



**State of New Hampshire**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**AFSCME Local 3657/Merrimack Police and Fire Officers**

**v.**

**Case No. G-0002-3**  
**Decision No. 2010-066**

**Town of Merrimack**

**Appearances:**

Karen E. Clemens, Esq., Associate General Counsel, AFSCME Council 93, Boston, Massachusetts for the Complainant.

Matthew H. Upton, Esq., Drummond Woodsum, Portsmouth, New Hampshire for the Respondent.

**Background:**

AFSCME Local 3657, Merrimack Police and Fire Officers (Union) filed an unfair labor practice complaint charging that the Town violated RSA 273-A:5, I (a), (b), (c), (e), and (g) by providing all non-union employees earning \$45,000 or more a \$1,000 stipend in order to “minimize the chance of additional unions forming.” The Union requests that the PELRB find that the Town has violated RSA 273-A:5, I (a), (b), (c), (e), and (g); order the Town to cease and desist violating RSA 273-A:5; order the Town to publicly post the findings of the PELRB for 30 business days; order the Town to pay Union employees the same \$1,000 stipended; and order the Town to pay the Union’s costs and expenses incurred to prosecuting this matter.

The Town denies the charges and asserts that the stipend was paid to address concerns over employee morale stemming from a freeze in non-union employee salaries. The Town requests that the PELRB deny the Union's requests for relief and find that the Town has acted appropriately in accordance with RSA 273-A and the parties' collective bargaining agreement.

The board held a hearing in this matter on January 14, 2010 at the offices of the PELRB in Concord at which time the parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The record was held open until February 23, 2010 in order to allow the parties to file post-hearing briefs. The parties' post-hearing briefs have been received, the record is closed, and the board's decision is as follows.

#### **Findings of Fact**

1. AFSCME Local 3657 is the certified representative for the Merrimack Police and Fire Officer's bargaining unit.

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

3. The Union and the Town are parties to a collective bargaining agreement effective July 1, 2006 through June 30, 2010.

4. Steve Lyons is an AFSCME Council 93 staff representative who works with this particular bargaining unit. Beginning in May, 2009 Mr. Lyons had discussions with existing bargaining unit members about the possibility of adding certain fire and police positions to the existing bargaining unit. Discussions included subjects such as which non-bargaining unit employees were interested and which positions should be considered for inclusion. Non-bargaining unit employees were also part of these discussions with Mr. Lyons and/or bargaining unit employees.

5. By June, 2009 Town Manager Keith Hickey had become aware, in part through discussions with the Police Chief, of this employee organizing activity.

6. One of Mr. Hickey's responsibilities as Town Manager is the preparation of the minutes at Merrimack Town Council meetings which deal with personnel matters addressed in non public sessions under the procedures set forth in RSA 91-A:3, II (a).

7. Mr. Hickey prepared minutes from a non-public session at a June 25, 2009 Merrimack Town Council Meeting which were accepted by the Council on November 5, 2009. The minutes included the following:

Personnel RSA 91-A:3, II (a)

The Town manager updated the Town Council on the staffing illnesses in the Police Communications Division.

The Town Manager informed the Town Council that he decided to provide all non union employees earning \$45,000 or more a \$1,000 stipend. The rationale given was that he has heard that discussions were occurring to form one or two additional unions and the stipend would minimize the chance of additional unions forming.

Councilor Yakuboff, on behalf of the Town Manager, requested that the Town Council consider granting the Town Manager a waiver of Section VI of the Personnel Policy, if needed. Councilor Yakuboff indicated he would bring the issue back to the Town Council in the future if requested.

8. Mr. Hickey arranged for the non-union employees earning \$45,000 or more to receive their \$1,000 payment on June 26, 2009.

9. On June 29, 2009 the Union filed a petition with the PELRB requesting modification of an existing bargaining unit to include the positions of Patrol Division Captain, Police Administrative Services Captain, Police Officer Manager, and Fire Office Manager. On June 30, 2009 the Union amended the petition to include the positions of Assistant Fire Chief and Deputy Police Chief.

10. Four employees who received the \$1,000 payment were employees whose positions were the subject of the Union's modification petitions submitted at the end of June, 2009.

11. At hearing Mr. Hickey testified that he authorized the \$1,000 stipend payment to address perceived employee morale issues arising from the fact that bargaining unit employees were to receive a 3.5% pay increase but no corresponding or similar pay increase was planned for employees earning over \$45,000 per year. This consideration is not reflected in the minutes from the Town Council meeting referenced in Finding of Fact 7.

### **Decision and Order**

#### Decision Summary:

The Town committed unfair labor practices in violation of RSA 273-A:5, I (a) and (b) when it paid \$1,000 to employees to discourage or prevent employee and Union organizing activity. The Town's conduct constituted an improper coercion of and interference with employees in the exercise of their statutory rights in violation of sub-section (a) and a domination and interference with the formation and administration of the Union in violation of sub-section (b).

#### Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. *See* RSA 273-A:6.

#### Discussion:

In this case the board must determine whether the Town coerced employees or interfered with employees who were having contacts and discussions with Union representatives and co-employees about possible inclusion in an existing bargaining unit and representation in collective bargaining. The board must also decide whether the Town

violated Union and employee rights to engage in the formation and administration of an employee organization free from public employer domination or interference. For the reasons that follow, the board finds that the Town violated sub-sections (a) and (b) of RSA 273-A:5, I.

Under the statute it shall be a prohibited practice for any public employer:

(a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter; and

(b) To dominate or to interfere in the formation or administration of any employee organization.

At the time Mr. Hickey authorized the \$1,000 wage payments under consideration he was aware of the organizing and related employee activity which ultimately resulted in the submission of the modification petitions at the end of June, 2009. When Mr. Hickey pre-viewed his plan to make the one-time and unscheduled \$1,000 wage payment with the Town Council he identified the discouragement of employee support for organizing efforts as the justification for the payments. The accuracy of the Town Council meeting minutes reflecting this objective is not in doubt. The minutes demonstrate that the reason for the payments was to prevent what the board concludes was statutorily protected Union and employee organizing activity. The board finds that this was the primary purpose and motivation for the payments, despite Mr. Hickey's alternative explanations for the disputed \$1,000 payment offered at hearing.

The right of public employers to oppose union organizing activity through legitimate methods does not include the right to make payments in an attempt to obtain employee loyalty or otherwise promote employee opposition to such union activity. Under the statute, public employees are entitled to be free from employer coercion or interference when they engage in discussions with an existing employee organization like the Union, discuss the potential for

inclusion in an existing bargaining unit with the Union and bargaining unit employees, and make decisions and judgments about such matters. Given the circumstances of this case, and in particular the timing of the payments relative to the Union's organizing efforts as well as Mr. Hickey and the Town Council's knowledge of the situation, the board finds that the Town committed unfair labor practices in violation of RSA 273-A:5, I (a) and (b). The payments to employees to obtain their loyalty during union organizing activity is conduct that is coercive in nature and is otherwise an interference with employees who are exercising their statutory rights under sub-section (a). This conduct also constitutes the domination of and interference with the Union, an existing employee organization, within the meaning of sub-section (b). The fact that the payments did not ultimately prevent the filing or prosecution of the modification petition does not excuse or otherwise exempt the Town from the application of the statute. The statute does not require evidence that the Town's coercive, interfering and dominating behavior has actually resulted in, for example, the defeat or suppression of the underlying union and organizing activity before the board can find a statutory violation and order appropriate relief.

Accordingly, the board finds that the Town of Merrimack has committed unfair labor practices in violation of RSA 273-A:5, I (a) and RSA 273-A:5, I (b). The Union's requests for relief are granted as follows. The Town shall cease and desist from engaging in the type of conduct complained about in this matter and which the board has determined is prohibited by the provisions of RSA 273-A:5, I (a) and (b). The board concludes that it does not have authority to order the payment of \$1,000 to all bargaining unit employees as requested by the Union and accordingly this specific request for relief is denied on that basis. The Town shall post this decision for 30 business days in public locations where bargaining unit and police

and fire department employees work and complete and return the Certificate of Posting provided with this decision.

So Ordered.

April 2, 2010.

A handwritten signature in blue ink, consisting of several overlapping loops and flourishes, positioned above a horizontal line.

Charles S. Temple, Esq., Alternate Chair

By unanimous vote. Alternate Chair Charles S. Temple, Esq. presiding with Board Members Carol M. Granfield and Kevin E. Cash also voting.

Distribution:

Karen E. Clemens, Esq.  
Matthew H. Upton, Esq.