STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

AFSCME Local 3657, Hillsborough County Sheriff's Office

v.

Hillsborough County

Case No. G-0012-20
Decision No. 2016-298

Appearances:

Meghan Ventrella, Esq.,
AFSCME Council 93
Boston, Massachusetts for the Complainant

Carolyn M. Kirby, Esq.,
Hillsborough County Legal Counsel
Goffstown, New Hampshire for the Respondent

Background:

On July 14, 2016, the AFSCME Local 3657, Hillsborough County Sheriff's Office (Union) filed an unfair labor practice complaint under the Public Employee Labor Relations Act (PELRA). The Union maintains that the County's unilateral implementation of cost items contained in a fact finder's report, rejected by the Union but accepted by the County Delegation, violated RSA 273-A:5, I. (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter); (b)(to dominate or to interfere in the formation or administration of any employee organization); (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations); (g)(to fail to comply with this chapter or any

rule adopted under this chapter); and (h)(to breach a collective bargaining agreement). The Union requests that the PELRB order the County to cease and desist from interfering with the employees in the exercise of their rights under RSA 273-A, to bargain in good faith, to post the PELRB's decision, and to make the Union whole for all costs and expenses incurred in the filing and prosecution of this unfair labor practice charge.[1]

The County denies the charges. The County maintains that its actions are consistent with a private sector employer's right to implement its last best offer in the event of an impasse in negotiations under the National Labor Relations Act. The County also argues that it had the right to implement the disputed wage increase following the county delegation's acceptance of the fact finder's report given the provisions of RSA 273-A:12, III and IV. The County requests that the PELRB dismiss the charges or, in the event the PELRB "orders the County to cease implementation of cost items approved by the legislative body pursuant to RSA 273-A:12, require the bargaining union members to repay any and all increases associated with the fact-finder's report."

The parties appeared for hearing on August 29, 2016. However, after marking exhibits and addressing preliminary matters the parties elected to submit this case for decision on exhibits,[2] stipulations, and briefs. All briefs were filed by the October 3, 2016 deadline, and the decision in this case is as follows.

Findings of Fact

1. The County is a public employer within the meaning of RSA 273-A.

[1] The Union also filed a motion for a cease and desist order pending the issuance of the board's decision which is now moot.

[2] Joint Exhibit 1, County Exhibits A-H, and Union Exhibits 1-8 (the County's objections to Union Exhibits 1, 2 and 7 are overruled).

2. The Union is the exclusive representative of and bargaining agent for certain employees of the Hillsborough County Sheriff's Department. Joe Maccarone is the AFSCME Council 93 representative who conducts and coordinates negotiations on behalf of the Union.

3. The County Board of Commissioners is the board of the public employer responsible for negotiating collective bargaining agreements with the Union. Gregory Wenger is the County Administrator and the County representative responsible for coordinating and carrying out negotiations with the Union on behalf of and in conjunction with the Board of Commissioners.

4. The County Delegation is the County's local legislative body.

5. The parties' most recent collective bargaining agreement expired on June 30, 2015. On February 18, 2015 the parties signed ground rules governing the negotiations for a successor contract which remained "in force until impasse is declared or until May 9, 2015, whichever occurs first." See County Exhibit E.

6. After a period of negotiations, the parties reached impasse and then attempted to resolve the impasse by mediation under RSA 273-A:12, with Nancy E. Peace serving as the mediator.

7. When mediation was unsuccessful, the parties proceeded to fact finding on December 15, 2015. Nancy E. Peace served as the fact finder and she issued a fact finder's report dated February 12, 2016.

8. Among other things, the fact finder's report recommended the elimination of Hazard Duty Pay and, for those employees previously eligible for Hazard Duty Pay, a base wage adjustment of $0.925 (applicable to bargaining unit certified full-time and part-time Deputy Sheriffs and Special Duty Sheriffs). The report also recommended a base wage adjustment for non-certified bargaining unit employees of $0.065 (i.e. those employees who were not previously

eligible for Hazard Duty Pay). The fact finder's report also recommended language providing for a merit increase of 1.25% for employees receiving a satisfactory evaluation for the prior year.

9. By email dated March 3, 2016 the Union notified the County that it had rejected the fact finder's recommendations.

10. By April 20, 2016 the County Board of Commissioners had accepted the fact finder's report and asked the Chairman of the County Executive Committee to have the County Delegation consider the report pursuant to RSA 273-A:12, III (a) with the Board's recommendation that the "Delegation vote to accept and fund the cost items included in the recommendation." See County Exhibit B.

11. At its April 22, 2016 meeting, the County Executive Committee "voted to recommend approval of the funding of the Fact-Finder's Report for the Sheriff's unit" and also agreed that "a Delegation meeting would be called for Monday, May 23rd." See County Exhibit G. At the May 23, 2016 meeting, the County Delegation adopted a motion "to accept the Factfinder's report dated February 12, 2016 (cost items only) between Sheriff of Hillsborough County and Local 2715." (sic)(parenthetical in original). See County Exhibit D.

12. The Union still refused to accept the fact finder's recommendations and on April 26, 2016 Mr. Maccarone asked Mr. Wenger for dates when the County was available to resume negotiations. See County Exhibit H ("Sir at your convenience could you provide some dates and times to begin anew Joe"). Moreover, the Union never agreed that the fact finder's report was the equivalent of a collective bargaining agreement, effective through June 30, 2016, once the County Delegation approved the cost items contained in the fact finder's report.

13. On June 20, 2016 the parties met and signed negotiation ground rules relative to bargaining over a successor agreement. See County Exhibit F. These ground rules were the same as the prior, expired version and stated "[i]t is agreed that these negotiation (sic) will be

solely for the purpose of bargaining a successor agreement to the collective bargaining agreement between the parties in full force through June 30, 2016."[3]

14. Thereafter, over the Union's objection, the County proceeded to implement the cost items contained in the fact finder's report, including, for example, "a wage adjustment of 1.25% for those employees who qualified for a merit increase between July 1, 2015 and June 30, 2016." This specific wage increase was included in paychecks issued at the end of June/beginning of July of 2016. The Union objected to the County's actions, and on June 28, 2016 Mr. Maccarone asked Mr. Wenger to provide legal authority for the County's decision to proceed with unilateral implementation of cost items contained in the fact finder's report.

Decision and Order

Decision Summary:

The County Delegation vote on the fact finder's report is not binding on the Union, did not settle ongoing bargaining disagreements over cost items, and did not provide the County with the right to make the disputed unilateral changes in wages. The County has committed an unfair labor practice in violation of RSA 273-A:5, I (a), (e), and (g). The Union's request for a cease and desist order is granted. The County shall immediately suspend the disputed changes, including to bargaining unit employee wages, and return unit employees to the status quo in effect prior to implementation of the disputed changes. In addition, within 45 days the parties shall meet and confer in order to reach agreement on how to address the disputed wages paid to date and shall file a joint report documenting their agreement with the PELRB within 60 days. A further order shall then issue as appropriate and necessary. The County shall post this decision in the workplace for 30 days.

[3] The June 30, 2016 date reference is unclear and presumably a scribner's error since the parties never agreed on a collective bargaining agreement through that date.

Jurisdiction:

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

Discussion:

The claims in this case relate to the fundamental obligation public employers have under the PELRA to establish the terms and conditions of employment through negotiation, and not by unilateral action, as well as the statutory scheme to address bargaining impasse.

> It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. "Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.

See RSA 273-A:3, I. This obligation includes bargaining over wages, as provided in RSA 273-A:1, XI ("[t]erms and conditions of employment" means wages...), which are a mandatory subject of bargaining. *Appeal of State*, 138 N.H. 716, 721 (1994); *Appeal of Berlin Education Association, NHEA/NEA*, 125 N.H. 779, 784 (1984).

There is no question that collective bargaining can be a prolonged and difficult process which sometimes results in a stalemate. To address this, the PELRA includes a multi-tier process, set forth in RSA 273-A:12, designed to help the parties break the impasse and reach agreement. In general, the process consists of third party mediation and fact-finding. If the impasse persists, the local legislative body becomes involved by voting "to accept or reject so much of the (fact finder's) recommendations as otherwise is permitted by law." The "permitted by law" phrase refers to the legislative body's exclusive authority to approve cost items[4] set forth

[4] Under RSA 273-A:1, IV a cost item "means any benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body of the public employer with which negotiations are being conducted."

in RSA 273-A:3, II (b). See *Appeal of Derry Education Association*, 138 N.H. 69, 71-72 (1994)(noting that under RSA 273-A legislative bodies do not have authority to negotiate and enter into collective bargaining agreements but do have power to appropriate public money to fund cost items).

The specific sub-sections of RSA 273-A:12 in dispute in this case provide as follows:

> III. (a) If either the full membership of the employee organization or the board of the public employer rejects the neutral party's recommendations, the findings and recommendations shall be submitted to the legislative body of the public employer at the next annual meeting of the legislative body, unless there is an emergency as defined in RSA 31:5 or RSA 197:3, *which shall vote to accept or reject so much of the recommendations as otherwise is permitted by law.*
>
> IV. *If the impasse is not resolved following the action of the legislative body, negotiations shall be reopened.* Mediation may be requested by either party and may, at the mediator's option, involve the board of the public employer. In cases where the board of the public employer also serves as the legislative body of a municipality, the mediator may request no more than one less than a quorum of the legislative body to participate in the mediation.

(Emphasis added). Our understanding of these two sub-sections is based upon the principle that legislative intent should be ascertained based upon "the plain language of the provision, considered in the context of the statute as a whole. Where reasonably possible, statutes should be construed as consistent with each other." *Appeal of Derry Education Association,* supra, 138 N.H. at 71 (citations omitted).

We conclude that even in the event of impasse, mutual agreement on the terms and conditions of employment remains the *sine qua non* of a collective bargaining agreement formed under the PELRA. The impasse resolution portion of the PELRA does not expressly grant to the County Delegation, as the local legislative body, any power beyond what is enumerated elsewhere in the PELRA, which is the appropriation of funding for cost items. As the court stated in *Appeal of Derry Education Association,* "had the legislature intended that the (County Delegation) vote be binding" on any portion of the fact finder's recommendation, including cost

and/or non-cost items, "it could have so stated." *Id.* at 72. In other words, sub-section IV could have been written to provide for "impasses to be resolved *by* rather than *following* action of the legislative body." *Id.* (Emphasis added). This observation is as germane in this case as it was in *Appeal of Derry Education Association.*

The local legislative body's vote on a fact finder's recommendations creates pressure which will hopefully help the parties move away from impasse and toward an agreement:

> [A]ccording to a memorandum to the PELRB from the attorney assigned from the speaker's staff to assist the conference committee in negotiating and drafting RSA chapter 273-A:12, part of its purpose is "to broaden participation in impasse negotiations" and to make the parties vulnerable to "the publicity that will no doubt attend an impasse." Michael LaFontaine, Memorandum to Chairman of New Hampshire Public Employee Labor Relations Board (November 25, 1975) (unpublished Page 468 memorandum, on file under legislative history with the PELRB). Submission of the fact-finder's report to the legislative body will likely heighten public scrutiny of the negotiations, and the expression of the legislative body's position on the report may increase the pressure on the parties to reach agreement. One of the legislative goals will thus be achieved.

Id. at 73. In this case, the County Delegation's vote gives the parties advance notice of a cost approval which could potentially serve as the basis for a subsequent, mutually agreed, and fully ratified collective bargaining agreement. Of course, if there is no such mutual agreement, then bargaining resumes, with mediation involving the board of the public employer if the mediator so directs as outlined in sub-section IV of RSA 273-A:12.

We also reject the County's reliance on the National Labor Relations Act (NLRA). The County argues, in substance, that if its actions would not violate the NLRA then they should be deemed acceptable under the PELRA. However, the County overlooks important and substantive differences between these laws. First, as already discussed, RSA 273-A:12 provides a comprehensive process which the parties must follow when at impasse. There is nothing in any provision of RSA 273-A:12, or elsewhere in the PELRA, which grants to a public employer a right to establish or change the terms and conditions of employment, which are mandatory

subjects of bargaining, through unilateral action instead of by mutual agreement. The other difference worth citing is the fact that under the NLRA private sector employees have strike rights. In contrast, RSA 273-A:13 provides that "strikes and other forms of job action by public employees are unlawful." This section of the PELRA ensures the "orderly and uninterrupted operation of government" in this state. Legislative Statement of Policy, 1975 Laws, Ch. 490, eff. 12-21-1975. See also *City of Manchester v. Manchester Firefighters Association,* 120 N.H. 230 (1980). Job actions like a strike can serve as a powerful and effective tool which helps to maintain a level playing field during the negotiation process, and they can temper an employer's inclination to abandon the bargaining table and resort to unilateral action. In short, the fact that strikes are illegal under the PELRA is a crucial difference between the two laws, and we conclude the County's reliance on the NLRA is misplaced in this case.

In accordance with the foregoing, we find that the County has committed an unfair labor practice in violation of RSA 273-A:5, I (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter); (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations); and (g)(to fail to comply with this chapter or any rule adopted under this chapter). All other claims are dismissed.

The County is ordered to immediately cease and desist from providing to bargaining unit employees wages and other benefits which have not been fully negotiated and duly ratified by both parties and to return unit employees to the status quo in effect prior to the County implementation of the disputed changes. Additionally, within 45 days, the parties shall meet and confer for the purpose of reaching agreement about the treatment of the non-negotiated wages and other benefits provided to bargaining unit employees through the date of the County's compliance with this cease and desist order. Within 60 days, the parties shall file a joint report

with this board summarizing the outcome of these discussions. The board is retaining jurisdiction in this case for the purpose of receiving and reviewing the referenced joint report and taking action thereon, including the issuance of further orders, as appropriate and necessary. Finally, the County shall post a copy of this decision in locations and areas where bargaining unit employees work for 30 days.

So ordered.

December 22, 2016

/s/ Andrew Eills
Andrew Eills, Esq., Chair

By unanimous vote of Alternate Chair Andrew Eills, Esq., Board Member Carol M. Granfield, and Board Member Richard J. Laughton, Jr.

Distribution: Meghan Ventrella, Esq.
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