Appeal of PELRB Decision
No. 2010-241 withdrawn

MANDATE
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Maureen A. Caraway 3/28/2011
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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2011-0129, Appeal of Pembroke School District & a., the court on March 11, 2011, issued the following order:

Assented-to motion to withdraw appeal is granted.

Appeal withdrawn.

This order is entered by a single justice (Conboy, J.). See Rule 21(7).

Eileen Fox,
Clerk

Distribution:
NH Public Employee Labor Relations Board, #E-0088-02
Kathleen C. Peahl, Esquire
Pierre A. Chabot, Esquire
Education Association of Pembroke, NEA-NH
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File

Appeal of NH Supreme Court withdrawn on 03-11-2011
(NH Supreme Court Case No. 2011-0129)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Education Association of Pembroke

v.

Pembroke School District

Case No. E-0088-02
Decision No. 2010-241

Appearances:

Lorri Hayes, NEA-NH, Concord, New Hampshire for the Complainant

Kathleen Peahl, Esq., Wadleigh, Starr & Peters, PLLC, Manchester, New Hampshire, for the Respondent

Background:

The Education Association of Pembroke (Association) filed an unfair labor practice complaint against the District on March 4, 2010. The Association complains that during collective bargaining in 2009 and 2010 the District violated RSA 273-A:5, I (a), (e) and (g) on account of: 1) the School Board's bargaining proposal that the parties identify increases set forth in the contractual wage schedule as cost of living adjustments and not a pay plan subject to continuation under RSA 273-A:12; 2) the manner in which the School Board presented its bargaining proposal and its characterization of its proposal as a "deal breaker"; and 3) the School Board's proposals concerning a change in health plans including a proposal to change to a plan available through the Local Government Center given one school board member's status as a

board member of the Local Government Center and this individual's service on the School Board's negotiating team. The Association asks the board to find that the District has violated RSA 273-A and order the District to cease and desist from its unlawful course of conduct, its refusal to negotiate in good faith, and its failure to comply with RSA 273-A.

The District denies that it has violated any provision of RSA 273-A and contends that its conduct during collective bargaining has been proper and that its bargaining proposals concerning cost of living adjustments are legitimate efforts to address and mitigate the costs of RSA 273-A:12 on the District.

After the Association filed the complaint it requested and obtained a delay in further proceedings in order to allow additional time to resolve matters by agreement. The PELRB subsequently scheduled the case for hearing on June 28, 2010, but at the Association's request the hearing was continued and rescheduled to August 24, 2010. On that date this Board held a hearing at the offices of the PELRB in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties have filed post-hearing briefs.

On September 23, 2010 the New Hampshire School Boards Association (NHSBA) filed a Petition to Intervene as Amicus Curiae and included an Amicus Brief. The Association objects to allowing the NHSBA to have party status in these proceedings but does not object to the NHSBA's submission of an amicus brief. Any request by the NHSBA to intervene and obtain party status in these proceedings is denied. However, the NHSBA's amicus brief is accepted into the record. On September 23, 2010 the District submitted a request for findings of fact. Rulings on such requests are only required under RSA 541-A:35 when they are submitted in accordance with this Board's rules, set forth in Pub 100-300. The District's requests will not be

acted upon since they are not authorized under Board's rules, the Board did not request them in this case, and this decision includes separately stated findings of fact which are the basis for this decision.

Findings of Fact

1. The Education Association of Pembroke, NEA-NH is the certified exclusive representative of certain employees, including teachers, who work in the Pembroke School District.

2. The District is a public employer within the meaning of RSA 273-A:1, IX.

3. After June 1, 2009 the Association and the Pembroke School District School Board began the process of negotiating a successor contract to their July 1, 2007 to June 30, 2010 Collective Bargaining Agreement (2007-10 CBA). *See* Joint Exhibit A. Wages for bargaining unit employees in the 2007-10 CBA are presented in "Appendix A Pembroke Salary Schedule 2007/08," "Appendix B Pembroke Salary Schedule 2008/09," and "Appendix C Pembroke Salary Schedule 2009/10." Each appendix contains four different salary tracks with 14 different steps for each track.

4. Roger Miknitais, a teacher with 31 years experience and with service on five negotiating teams, served as the chief negotiator for the Association.

5. Clint Hanson, the chairman of the Pembroke School Board, served on the School Board's negotiating team as chief negotiator. Mr. Hanson has served on the School Board since 1987 and has been involved in the negotiation of numerous collective bargaining agreements. Mr. Hanson has served as president of the NHSBA and during the time period in question was a board member of the Local Government Center Health Insurance Trust. He does not receive

compensation for this service, and he will not receive any financial benefit if LGC Healthsource becomes the new provider.

6. The parties met on September 8, 2009 and reached agreement on preliminary matters, such as ground rules and the need to reach a new collective bargaining agreement.

7. The parties subsequently met for negotiations and exchanged proposals on September 24 and October 1, 2009. The School Board bargaining proposals include changing health insurance carriers from Blue Cross-Blue Shield to LGC Healthsource.

8. During the September 24, 2009 negotiations Mr. Hanson referenced the "evergreen law" which the parties understand to refer to the following language added to RSA 273-A:12, effective July 15, 2008:

> RSA 273-A:12, VII. For collective bargaining agreements entered into after the effective date of this section, if the impasse is not resolved at the time of the expiration of the parties' agreement, the terms of the collective bargaining agreement shall continue in force and effect, including but not limited to the continuation of any pay plan included in the agreement, until a new agreement shall be executed. Provided, however, that for the purposes of this paragraph, the terms shall not include cost of living increases and nothing in this paragraph shall require payments of cost of living increases during the time period between contracts.

At this first meeting there was a casual reference to the evergreen law and Mr. Hanson informed the Association that language contained in a Gilford collective bargaining agreement might be an acceptable way to address the evergreen law. The Gilford language Mr. Hanson referenced is set forth in Joint Exhibit K and was acceptable to the Association. However, at the time he made these representations Mr. Hanson had not actually reviewed the Gilford language, and he subsequently withdrew this suggestion when he discovered that the Gilford contract did not address the evergreen law in the manner he originally believed.

9. During the October 1, 2009 negotiations, Mr. Hanson presented the school board's proposal for new language to be inserted in Article V, Compensation as follows (School Board COLA proposal):

> The compensation detailed in the appropriate Appendices noted in this paragraph represent cost of living adjustments agreed to by both parties and do not constitute a pay plan subject to continuation as noted in RSA 273-A:12, paragraph VII.

10. During negotiations Mr. Hanson made it very clear that he strongly disagreed with the evergreen law. At times he has referred to the evergreen law as "asinine" and he openly acknowledged his negative views about the evergreen law during the course of the adjudicatory hearing in this matter. He was adamant in his statements and demeanor that the School Board's evergreen law proposal was a "deal breaker" in the sense that the parties could not finalize a collective bargaining agreement without an agreement on the evergreen law that was acceptable to the School Board.

11. Both parties understood the purpose of the School Board's COLA proposal was to avoid the new statutory requirement that pay plans, including those which provide for annual step increases, continue during any interval between the expiration of collective bargaining agreements entered into after July 15, 2008 and successor collective bargaining agreements.

12. The pay plan referred to in the School Board's COLA proposal contains a schedule of different compensation levels based upon four different categories or pay grades (BA, BA+15, MA, MA+15) and 14 different steps within each pay grade. Nothing in the pay plan or in the evidence submitted into the record established that it was prepared based upon cost of living adjustments (COLA) or that the listed compensation amounts in fact represent a COLA.

13. When the Association questioned the characterization of the pay plan as a COLA Mr. Hanson responded that the pay plan was a COLA because he was calling it that.

14. The Association treated the School Board's COLA proposal as a request that the Association give up its rights under the evergreen law, something the Association refused to do.

15. The School Board's COLA proposal led to impasse in negotiations, and the Association filed a petition with the PELRB for appointment of a mediator on October 28, 2009. On November 5, 2009 the parties met again, on their own, and the Association presented a wage proposal which included step increases that would be subject to the evergreen law. In response, the School Board reaffirmed that it would not agree to a proposal which included "evergreened" step increases.

16. The parties proceeded to mediation on November 23, 2009 but were unable to resolve the outstanding issues. The School Board remained steadfast in its support for its COLA proposal at the mediation.

17. The Association presented another proposal to the School Board on January 14, 2010 which also contained wage proposals that would be "evergreened." On January 27, 2010 the School Board responded with its own proposal on wages and continued to maintain its earlier position that any scheduled salary increases must be treated as a COLA that is not subject to the evergreen law.

18. Throughout the October 2009 to March 2010 time period, the School Board maintained that its COLA proposal was a deal breaker, and that a new collective bargaining agreement was not possible without an agreement on evergreen that was acceptable to it.

19. On May 6, 2010, after the Association filed this complaint, the parties returned to the bargaining table. During this round of negotiations the School Board finally abandoned its COLA proposal and instead made a wage proposal based on merit pay which did not provide for or include steps.

Decision and Order

Decision Summary:

The Pembroke School District has committed an unfair labor practice in violation of RSA 273-A:5, I (e) because of the manner in which it presented and maintained its COLA proposal, a non-mandatory subject of bargaining, during the September, 2009 to March, 2010 time period. The Association's claims based upon Mr. Hanson's demeanor and behavior during negotiations, his status as a board member of the Local Government Center Health Insurance Trust, and the School Board's proposals to change from a Blue Cross-Blue Shield health insurance program to a LGC Health Source program are denied.

Jurisdiction:

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

Discussion:

This case involves the parties' efforts to reach agreement on their first contract since the effective date of RSA 273-A:12, VII. Under that law pay plans contained in collective bargaining agreements entered into after July 15, 2008 (the effective date of the statute) will continue by law following the expiration of a collective bargaining agreement:

> For collective bargaining agreements entered into after the effective date of this section, if the impasse is not resolved at the time of the expiration of the parties' agreement, *the terms of the collective bargaining agreement shall continue in force and effect, including but not limited to the continuation of any pay plan included in the agreement, until a new agreement shall be executed.* Provided, however, that for the purposes of this paragraph, the terms shall not include cost of living increases and nothing in this paragraph shall require payments of cost of living increases during the time period between contracts (emphasis added).

Under the prior law, as explained by court and PELRB decisions, "evergreen" provisions calling for the continuation of a contract after its expiration date were deemed a cost item requiring

legislative approval[1] before a pay plan could be enforced to obtain step increases during intervals between contracts. *See Monadnock Education Association, NEA-New Hampshire v. Monadnock Regional School District,* PELRB Decision No. 2007-034 and *Appeal of Alton School District*, 140 N.H. 303, 315-316 (1995).[2]

There are several well established principles in public sector collective bargaining in New Hampshire relevant to our analysis of the School Board's conduct in this case. Both parties have an obligation to bargain in good faith, which means bargaining with the intent but not the obligation to reach agreement. Both parties must bargain subject to applicable law, including the various provisions of RSA 273-A like RSA 273-A:12, VII, despite any objections to or disagreements with such laws. Additionally, the nature and extent of a party's obligation to bargain a particular proposal presented to it, and the corresponding right of the party making a particular proposal to pursue it, differs depending on whether the proposal concerns a mandatory, permissive, or prohibited subject of bargaining. In this regard, the court has outlined a three part test to apply to determine the proper categorization of a particular proposal:

> First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation.... Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy....Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI. A

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[1] Voters at town meeting, city council, town council, or board of aldermen, see RSA 273-A:3, II.

[2] "To avoid judicially imposed "status quo" there are three collectively bargained alternatives. The first, as was attempted in Alton, is the "evergreen" provision, where the collective bargaining agreement, at the end of the stated term, renews itself automatically until the successor agreement is ratified. Obviously, as we say above, this agreement must be ratified by the legislative body, said body being fully informed of its terms and aware of its financial impact, or, in bargaining parlance, *Sanbornized.* The second is the limited "evergreen" provision that we see in the Rochester contract. This provides for an extension of the contract during the period of negotiation. This also must have the informed ratification of the legislative body and bears the risk of the specter of judicially imposed "status quo" should bargaining be abandoned. The third is a "status quo" clause where the precise terms of the post-term relationship are spelled out by the parties. This is also a cost item requiring informed legislative ratification, but, being bargained, would avoid further dispute."

> proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.

In re Appeal of Nashua Police Commission, 149 N.H. 688 (2003)(citations omitted).

The distinctions that must be made between various subjects of bargaining means, for example, that a public employer subject to RSA 273-A collective bargaining may not make unilateral changes to terms and conditions of employment, like wages, that are mandatory subjects of bargaining. *See, e.g., Appeal of City of Nashua Board of Education,* 141 N.H. 768, 772-73 (1997). In contrast, unilateral employer changes in areas which constitute permissive subjects of bargaining, like a just cause discipline proposal, are allowed, but parties may also agree to bargain such matters. *Id. at 773; Appeal of State,* 138 N.H. 716, 724 (1994)(union discipline proposal not subject to mandatory bargaining, but state may choose to bargain the proposal); *Appeal of International Association of Firefighters,* 123 N.H. 404, 408 (1983)(fire department platoon size was a permissive subject of bargaining and city could have properly refused to bargain the union's proposal). Because of this difference between mandatory and permissive proposals, the School Board's right to pursue non-mandatory proposals in negotiations with the Association is limited; it is in fact entirely dependent upon the Association's willingness to bargain and reach agreement on the matter. Additionally, because parties are obligated to bargain mandatory proposals, a failure to reach agreement on mandatory subjects can lead to impasse, resulting in mediation and fact finding pursuant to RSA 273-A:12. However, a failure to reach agreement on permissive proposals does not, in general, justify an impasse in negotiations since there is no obligation to bargain such proposals at all.

Therefore, we consider the School Board's conduct in this case, and its COLA proposal in particular, within this general framework. With respect to the phrase "cost of living

adjustment" (COLA), we note that it is a fairly common term. It is used in RSA 273-A:12, VII but is not given any special definition. Under applicable rules of statutory construction, the term should be assigned its plain and ordinary meaning. *See Appeal of State Employees' Association of New Hampshire, SEIU Local 1984,* 158 N.H. 258 (2009). A cost of living adjustment is "[a]n increase or decrease in wages based on the fluctuation of the Consumer Price Index or any local measure of changes in prices." Roberts Dictionary of Industrial Relations, 4th Ed., 1994. A "cost of living clause" is "[a] provision, commonly in labor agreements, and also in certain pension or retirement programs, giving an automatic wage or benefit increase tied in some way to cost-of-living rises in the economy. Cost of living is usually measured by the Consumer Price Index." Black's Law Dictionary, 5th ed., 1983. The School Board's COLA proposal does not satisfy either of these definitions, nor has the District cited any other commonly used meaning of the phrase "cost of living adjustment" that would justify its application to the pay plan at issue in this case. The School Board did not in fact propose to negotiate a cost of living adjustment but was attempting to have the Association agree to a fiction which would, in the School Board's estimation, prevent the continuation of the referenced pay plan, including step increases, during any future interval between collective bargaining agreements.

We agree with the Association that the School Board's COLA proposal concerned a non-mandatory subject of bargaining and find that the School Board improperly presented and pursued the proposal for approximately five months and in the process violated its legal obligation to bargain in good faith as set forth in RSA 273-A:5, I (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit). The continuation of pay plans following the expiration of a collective bargaining agreement is now required by law pursuant to RSA 273-A:12, VII.

We find that the Association acted well within its rights and in accordance with its responsibilities at the bargaining table when it properly and promptly rejected the School Board's COLA proposal. At that point it was incumbent upon the School Board to proceed with good faith negotiations on remaining subjects. The School Board failed to do so and instead adamantly and inappropriately continued to insist on its COLA proposal for months, effectively and improperly bringing productive negotiations to a standstill. As noted in Finding of Fact 19, the School Board's intransigence was only broken by the filing of this unfair labor practice complaint. The School Board's attitude throughout this time period was motivated for the most part by its open disdain for the continuation language in RSA 273-A:12, VII, and in this regard the School Board clearly permitted its disagreement with the applicable law to improperly dictate and guide its conduct in negotiations. In the process the School Board abdicated its obligation to negotiate with the Association subject to and within the parameters of applicable law.

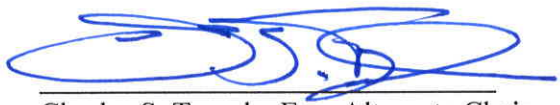
The balance of the Association's complaint concerns Mr. Hanson's behavior and attitude in negotiations, his status as a board member of the Local Government Center Health Trust, and the School Board's proposal to switch health insurance carriers from Blue Cross-Blue Shield to LGC Healthsource. It is true that Mr. Hanson was vehement and forceful in presenting and maintaining the School Board's COLA proposal. However, with the exception of his involvement in presenting and maintaining the School Board COLA proposal, which he repeatedly characterized as a "deal breaker" and with respect to which he took a hard bargaining position, all of which was improper, as noted, we find his demeanor at the bargaining table was otherwise within acceptable limits. As to his service as a board member of the Local Government Center Health Trust, there is nothing in RSA 273-A that prohibits someone with this status from also serving as a member of a local school board and participating in collective

bargaining negotiations. We conclude that any question about the propriety of his involvement in negotiations in the circumstances of this case is beyond the purview of the PELRB. We also find nothing improper about the School Board's proposal to change to a Local Government Center Health Insurance provider.

Accordingly, we find that the School Board committed an unfair labor practice under RSA 273-A:5, I (e) because the manner in which it presented and maintained its COLA proposal violated its obligation to negotiate in good faith with the Association. The School Board shall post this decision for thirty days in a conspicuous place where it can be reviewed by bargaining unit employees. The School Board is ordered to cease and desist from engaging in such conduct during any and all future negotiations and to bargain in good faith with the Association subject to applicable law.

So ordered.

December 10, 2010.



Charles S. Temple, Esq. Alternate Chair

By unanimous vote of Alternate Chair Charles S. Temple, Esq., Board Member Kevin E. Cash and Alternate Board Member Sanford Roberts, Esq.

Distribution: Lorri Hayes
Kathleen Peahl, Esq.

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Education Association of Pembroke

v.

Pembroke School District

Case No. E-0088-02
Decision No. 2011-028

Order on Motion for Rehearing

The District filed a motion for rehearing of PERLB Decision No. 2010-241. The Board notes that in reaching its prior decision it considered the District's reply brief referenced in the District's motion for rehearing but inadvertently neglected to state in its decision that the District's Motion for Leave to File a Reply Brief was granted. This confirms that this motion is granted, and the points raised in the District's reply brief were reviewed and considered by the Board in reaching its decision. The District's Motion for Rehearing is otherwise denied.

So ordered.

January 25, 2011.

Charles S. Temple, Esq. Alternate Chair

By unanimous vote of Alternate Chair Charles S. Temple, Esq., Board Member Kevin E. Cash and Alternate Board Member Sanford Roberts, Esq.

Distribution:

Lorri Hayes
Kathleen Peahl, Esq.