State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Teamsters Local 633 of NH/Newmarket Police Association Complainant	*	
v.	*	Case No: P-0766-2
Town of Newmarket Respondent	*	Decision No. 2005-050

APPEARANCES

Representing the Union: Thomas D. Noonan, Business Agent, Local 633 Teamsters

Representing the Town: J. Joseph McKittrick, Esq., McKittrick Law Offices

DECISION AND ORDER

BACKGROUND

The Teamsters Local 633 of New Hampshire/Newmarket Police Association (hereinafter "the Union") filed an unfair labor practice complaint on October 25, 2004 alleging that the Town of Newmarket (hereinafter "the Town") committed unfair labor practices in violation of RSA 273-A:5 I (a), (b), (c), and (i). It alleged that the Town refused to implement an increase in the police detail rate following approval of the budget by the Town Meeting that funded the rate increase effective July 1, 2004 and, by later conduct exhibited by the Police Chief at a meeting held on October 14, 2004 when he stated that the proposed union would not receive certain benefits provided to other employees.

A pre-hearing conference was conducted on December 1, 2004 followed by an evidentiary hearing conducted on March 3, 2005 at which both parties were represented. Each was provided the opportunity to present witnesses and exhibits and had the opportunity to cross-examine witnesses. Each party made a brief closing statement in lieu of the submission of a post-hearing legal memorandum. At the conclusion of the hearing the members of the board considered all evidence admitted, assigned appropriate weight to each, weighed the credibility of all witnesses and made the following determinations of fact:

FINDINGS OF FACT

1. The Teamsters, Local 633, Newmarket Police Association (hereinafter the "Union") is the exclusive representative, pursuant to RSA 273-A:8, for the bargaining unit comprised of "all full-time Patrolmen, Detectives, Master Detectives, Sergeants, Dispatchers and permanent part-time Dispatchers of the Newmarket Police Department."

2. The Town of Newmarket (hereinafter the "Town") is a public employer within the meaning of RSA 273-A:1 X.

3. The Union filed a Petition for Certification on July 12, 2004 and, after being successful in an election conducted on February 8, 2005, the Union was certified as the exclusive representative for the individuals employed in the positions referred to in Finding of Fact #1, above.

4. The Teamsters' representative, on behalf of the employees desiring to organize, sent a letter to the Town Administrator expressing the intent of this group to organize. The letter was dated July 9, 2004 and was received July 12, 2004. Attached to the letter was a copy of the Petition for Certification.

5. The Town Administrator had "heard rumors" prior to the July 12, 2004 written notice from the Union representative that organization of the police department employees was being undertaken.

6. At all times relevant to this matter the Town has employed the Town Manager form of Government and has adopted the SB-2 form of Town Meeting.

7. The budget development process begins in the fall of each year and progresses from department head level to Town Administrator to Town Council to Budget Committee to Town Meeting deliberation session and Town Meeting vote, which occurred in May of 2004.

8. The participants in the budget process were aware or should have been aware of the planned increase in the compensation rate for private police details from $27.50 to $30.00 per hour.

9. The budget for the Town that was approved in May of 2004 and became effective July 1, 2004 anticipated and incorporated sufficient funds for the increased rate.

10. The amount of funds appropriated for the police private details appears on a separate line item entitled, "Extra Detail". (See Town Exhibit #7).

11. There was an expectation among the police officers that they would receive the increased rate for private details after the new budget went into effect on July 1, 2004. This expectation was due to the passage of the budget with the increased gross allotment to extra detail and comments made by the former chief of police based upon statements made to him by the finance director during the spring of 2004.

12. Tara Tucker serves as a Master Detective for the police department and was an activist in unionizing the department. The Town knew of her involvement in unionizing the department.

13. Det. Tucker's initial contact with the Teamsters occurred on June 3 or 4 of 2004.

14. On July 9, 2004 the Teamsters, on behalf of the Newmarket Police Officers filed a Petition for Certification with the PELRB.

15. On July 23, 2004 the Town filed its partial objection to the union's certification request and a contested hearing was conducted on September 15, 2004.

16. Following resolution of the contested positions for inclusion in the union, an election was conducted on February 9, 2005 at which the a majority voted to elect an exclusive bargaining representative and the bargaining unit was formally certified on February 15, 2005

17. It was during this election process that this complaint of unfair labor practices was filed by the union.

18. Det. Tucker learned in August 2004, following her first assigned private detail of the of the new budget year, that she and other officers were not being compensated at the expected rate of $30.00/hr.

19. Det. Tucker wrote to the Town Administrator on October 8, 2004 bringing the matter to his attention and requesting that the detail rate be increased to the $30.00/hr. contemplated in the budget and to make that adjustment retroactive to all details paid since July 1, 2004.

20. Her first response to this letter came from Chief Collins who told her that he had been informed that the Town was not going to pay at the increased level because of the "union thing", a comment attributed by him to the finance director.

21. She was next contacted by Capt. Cyr. who informed her that the Town Administrator wanted to see her the next morning, October 14, 2004 in his office.

22. Town Administrator Dixon, Capt. Cyr (now, Police Chief as of 12/1/04) and Det. Tucker were present at the scheduled meeting. The tone of the meeting was initially cordial, generally regressed over its duration and ended with the Administrator exhibiting a demeanor, in a verbal and overall communicative manner, which was authoritative.

23. During the meeting, which was in response to the October 8, 2004 letter request that the increased detail rate be paid, the Town Administrator provided a written response to Det. Tucker's letter (Town Exhibit #4), which he characterized to the board as "cold", and verbally stated at the meeting that he wasn't going to pay private details at the increased amount.

24. The Town Administrator also informed Det. Tucker during the October meeting that employees scheduled for inclusion in the union would not be getting regular pay raises scheduled for January 1, 2005, would not be included in a pending pay classification plan study, would not receive a cost of living increase in 2005 and would have to pay higher amounts towards health insurance premiums in 2005. The Town Administrator delivered this litany in what we characterize as heavy-handed in manner and tone.

25. The meeting ended without extensions of civility, such as handshakes and with the effect of having Det. Tucker feel intimidated by the Town Administrator's manner of delivery such as to characterize her interpretation of his action as "reminding me who I worked for."

26. Det. Tucker informed the Teamster representative of the substantive high points of the meeting in a memo dated October 14, 2004. (Union Exhibit #1) and her personal feelings in a separate conversation with the Teamster representative.

27. The first formal communication received by the Town Administrator of the employees' intention to unionize was the July 9, 2004 letter from the Teamsters representative accompanied by a copy of the Petition for Certification filed with the PELRB.

28. The Town had implemented the cost of living adjustments to Town employees, including those in the bargaining unit, on July 1, 2004.

29. The Town Administrator has not previously negotiated with a union in the Town of Newmarket as none existed prior to this effort by the police employees.

30. The Town Administrator has the authority to expend funds from those on the "Extra Detail" line item from within the budget approved by the Town Meeting, but is not obligated to do so unless a specific warrant article creates that obligation.

31. The Town Administrator is of the opinion that there is "no human way" that the parties could achieve a collective bargaining agreement within a year although he does deny, subsequent to the union's certification, that he said "They won't get a contract for three years."

32. Melodie Hodgdon is the finance director for the town and testified that prior to the last two changes in private detail rates, the town conducted a comparative survey prior to increasing the pay for private details and that the comparative survey for 2004-2005 was not undertaken.

33. Ms. Hodgdon had conversations with the previous police chief in connection with the private detail increase in which she indicated that the increase in private detail rates was included in the budget.

DECISION AND ORDER

DECISION SUMMARY

The filing of a Petition for Certification by a proposed bargaining unit puts the Town on notice that its actions during the formation and election of an exclusive bargaining unit may classify as interfering with that formation. The spending actions complained of here are actions within the discretion of the Town Administrator, notwithstanding the formation stage of this bargaining unit. The personal speech and conduct of the Town Administrator during a meeting with a unit organizer while authoritarian can not be said to have interfered with the formation of this, now existing, bargaining unit and its successfully elected exclusive bargaining representative to an extend violating the statute. The complaint is denied.

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate claims between the duly elected "exclusive representative" of a certified bargaining unit comprised of public employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I).

In this case, the Union has complained that actions of the Town constitute violations of RSA 273-A:5,I (a) constraint, coercion or interference with employees exercising their rights, (b) dominating or interfering in the formation of an employee organization, (c) discriminating against employees to discourage membership in the employee organization, and (i) making regulations or rules that would invalidate any portion of an agreement entered into. By reason of these alleged violations of the statute, we accept jurisdiction of the Union's complaint.

DISCUSSION

This case involves our examination of certain actions undertaken by the Town related to its alleged failure to implement an increase in the hourly compensation received by police officers for so-called "private duty details" and certain conduct of its Town Administrator during a meeting with one of the organizers of the proposed police association prior to the conduct of an election to determine whether or not the Teamsters would become that exclusive bargaining representative.

The first issue brings into consideration the municipal budgeting process in the Town of Newmarket. Budget formulation begins with interchanges between department heads and the Town Administrator, usually in the fall of the year preceding the start of the next fiscal year. Here those interchanges began in the fall of 2003 for the FY 2005 budget that went into effect on July 1, 2004 and would end on June 30, 2005. There is no dispute that the budget was adopted with sufficient funds to sustain an increase in the private detail rate. The testimony of the Town Administrator, Finance Director, and Det. Tucker, as well as the Town's budget document (See Town Exhibit #7) all support that proposition. Further, when the wheat is separated from the chaff in the collective witness testimony, no one disputes that the increase could be implemented if a proper form is processed. However the Administrator, if not the new Police Chief, has elected not to submit this Personnel Action Form (PAR) to the finance department. This is an action that is required in order for the finance department to draw the compensation payable to the employee for performance on a private detail.

There is no dispute that the expectancy of the members of the bargaining unit was that the private detail rate would be increased from $27.50 to $30.00 hourly. Their expectancy was based upon representations made to them by their prior police chief, who had relied upon a statement of the finance director prior to budget approval at the Town Meeting. Their expectancy was also based upon the successful passage of the Town's

budget that included an appropriation within the approved Town Meeting budget that included a budget line item entitled, "Extra Detail" within the police department section of the budget. Notwithstanding that such money was included in the overall town budget approval, we note that this money was not the subject of a special article submitted to the Town Meeting and as such, under the form of government exercised in Newmarket, the Town Administrator is not restricted nor compelled to expend those funds for that purpose. Further, evidence of past practice offered by the Union indicates that there had been increases to private detail pay in the past, but does not demonstrate that such increases always happened concurrent with the beginning of a new budget year or that it was mandatory that the Town Administrator expend the funds for private detail purposes.

There is no dispute that on July 1, 2004 the members of the bargaining unit received a "cost of living" increase, as did other Town employees. However, here the parties' positions diverge. Contrary to the expectations of the Union, at some point after July 1, 2004 a member of the bargaining unit performed a private detail and was not compensated at the higher rate. We do not know when the first private detail of FY2005 was performed as no evidence was offered on this point by either party. Therefore, we do not know whether any payments at the higher rate were made prior to the Town receiving its notice of the intent of the bargaining unit to form. We do know that when that employee, Det. Tucker, performed her first detail it occurred in August of 2004 and she noticed that she was compensated at the "old" rate, *i.e.* $27.50.

A significant event occurred between the beginning of the fiscal year and Det. Tucker's first private detail – the union filed a petition for certification as a bargaining unit with the PELRB and notified the Town of that intention. This occurred on July 12, 2004. The significance of this event is that it initiates that period of time leading up to an election where heightened scrutiny attaches to management's reaction to the notice of intent to form a union, particularly as it relates to existing terms and conditions of work in existence between the parties at that time. This does not mean that a term or condition of work cannot be changed, but rather that a change implemented over the objection of the petitioning employees creates exposure for management to a complaint of improper labor practice. We do not believe that the Town Administrator was prevented from raising the amount of compensation to an employee performing a private detail because we do not believe it would have been contested. The reverse, *i.e.* the reduction of compensation, would probably have been contested and probably would have caused a complaint of improper labor practice to be filed. But the fact is that the Town Administrator, with or without the advice of the Police Chief, has decided not to spend funds to increase the private detail rate received by the employee. There was no evidence presented indicating whether the Town has increased the amount it charges to users of private details since July 1, 2004.

The Union asserts that based upon the finance director's comment as reported by the former chief that the reason that the increase in private duty pay was not implemented was because of the "union thing". We understand the "union thing" to be the Petition for Certification of a bargaining unit that was filed with the PELRB on July 12, 2004. That document constituted the first official notice to the Town of the intent of the group of

employees to unionize. It also put the Town on notice, or the Town thereby should have been on notice, that its conduct thereafter as it related to the organizational effort of its employees may be of concern as a violation of RSA 273-A:5,I (a), (b) or (c). The general prohibitory language of these sections of the law are applied on a case by case basis by the PELRB because there are innumerable incidents of conduct or language by a public employer that could make it suspect of a violation.

The facts lead us to conclude that while there is nothing that would prevent the Town from implementing the increase, the union cannot compel the Town Administrator to expend funds over which he has discretionary authority. Without evidence that the higher rate was paid to an employee prior to the Town learning of the employee's intention to unionize or that private detail rates have historically occurred automatically with the beginning of a new fiscal year, we do not view the higher rate as an existing benefit that has been unilaterally reduced. Further, competent and uncontested testimony established that comparative rate increases of surrounding communities were historically conducted by the Town prior to it setting its own private detail rate. In this instance, the finance director admitted that she has not undertaken such a survey that is used to set a rate competitive with those surrounding communities. We believe that a the Town's actions are legitimate actions undertaken in the furtherance of its responsibility to use discretion where it can and measure its competitive position where it can to conserve the expenditure of public funds.

The Union also raises the personal conduct of the Town Administrator as an issue for us to determine whether or not an improper labor practice occurred as a result of his comments and conduct during a meeting with Det. Tucker on October 14, 2004. The meeting was called by him in response to Det. Tucker's October 8, 2004 letter regarding the private detail rate issue, as discussed above. This meeting was conducted before a date for the election of an exclusive bargaining representative had been set. This sequence, again, puts the Town's actions in a bright focus to assure that actions are not seen to constitute improper labor practices violative of our statute.

We believe Det. Tucker's testimony characterizing the substance and tone of the Town Administrator's comments. We believe that his oral comments likely echoed his own characterization of his written response to her as being "cold". He also was insensitive to the role that Det. Tucker held in the union organization effort and to the heightened level of caution that should be exercised by management in the run up time to an election. His comments may have been interpreted by Det. Tucker to have been harshly delivered. However Chief Cyr, who at the time of the meeting held the rank of captain, while admitting that Det. Tucker was not "happy" with the tone used or the result of the meeting would not characterize the Town Administrator's tone as especially harsh. While we can understand that Det. Tucker, as the subordinate employee in the room and feeling vulnerable in the exposed position of representing her colleagues, may have felt intimidated, we do not find that the Town Administrator's conduct rose to the level of improper labor practices and therefore was not violative of RSA 273-A:5, I (a), (b) and (c). If he had intended his actions to alter the later held election, he was unsuccessful. If he were manifesting his intended future approach to collective bargaining with this

bargaining unit, we would remind him of the parties' obligation to exercise good faith in this mutual process.

We find insufficient evidence that any of the actions complained of constitute the institution of a rule or regulation in violation of an existing agreement between the parties and therefore no violation of RSA 273-A:5, I(i).

The Union's complaint against the Town is denied.

So ordered.

Signed this 19th day of April, 2005.

Doris Desautel, Alternate Chairperson

By unanimous vote. Alternate Chairman Doris Desautel presiding with Board Members James M. O' Mara and E. Vincent Hall also voting.

Distribution:

Thomas Noonan, Business Agent, Local 633 Teamsters
J. Joseph McKittrick, Esq.