



**STATE OF NEW HAMPSHIRE**  
**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

**HAMPTON POLICE HPA, INC.**

**COMPLAINANT**

**CASE NO. P-0719-22**

**v.**

**DECISION NO. 2009-128**

**TOWN OF HAMPTON**

**RESPONDENT**

**APPEARANCES**

Representing: Hampton Police HPA, Inc.  
J. Joseph McKittrick, Esq., McKittrick Law Offices,  
North Hampton, New Hampshire

Representing: Town of Hampton  
Elizabeth A. Bailey, Esq., Sheehan, Phinney, Bass & Green P.A.,  
Manchester, New Hampshire

**BACKGROUND**

Hampton Police HPA, Inc ("HPA") filed an unfair labor practice complaint against the Town of Hampton on January 26, 2009. In 2008 the HPA and the Town reached a collective bargaining agreement subject to legislative approval of cost items. The HPA complains that although Town Board of Selectmen ratified the contract by a 3-1-1 vote, they failed to recommend the warrant article reflecting the costs of the contract to the voters. As a result, the HPA contends the Town violated RSA 273-A:5, I (a), (b), (e), (g), (h) and (i).

As relief, the HPA requests the PELRB: 1) find that the Town committed an unfair labor practice; and 2) award the HPA costs and fees.

The Town filed its answer on February 10, 2009. The Town denies the charge and contends that: 1) the HPA has failed to state a claim; 2) the PELRB has no authority to order the Town to petition the superior court for a special town meeting; 3) the PELRB has no authority to order the Board of Selectmen to recommend or not recommend a particular warrant article and the Board of Selectmen was not obligated to recommend the warrant article related to the negotiated contract. The Town requests that the PELRB: 1) dismiss the complaint; 2) deny the HPA's requests for relief; and 3) award the Town its reasonable attorney's fees and costs.

The board conducted a hearing in this matter on March 25, 2009, at which time the parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the parties' request the record was held open until April 24, 2009 to allow the parties to submit post hearing briefs. Both parties have filed their briefs and the record is now closed. The parties' March 24, 2009 Stipulation of Facts are set forth below as Findings of Fact 3-14.

#### FINDINGS OF FACT

1. The Hampton Police HPA, Inc.<sup>1</sup> ("HPA") is the board certified exclusive representative for full time police officers under the rank of Sergeant and Special Police Officers pursuant to RSA 273-A:10.

2. The Town of Hampton is a public employer within the meaning of RSA 273-A:1, X.

---

<sup>1</sup> The board presumes that the Hampton Police HPA, Inc. is the incorporated form of the Hampton Police Relief HPA, the certified exclusive representative of this bargaining unit per PELRB records.

3. The Town and the HPA are parties to two separate CBAs, one pertaining to Sergeants (“HPA Sergeants”) and one pertaining to Full-Time and Part-Time Police Officers.

4. Both CBAs covered the period between April 1, 2003 and March 31, 2006, and are currently under the status quo doctrine.

5. In or about August, 2008, amongst other times, the Town and the HPA met to negotiate a successor CBA.

6. The Town’s negotiating team consisted of Attorney James E. Higgins and Town Manager Frederick Welch. The HPA’s negotiating team consisted of Attorney J. Joseph McKittrick, HPA President Steven Henderson, Patrolman Joe Jones, Officer Scott Bates, Sgt. Barry Newcomb and Special Officer John Joyce.

7. The Town and the HPA ultimately reached a tentative agreement on the successor CBAs for both the Sergeants and the Full-Time and Part-Time Police Officers.

8. Prior to the January 31, 2009 Deliberative Session of the 2009 Town Meeting, Warrant Articles were prepared.

9. As part of preparing the Warrant Articles for presentation at the Annual Town Meeting, the Board of Selectmen voted to recommend certain Warrant Articles.

10. At its January 12, 2009 Meeting, the Board voted on “[r]ecommendations on the money warrant articles.”

11. At the Board’s January 13, 2009 Meeting, the question arose whether Selectman Bateman should have voted concerning the proposed HPA CBA which was addressed in Warrant Article 14.

12. This conflict of interest issue involved Selectman Bateman. Selectman Bateman is a member of the HPA, and part of the Full-Time and Part-Time Police Officers bargaining unit.

13. As a consequence of these conflict of interest concerns, a re-vote was taken as to Warrant Article 14, and Selectman Bateman abstained. The revote thus resulted in a 2-2-1 vote.

14. At the Town's March 10, 2009 Annual Town Meeting, the Town of Hampton voters were presented with Warrant Articles.

15. The parties negotiated on July 17, August 18, and August 26, 2008. On August 18 meeting Town representatives asked the HPA to sign contract extensions, Town Exhibits C and D, and the HPA agreed to do so. The parties anticipated that the contract extensions would allow the Town to avoid certain expenses it might otherwise incur on account of recently enacted legislation concerning municipal employer contributions to the New Hampshire Retirement System.

16. Another bargaining unit of Town employees refused to sign a similar contract extension, and as a result the Town included an additional \$650,000 in the proposed 2009 budget because of the anticipated retirement of a single firefighter.

17. During the course of bargaining Town negotiators agreed to recommend to the Board of Selectmen the tentative agreements completed at the negotiation sessions.

18. The Board of Selectmen was made aware of the HPA's assistance in signing the contracts extensions at the December 29, 2008 Board of Selectmen's meeting and also at a subsequent meeting held on January 12, 2009.

19. On December 29, 2008 the Board of Selectmen ratified the HPA tentative agreement in a 3-1-1 vote. Selectman Workman moved for the vote and Selectman Griffin seconded the motion. The record does not reflect how each individual selectman voted.

20. Neither the minutes of the December 29, 2008 meeting, the tentative agreement, nor other evidence establish any undertaking by the Board of Selectmen that they would recommend the contracts costs or related warrant article containing the contract costs or inform voters about the HPA's cooperation in signing the contract extension.

21. On January 12, 2009 the Board of Selectmen voted 3-2 to recommend the Warrant Article 14, the warrant article setting forth the costs of the ratified tentative agreement. Selectmen Workman moved for the vote and Selectmen Bateman seconded the motion. The record does not reflect how each individual selectman voted.

22. The selectmen voted as follows on the January 13, 2009 second vote on the Warrant Article 14 recommendation: Selectmen Workman and Lally voted in favor, Selectmen Griffin and Nichols voted against, and Selectman Bateman abstained. This 2-2-1 vote was the Board of Selectmen's final recommendation on Warrant Article 14.

23. Warrant Article 14 was defeated at town meeting.

#### DECISION AND ORDER

##### DECISION SUMMARY

The HPA's complaint is denied. There is insufficient evidence that the Board of Selectmen agreed to support a warrant article related to the tentative agreement and/or to promote to voters the HPA's cooperation in signing a contract extension. However, consistent with prior PELRB decisions, provisions of RSA 32:5 and 19, and the Board of Selectmen's general obligation to bargain in good faith, the Board of Selectmen had a legal duty to support

the ratified tentative agreement, at least to the extent of recommending the related warrant article. The HPA has not provided evidence that is sufficient to establish that the Board of Selectmen failed to fulfill this specific duty or its general obligation to bargain in good faith given the circumstances of this case.

#### JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I. PELRB jurisdiction is proper in this case as the HPA has alleged violations of RSA 273-A:5, I (a), (b), (e), (g), (h) and (i).

#### DISCUSSION:

The Town's motion to dismiss based upon the Association's withdrawal of its request that the board order the Town to petition the superior court for a special town meeting is denied. Even with the withdrawal of this particular request for relief the PELRB still has jurisdiction to determine whether the Town has committed a violation of the provisions of RSA 273-A cited by the Association and, if necessary, to fashion an appropriate remedy, including, for example, the issuance of a cease and desist order.

To prevail in this case the Association must prove: 1) that either before, during or after negotiations the Board of Selectmen entered into an agreement to support the tentative agreement by recommending the related warrant article to voters and by informing voters of the HPB's cooperation in signing the contract extension but failed to do so; and/or 2) that once the Board of Selectmen ratified the tentative agreement it had an independent legal duty to recommend the related warrant article or otherwise support the tentative agreement but failed to do so.

The claim that the Board of Selectmen entered into a binding agreement to recommend Warrant Article 14 or otherwise support or recommend the tentative agreement to voters is problematic for several reasons. First, the alleged undertaking was not reduced to a writing, a notable deficiency since under RSA 273-A:4 “[e]very agreement negotiated under the terms of this chapter shall be reduced to writing...” If, as claimed, the agreement was actually made as part of the collective bargaining process, it must also qualify as an “agreement negotiated under” RSA 273-A and was therefore subject to the mandatory writing requirement. The board does not accept counsel’s January 21, 2009 letter, Association Exhibit 2, as sufficient proof of such a written agreement, and the Association has not offered other writings which are sufficient to establish such an agreement. Second, even assuming such a writing is not required, there is still insufficient evidence that prior, during, or after negotiations the Board of Selectmen authorized, approved, or entered into an agreement to support or recommend the tentative agreement to voters.

The board does find that once the Board of Selectmen ratified the tentative agreement on December 29, 2008 its obligation to bargain in good faith included a duty to continue to support the ratified tentative agreement, at least to the extent of providing a favorable recommendation on Warrant Article 14. However, there is insufficient evidence to find that the Board of Selectmen did not meet this duty given the circumstances of this case. The basis for the board’s finding that the Board of Selectmen had an independent legal duty to recommend Warrant Article 14 is several prior PELRB decisions as well as the language in RSA 32:5 and 19.

In *Governor Wentworth Education Association, NEA-New Hampshire v Governor Wentworth Regional School Board*, PELRB Decision No. 83-60, the PELRB concluded that school board representatives on the negotiating team had a duty to support the tentative

agreement as it proceeded through the school board's ratification process. In that case the PELRB found that the employer engaged in bad faith bargaining when one member of the school board negotiating team opposed the tentative agreement and another negotiating team member abstained from voting during the school board ratification process, resulting in a tie vote and the school board's failure to ratify the tentative agreement. In *Stratford Teachers Association, NEA-New Hampshire v. Stratford School District et al*, PELRB Decision No. 85-85, one of the school board members opposed a tentative agreement and spoke against it at the annual school district meeting. Two other school board members who were present "remained silent" as the third school board member criticized the agreement. The board concluded that the employer had not met its good faith bargaining obligation in these circumstances imposed by the statute and by express language in the tentative agreement.

RSA 32:19 provides:

#### Collective Bargaining Agreements

Whenever items or portions of items in a proposed budget constitute appropriations, the purpose of which is to implement cost items of a collective bargaining agreement negotiated pursuant to RSA 273-A...such items shall be submitted to the budget committee and considered in its budget preparation. *Such appropriations shall be submitted to the legislative body and shall include a statement of the governing body's recommendation and a separate statement of the budget committee's recommendation... The failure of the budget committee to recommend any portion of such appropriations shall not be deemed an unfair labor practice under RSA 273-A.* (emphasis added)

RSA 32:5, V (a) provides that warrant articles "shall contain a notation of whether or not that appropriation is recommended by the governing body, and, if there is a budget committee, a notation of whether or not it is recommended by the budget committee."

These prior PELRB decisions, and the emphasized language in RSA 32:19 shielding the budget committee but not the governing body from unfair labor practice charges stemming from their warrant article recommendations, establish that the Board of Selectmen, as the



Town's governing body, had a duty to support the ratified tentative agreement, at least to the extent of recommending the warrant article, in order to meet its statutory obligation to bargain in good faith.

However, the HPA's unfair labor practice charge is denied, as the board finds the evidence is insufficient to establish that the Board of Selectmen failed to meet its duty to support the ratified tentative agreement given the circumstances of this case. Initially the Board of Selectmen voted to recommend Warrant Article 14 by a 3-2 vote. The Board of Selectmen's decision to conduct a second vote on whether to recommend Warrant Article 14 was based upon a legitimate conflict of interest issue. The HPA makes a plausible argument that the evidence supports a finding that Selectman Griffin voted to ratify the tentative agreement and later voted not to recommend Warrant Article 14. However, the actual vote of each individual selectman is not documented in the minutes of the December 29, 2008 and January 12, 2009 meetings or in the record. Testimony from Selectmen Griffin or other selectmen would likely have been very probative on this point, but such testimony was not offered at hearing. In any case, given the state of the record it is not possible to determine with sufficient accuracy how all the individual selectmen voted on the three votes at issue, and therefore the board concludes that the final 2-2-1 vote is properly attributable to the conflict of interest issue, and the board cannot say that the second warrant article recommendation vote is tantamount to bad faith bargaining.

So ordered.

Signed this <sup>th</sup>25 day of June, 2009.

  
Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Members Carol M. Granfield and Kevin E. Cash also voting.

Distribution:  
J. Joseph McKittrick, Esq.  
Elizabeth A. Bailey, Esq.