the Union on the matter because withholding the merit increase was the City's prerogative given the language of the Personnel Policy. (Finding of Fact No. 5). On cross examination Pitts testified that, when provisions of the CBA and Personnel Policy conflict, the former controls.

9. Alfred Elliott, Director of the Municipal Services Department, attended many of the negotiation sessions and recalls that discussions of funding included mention of the City Council's authority to withhold merit raises.

10. Brian Waltos testified that he had been a member of the negotiating team for the current CBA. He understood that when the CBA was approved, the City Council had ratified all three years' pay provisions and there was no discussion of the City Council withholding pay raises in 1998. An employee would get a pay raise unless he were written up. Waltos testified that the step increase had been lowered from 5% to 2.5%

on Mr. Pitts' suggestion so that the merit raise would be paid. This was discussed as a mutual agreement by the parties. Mr. Pitts prepared the matrix tables reflecting the step percentage change for CBA inclusion. (Joint Exhibit No. 1). Waltos, Chapter President John Ahlman and SEA representative Robert DeSchuiteneer all attested their recollection or understanding that the small cost of living raise included in the CBA had been a concession related to the step raise.

11. No formal evaluations were performed before July 1, 1998, upon which merit raises could be granted or withheld. Section 10.3 specifically states that merit step increases shall be based on an annual evaluation (Joint Exhibit No. 1). Mr. Pitts attested that it was his habit to request department heads and supervisors to inform him if they had an employee who had not performed well enough to warrant a merit increase.

DECISION AND ORDER

RSA 273-A:6 requires that all administrative remedies be exhausted before unfair labor practice charges be brought under RSA 273-A:5 I (c) and (d). Generally, the PELRB encourages the processing of grievances prior to seeking the remedies available under RSA 273-A:5. At the hearing, charges related to failure to provide uniforms and tool allowances, as well as the subcontracting of two positions were referred to the parties for grievance processing and they are now dismissed without prejudice to be raised again if necessary without regard to time limits. Questions of breach of the CBA by direct dealing and failure to honor the monetary package of the CBA, RSA 273-A:5 I (e), (h) and (i), are addressed herein.

The City asserts that the monetary promises contained in the Article X of the CBA were not binding on it because of a provision of the City Personnel Policy that allows the City Council to decide each year whether merit raises will be granted. The City points to Appeal of Sanborn School Board, 133 NH 513 (1990). In that case, the voters of the school district failed to fund an increase in teachers' salaries as required by the second year terms of the collective bargaining agreement and

their failure to fund was upheld on the basis of insufficient notice to the voters of the financial consequences for each year of a multi-year contract at the time of approval. All testimony supported a finding that Sanborn voters were aware of the monetary provisions of the first year only. Sanborn is not analogous to the circumstances of the present case though the Court's words that "[c]ollective bargaining agreements are to be construed in the same manner as other contracts...."are applicable. *Id.* at 518 (1990) cited in Appeal of Timberland Regional School Board, 142 NH ___ (May 29, 1998).

The City and the Union bargained contract articles in controversy, giving and taking in the process of reaching the agreement that was voted and then signed by the parties. Both the City and the Union made concessions, as is the nature of the negotiation process employed to reach a binding contract. Thereafter, the bargaining unit members did not get the benefit of their bargain. The City Council voted to approve the three year CBA in November, 1997, and then voted contrary to the monetary promises of the CBA in the following months. Unlike a previous Franklin case cited by the City, Appeal of City of Franklin, 137 NH 723 (1993), the cost items that make up the monetary package of this multi-year CBA are the same cost items originally voted upon by the City Council. A multi-year contract can be approved at one sitting and there is no requirement that "cost items" be submitted for approval more than once. *Id.* at 730. There has been no defect in notice.

Wage terms are mandatory bargaining subjects, RSA 273-A:1 XI, but management may adopt merit raise plans with a reservation of rights unto itself. RSA 273-A:1 XI. In the present case, a merit raise plan was long ago established by vote of the City Council. It is found in the City Personnel Policy. (Finding of Fact No. 6.) In it, the City Council reserves the right not to grant any step increases in a given year and reserves the right to base any raises on the past year's performance. However, Article X of the CBA specifically modifies the former reservation as to bargaining unit members and serves as a promise to pay a merit step increase in 1998 to those deserving of it based on an evaluation and absent an adverse personnel action report. Thereby, the latter reservation is preserved with additional particulars as to how it shall operate but the former reservation is waived for 1998.

City Manager Pitts testified that he is aware that the CBA supersedes the Personnel Policy when a conflict is perceived between the two documents but avers that the monetary term of the CBA is not binding and that he advised the City Council so. The transcript of the City Council meeting of November 3, 1998, submitted by the Union, post hearing, is filled with ellipses and is probative only of the CBA's approval. There is no testimony in the record from City Council members who approved the CBA and the testimony of Mr. Elliott, Director of the Municipal Services Department, deals only with discussions during negotiations and is countered by several opposing witnesses. Bargaining unit witnesses familiar with the negotiations described the small COLA as a concession in the bargaining process. Accordingly, the inclusion of a 1% COLA evidences a *quid pro quo* in relation to the 2.5% merit raise. Regardless of advise Mr. Pitts may have given the City Council, the content of the negotiation sessions and the several pages of tables, dealing with the impact of the 2.5% on the three series of employees, drawn by Mr. Pitts were convincing to the Union that these moderate step increases would be paid along with the small COLA if the CBA were approved. Bargaining unit president and negotiating team member John Ahlman recalled that there was no suggestion that City Council could "pull" the raise under this CBA. Thus, considering the testimony and documents submitted, a reading that both parties intended to be bound by the monetary package of the CBA gives meaning to the specific new language in the current CBA and the prior CBA relating to the merit step increase. (Joint Exhibit No. 1, Union Exhibits Nos. 1 and 2).

The City cannot simply change the monetary terms that apply to those covered by the CBA according to its internal needs. The funds for the step increase, just as the funds for the 1% COLA, were to be included in the budget. The tax cap may have limited expenditures as a whole but it did not prevent the City Council from allotting money to fund the Municipal Services Department employees' contract raises. The City Council allotted the money elsewhere.

The terms of the CBA have been violated. The City Council members knew or had reason to know that they were approving a binding agreement. The City's failure to pay step increases and failure to pay the COLA as described in Article X of the CBA constitute unfair labor practices pursuant to RSA 273-A:5 I (h). Evaluations were promised and necessary under the monetary plan of the CBA if the City had planned to exercise its role in

deciding who would be awarded merit step increases. Evaluations were not forthcoming evidencing a lack of intent to pay the promised raises. Consequently, there is an absence of good faith in bargaining implicating RSA 273-A:5 I (e) as well as (h). The City's bypassing the exclusive bargaining agent in favor of direct communication with bargaining unit members informing them of the changes it had made unilaterally constitutes an absence of good faith and a breach of the CBA contrary to RSA 273-A:5 I (e)and (h). Appeal of Franklin Education Association, 136 NH 332, 334-5 (1992).

The City shall make bargaining unit members whole by providing them evaluations based on their 1998 performance as described in Article X of the CBA. Thereupon, the City shall advance these employees to the next step of the merit pay plan. Raises shall be retroactive to July 1, 1998. The City shall cease and desist from direct dealing but shall correspond and communicate with the exclusive bargaining agent for the Municipal Services Employees bargaining unit.

So ordered.

Signed this 5th day of February, 1999.

Gail C. Morrison
Hearing Officer