THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2012-057

APPEAL OF LACONIA PATROLMAN ASSOCIATION
(New Hampshire Public Employee Labor Relations Board)

Argued: October 11, 2012
Opinion Issued: February 8, 2013

Molan, Milner & Krupski, PLLC, of Concord (John S. Krupski on the brief and orally), for the petitioner.

Devine, Millimet & Branch, P.A., of Manchester (Mark T. Broth and Laurel A. Van Buskirk on the brief, and Mr. Broth orally), for the respondent.

BASSETT, J. The petitioner, Laconia Patrolman Association (Association), appeals a decision of the New Hampshire Public Employee Labor Relations Board (PELRB) finding that the respondent, the Laconia Police Commission (Commission), did not commit certain unfair labor practices. We affirm.

The parties stipulated to, or the administrative record supports, the following facts. The Association represents police officers and detectives in the Laconia Police Department. The Association and the Commission had a collective bargaining agreement (CBA) that expired on June 30, 2010. Before the CBA expired, the Association and the Commission reached a tentative agreement on a successor CBA. During negotiations, Laconia's city manager

informally reviewed the parties' proposals and recommended changes that she believed would improve their chances of obtaining the approval of the Laconia City Council (Council). The parties incorporated the city manager's suggestions into the tentative agreement, which was ratified by the parties.

The tentative agreement was presented to the Laconia City Council for approval on February 8, 2010. At that meeting, the city manager said that she could no longer support the tentative agreement. Several Council members expressed concern that the agreement granted increased leave and compensatory time to employees and would result in increased retirement pay-outs. The Council requested a new draft of the agreement, and the members went through each line of the agreement suggesting changes to specific provisions. The Council did not take a formal vote on the tentative agreement until October 2010 when it rejected the cost items contained therein.

On June 24, the Commission, knowing that the Council wanted it to reduce its budget by $35,000, nonetheless voted to grant step increases effective after the expiration of the CBA on July 1. In response, the Council voted on June 28 to remove $100,000 from the Commission's budget. Two days later, the Commission rescinded its previous vote.

The Association filed an unfair labor practice charge with the PELRB, alleging that the Commission violated RSA 273-A:3, II (2010) when it failed to ensure that the Council voted upon cost items within thirty days. It further alleged that the Council interfered with the negotiations and that the Commission's acquiescence to the Council's interference amounted to a failure to bargain in good faith. The Association also claimed that the Commission committed an unfair labor practice when it rescinded the step increases.

The case was submitted to the PELRB on stipulated facts and documentary evidence. The PELRB ruled that the Council's failure to vote on the cost items in the tentative agreement within thirty days, as required by RSA 273-A:3, II(c), did not constitute an unfair labor practice by the Commission. The PELRB stated that "the [Commission] cannot be held responsible for an unfair labor practice based on the conduct of the [Council], at least on the record presented for decision in this case." It found that the Commission had "no control or authority over whether the [Council] discharge[d] its statutory responsibility," and there was "no evidence suggesting that the Commission promoted or encouraged the [Council] to abdicate its duty to vote within the thirty day period."

To the extent that the Association argued that the Council interfered improperly with the Commission's bargaining power, the PELRB determined that such claims could not be brought against the Commission. It further stated that the record was insufficient to establish that the Council improperly

usurped the Commission's bargaining authority.

The PELRB also ruled that the Commission did not commit an unfair labor practice when it rescinded the step increases. The PELRB determined that the Commission was not obligated to provide the post-CBA step increases under the status quo doctrine. It further stated that the step increases were cost items that required the Council's approval, and, absent its approval, the Commission "retained the right to reverse its earlier vote and withhold" the step increases.

On appeal, the Association argues that the PELRB erred when it ruled that the Commission was not required to ensure that the Council voted on the tentative agreement within thirty days. It further argues that the PELRB erred when it failed to find that the Commission ceded its responsibilities to the Council. Finally, it argues that the Commission engaged in an unfair labor practice when it rescinded the step increases.

In reviewing a decision of the PELRB, "[w]e adhere to the standard of review set forth in RSA 541:13 (2007)." Appeal of Town of Deerfield, 162 N.H. 601, 602 (2011). "[T]he order or decision appealed from shall not be set aside or vacated except for errors of law, unless [we are] satisfied, by a clear preponderance of the evidence before [us], that such order is unjust or unreasonable." RSA 541:13. "This court is not free to substitute its judgment on the wisdom of an administrative decision for that of the agency making the decision." Appeal of Prof. Firefighters of E. Derry, 138 N.H. 142, 145 (1993). "The PELRB's findings of fact are presumptively lawful and reasonable, and will not be disturbed if they are supported by the record." Appeal of Town of Deerfield, 162 N.H. at 602. "However, we act as the final arbiter of the meaning of the statute, and will set aside erroneous rulings of law." Id.

We first address whether the PELRB erred in ruling that the Commission was not responsible for ensuring that the Council voted on the tentative agreement's cost items within thirty days. Resolution of this issue requires that we interpret the language of RSA 273-A:3, II. In matters of statutory interpretation, we are the final arbiters of the intent of the legislature as expressed in the words of the statute considered as a whole. Prof. Fire Fighters of Wolfeboro v. Town of Wolfeboro, 164 N.H. 18, 20-21 (2012). When examining the language of the statute, we ascribe the plain and ordinary meaning to the words used. Id. at 21. We do not consider words and phrases in isolation, but rather within the context of the statute as a whole. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Frost v. Comm'r, N.H. Banking Dep't, 163 N.H. 365, 375 (2011).

RSA 273-A:3, II(b) provides, in pertinent part, that "[o]nly cost items shall be submitted to the legislative body of the public employer for approval." RSA 273-A:3, II(c) provides, in pertinent part:

> If the public employer is a local political subdivision with a city or town council form of government cost items shall be submitted within 30 days to the city council or aldermen or to the town council for approval. Within 30 days of the receipt of the submission, the city council, aldermen, or the town council shall vote to accept or reject the cost items.

Because Laconia has a city council form of government, RSA 273-A:3, II(c) required the Council to vote upon the tentative agreement's cost items within thirty days after their submission. The Council failed, however, to comply with its statutory obligation.

Contrary to the Association's assertions, there is nothing in the plain language of RSA 273-A:3, II(b) or (c) that requires a public employer – here, the Commission – to ensure that the legislative body – here, the Council – votes within thirty days. To impose such a duty on the public employer would require adding words to the statute that the legislature did not see fit to include, and we decline to do so. See Appeal of City of Franklin, 137 N.H. 723, 727-28 (1993). Moreover, the PELRB found that the Commission had no control over whether the Council complied with its statutory duty and that there was "no evidence suggesting that the Commission promoted or encouraged the Council to abdicate its duty to vote within the 30 day period." Because the record supports the PELRB's factual finding, we will not disturb it. See RSA 541:13; see also Appeal of Town of Deerfield, 162 N.H. at 602.

We next address whether the PELRB erred when it found that the Commission did not cede to the Council its responsibilities as a public employer. The Association, in effect, argues that the evidence before the PELRB compelled it to find that the Commission "allowed the [Council] to take over the collective bargaining process." We disagree with the Association and uphold the PELRB's determination that the evidence failed to demonstrate that the Commission improperly allowed the Council to take over its bargaining role. Although the Association interprets the evidence differently than did the PELRB, we do not find the PELRB's interpretation to be clearly unreasonable or unlawful. See RSA 541:13.

Finally, we address whether the PELRB erred when it failed to conclude that the Commission committed an unfair labor practice when it rescinded its vote to grant step increases. The PELRB ruled that under the status quo doctrine, the Commission could lawfully rescind the step increases because they were cost items that required the Council's approval to become binding

obligations and that approval was neither sought nor obtained. Although we conclude that this ruling was error, we nonetheless uphold, on alternative grounds, the PELRB's ultimate determination that the Commission did not commit an unfair labor practice. See Appeal of N.H. Dept. of Safety, 155 N.H. 201, 203-04 (2007) ("When the Board bases its decision upon mistaken grounds, we will sustain it if there are valid alternative grounds to support it.").

Upon expiration of a collective bargaining agreement, but prior to the execution of a successor agreement, the parties must maintain the status quo, i.e., the conditions under which the employees worked. Appeal of Alton School Dist., 140 N.H. 303, 307 (1995); Appeal of Milton School Dist., 137 N.H. 240, 245-47 (1993). The status quo doctrine "does not require payment of [step increases] after a CBA expires." Appeal of Alton School Dist., 140 N.H. at 307 (quotation omitted). Therefore, a public employer retains the discretion, but not the obligation, to grant step increases during the status quo period. See id. at 307-08. Because the decision to grant the step increases was discretionary, the Commission remained free to rescind them. Cf. id.

The Association maintains that the Commission committed an unfair labor practice when it failed to submit the step increases to the Council. However, we reject this argument because, contrary to the ruling of the PELRB, the step increases were not cost items as defined by RSA 273-A:1, IV (2010). RSA 273-A:3, II(b) requires that "only cost items be submitted to the legislative body of the public employer for approval." A cost item is defined as "any benefit acquired through collective bargaining." RSA 273-A:1, IV (emphasis added). In Appeal of Alton School Dist., 140 N.H. at 310-11, we held that a legislative body's vote to fund status quo step increases did not bind a public employer because those step increases were benefits not acquired through collective bargaining and, therefore, were not cost items within the meaning of the statute. Similarly, the post-CBA step increases here were not "benefits acquired through collective bargaining"; therefore, they were not cost items that needed to be submitted to the legislative body under RSA 273-A:3, II(c). Accordingly, because the step increases did not result from collective bargaining, the Commission was free to rescind them and had no obligation to submit them to the Council for approval. We, therefore, uphold the PELRB's ultimate determination that the Commission did not commit an unfair labor practice.

Affirmed.

DALIANIS, C.J., and HICKS, CONBOY and LYNN, JJ., concurred.

NH Supreme Court affirmed this decision on 2-8-2013, Slip Op. No. 2012-057.
(NH Supreme Court Case No. 2012-057)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Laconia Patrolman Association

v.

Laconia Police Commission

Case No. G-0146-1
Decision No. 2011-269

Appearances: John S. Krupski, Esq., Molan, Milner & Krupski, PLLC Concord, New Hampshire for the Complainant

Mark T. Broth, Esq., Devine, Millimet & Branch, Manchester, New Hampshire, for the Respondent

Background:

The Laconia Patrolman Association (Union) filed an unfair labor practice complaint against the Laconia Police Commission (Commission) on August 6, 2010 charging that the public employer's conduct during the negotiation process violated RSA 273-A:3, RSA 273-A:5, I (e), (g), (h), and (i), and RSA 273-A:12, VII. In general, the Union complains about the City Manager's lack of support for a tentative agreement before the City Council, the City Council's failure to formerly vote on the tentative agreement, the City Council's alleged interference with the Commission's bargaining authority, and the City Council's threatened budget reduction of $100,000 in response to the Commission's stated intent to provide pay step increases following the expiration of the 2007-10 collective bargaining agreement, and the Commission's decision not to provide step increases in July, 2010 or thereafter.

The Commission denies the charges. According to the Commission it negotiated in good faith with the Union and reached a tentative agreement but it is the City Council's function as the local legislative body to act on cost items. Additionally, the Commission contends it is not responsible for the manner in which the City Council conducts its business, including when and how it votes on cost items contained in a tentative agreement. The Commission also contends that bargaining unit employees were not entitled to the disputed step pay increases under the applicable law.

The proceedings in this case were delayed several times at the parties' request and the parties ultimately agreed to submit the case for decision based on stipulated facts, exhibits, and briefs, with final filings due at the end of June, 2011. Both parties have submitted briefs, and the stipulations are reflected in the findings of fact 1-19 set forth below. The parties stipulated exhibits 1-15 have been marked and are included in the record for decision and incorporated by reference in this decision, all of which has been reviewed by the Board.

Findings of Fact

1. The Union is the certified exclusive representative of all police officers and detectives in the Laconia police department by virtue of their certification by the Public Employee Labor Relations Board.

2. The Commission is a public employer as that term is defined by RSA 273-A:1 (IX).

3. The Commission's authority is established by the Laconia City Charter and RSA 105-C.

4. The City Council of the City of Laconia (City Council) is the "legislative body" of the City within the meaning of RSA 273-A:1 (X).

5. The most recent collective bargaining agreement between the Union and the Commission covered the period between July 1, 2007 and June 30, 2010, when it expired.

6. Prior to the expiration of the collective bargaining agreement, the Union and the Commission reached a tentative agreement as to a successor collective bargaining agreement.

7. The Commission ratified the tentative agreement.

8. The Association ratified the tentative agreement.

9. The tentative agreement was presented to the legislative body of the public employer, i.e. the City Council, on February 8, 2010, for a vote. The City Council did not vote on the tentative agreement at its February 8, 2010 meeting. The record reflects that the City Council did not vote until its October 12, 2010 meeting, at which time it voted unanimously to reject the cost items contained in the tentative agreement as reflected in Exhibit 15.

10. On May 20, 2010, Chief Moyer informed the Commission that the City Council wanted a reduction of $35,000 from the police budget and that this could be obtained by discontinuing step increases.

11. On June 24, 2010, the Commission voted to grant step increases effective July 1, 2010.

12. On June 28, 2010, the City Council voted to remove $100,000 from the budget of the police department.

13. On June 30, 2010, the Commission rescinded its previous vote to grant step increases effective July 1, 2010.

14. Since July of 2010, no member of the Union has received a "step increase" regardless of their performance.

15. On July 12, 2010, the City Council returned $66,337 of the $100,000 previously removed from the Police Department budget.

16. The Commission has line item control over the Police Department budget.

17. City Manager Eileen Cabanel did not attend any bargaining sessions between the Union and the Commission. She did not bargain the first or second tentative agreements that are the subject of these proceedings.

18. During negotiations the parties exchanged proposals on a variety of topics but did not discuss or negotiate the topic of vacations.

19. During the course of the negotiations between the Union and the Commission, Commission representatives conferred with City Manager Cabanel regarding her view on whether certain proposals would be approved by the Council.

20. At the February 8, 2010 City Council meeting, as reflected in Exhibit 4, City Manager Cabenel related the following about her contacts with the parties to the bargaining process:

> Do you mind if I say something first? I wanted to say that the way this transpired has not been my best work I would say and I've apologized to the police department and the police union and I do it again, do so publicly. They were very gracious. They brought in a contract that was approved by the commission and it came to me first and I said, oh, you know I don't think that's going to work, I'm not sure that that's going to work and I gave them suggestions on what they could do to make it more palatable and you know, they did exactly what I told them to do and you know they went right back to the table and as they always do they tried to come back with a contract and work with us...what has happened since then is that things obviously have changed a great deal with regard to money, with regard to negotiations with other employees whereby everyone's kind of poised because they're waiting to see if somebody else is going to get more than them so, to make a long story short, the contract that I originally actually suggested to them, I no longer support because of things that have changed...

21. At the February 8, 2010 City Council meeting Police Chief Moyer made the following comments, as reflected in Exhibit 4:

> From day one the union, when I spoke to them and certainly the commissioner, they were given some parameters of what we thought the council wanted. One of them was a one year contract. They accepted that. Another was no COLA. They accepted that. So as the manager said and the commissioner, from day 1 they have come on board with this and I certainly give them a lot of credit for that. And they do recognize the times, trust me, they do...
>
> So there's no cost certainly that I can see to this contract.

Decision and Order

Decision Summary:

The Commission fulfilled its good faith bargaining obligation by reaching a tentative agreement and arranging its submission to the City Council, where it was duly supported by Commission representatives. Procedurally the Union's complaint was filed against the Laconia Police Commission, not the Laconia City Council, and in the circumstances of this case the

Commission did not violate the provisions of RSA 273-A on account of the conduct of the City Council about which the Union complains. The Commission had no authority to compel the City Council to take a formal vote, and neither the City Council's failure to vote on contractual cost items nor its alleged interference with the Commission's bargaining authority constituted an unfair labor practice by the Commission. The Commission was not obligated to provide step increases and therefore its final decision to withhold such pay increases was not improper. The City Manager's ultimate lack of support for a tentative agreement she had previously endorsed was not improper given her status in the bargaining process and the surrounding circumstances. The unfair labor practice complaint is dismissed.

Jurisdiction:

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

Discussion:

We first consider whether City Manager Cabenel's lack of support for the second tentative agreement at the February 8, 2010 City Council meeting constituted an unfair labor practice. In this regard it is important to note that City Manager Cabanel was not on the Commission's bargaining team and she did not negotiate the tentative agreement. Despite the foregoing, and no doubt because of her official capacity and her work with the City Council, City Manager Cabanel was not ignored during the bargaining process. Commission members consulted her about the prospects for City Council approval of certain bargaining proposals, and City Manager Cabanel did suggest specific changes to the first tentative agreement which were implemented in a second tentative agreement. In this way City Manager Cabanel was used by the negotiating parties to gauge the prospects of a tentative agreement once it was submitted to the City Council for approval. Nothing in RSA 273-A prohibits or mandates such consultations, and the parties were free to communicate with City Manager Cabanel about such matters and to

heed or reject any input she might provide. However, City Manager Cabanel's involvement in the bargaining process was relatively limited, and we find that she was not subject to the same duty to support the tentative agreement applicable to bargaining team members and ratifying parties like, for instance, the Commission in this case. *See Hampton Police HPA, Inc. v. Town of Hampton,* PELRB Decision No. 2009-128 (discussing duty to support tentative agreement).

Nevertheless, because of her involvement in the bargaining process we believe City Manager Cabenel was subject to the general obligation to act in good faith applicable to public employers engaged in collective bargaining pursuant to RSA 273-A:3, I. In assessing whether she violated her good faith obligations on account of her statements at the February 8, 2010 City Council meeting we take into account that she was approached by the negotiators, that at the time she provided her input she did so with good intentions, that at all times the bargaining parties were fully aware of the need for subsequent City Council approval, and that at the City Council meeting City Manager Cabenel explained the situation and her current position to the City Council in a candid manner, including why she did not currently support the tentative agreement. Given the overall circumstances as we understand them from the record presented, and given our conclusion that City Manager Cabenel's informal and unofficial input to the bargaining parties did not mean that she was subject to a specific continuing duty to support the tentative agreement, we find there is insufficient evidence to prove that she acted in bad faith or otherwise committed an unfair labor practice.

We next consider whether the Police Commission committed an unfair labor practice on account of the City Council's failure to conduct an RSA 273-A:3, II (c) vote on the costs of the second tentative agreement. Under RSA 273-A:3, II (c),

> [i]f the public employer is a local political subdivision with a city or town council form of government cost items shall be submitted within 30 days to the city council or aldermen or to the town council for approval. *Within 30 days of the receipt of the submission, the city council, aldermen, or the town council shall vote to accept or reject the cost items.* If the city council or aldermen or the town council rejects any part of the submission, or while

> accepting the submission takes any action which would result in a modification of the terms of the cost item submitted to it, either party may reopen negotiations on all or part of the entire agreement. (emphasis added)

We agree that the City Council improperly failed to vote on the tentative agreement as required under this statutory provision. The statute does not provide the City Council with authority to substitute an informal discussion of the tentative agreement for the required vote on the costs of the agreement. The record reflects that the City Council delayed voting for over seven months, well beyond the 30 day period specified by law. However, despite this lack of compliance with the applicable law, we decline to find an unfair labor practice because the complaint in this case is against the Laconia Police Commission, not the Laconia City Council. The Police Commission cannot be responsible for an unfair labor practice based upon the conduct of the City Council, at least on the record presented for decision in this case. The Commission has no control or authority over whether the City Council discharges its statutory responsibility, and there is no evidence suggesting that the Commission promoted or encouraged the City Council to abdicate its duty to vote within the 30 day period. Therefore, while we cannot find an unfair labor practice has been committed in this situation, we do expect the City Council will comply with the law applicable to its consideration of negotiated cost items in a timely manner in future cases.

We also decline to find that the Police Commission's decision not to proceed with the disputed step increase in July, 2010 constituted an unfair labor practice. The relevant sequence of events reflects that in May, 2010 the Commission learned that the City Council wanted a $35,000.00 reduction from the police budget which could be obtained by discontinuing step increases. Despite this information, on June 24, 2010 the Commission voted to proceed with step increases on July 1, 2010. On June 28, 2010 the City Council voted to remove $100,000.00 from the police department budget, which then prompted the Commission to rescind its earlier vote to grant the disputed step increase. The City Council subsequently restored $66,337.00 of

the previously removed $100,000.00 to the police department budget, and affected employees did not receive the anticipated step increases.

It must be emphasized that once the July 1, 2007 to June 30, 2010 agreement expired the "parties' obligations to one another (were).... governed by the doctrine of maintaining the status quo" which means the Commission was not obligated to provide the disputed step increases. *See Appeal of Alton School District,* 140 N.H. 303, 310 (1995). The Commission did not acquire an enforceable obligation to provide the disputed wage increase on account of its June 24, 2010 vote to award such increases in the absence of a corresponding vote by the City Council approving the costs of such increases. Therefore, the Commission retained the right to reverse its earlier vote and withhold the disputed such step increases. This is so even if the Commission's decision to do so was influenced by the City Council's concurrent treatment of the police department budget. Therefore we find that the Commission did not commit an unfair labor practice when it declined to proceed with the disputed step increases.

The Union also suggests the City Council erroneously concluded that the second tentative agreement contained cost items subject to its approval as the local legislative body and improperly did not accept, for example, the police chief's representation that "there's no cost certainly that I can see to this contract." See Joint Exhibit 4 (containing a transcript of portions of the February 8, 2010 council meeting). Joint Exhibit 4 also reflects comments by different councilors on costs they perceived in the tentative agreement. We find there is insufficient evidence to support the claim that the City Council's conclusions about the cost of the second tentative agreement were erroneous or improper and we are not persuaded that a violation of RSA 273-A:5, I has occurred. Additionally, as noted earlier in this decision, the Laconia Police Commission is not responsible for how the City Council exercises its authority and the conclusions it reached based upon the circumstances of this case.

The Union also asserts that the City Council overstepped its authority and improperly interfered with the Commission' right and obligation to bargain with the Union. Again, the Union's complaint in this case is against the Laconia Police Commission, and not the Laconia City Council, and procedurally this claim fails on that basis. Further, we find that the comments by different City Council members and the City Council's conduct as reflected in the record are insufficient to prove that the City Council improperly usurped the Commission's bargaining authority or position.

In accordance with the foregoing the Union's claims are denied and the complaint is dismissed.

So ordered.

November 1, 2011.

Charles S. Temple, Alternate Chair

By unanimous vote of Alternate Chair Charles S. Temple, Board Member Kevin E. Cash and Board Member Carol M. Granfield.

Distribution:

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