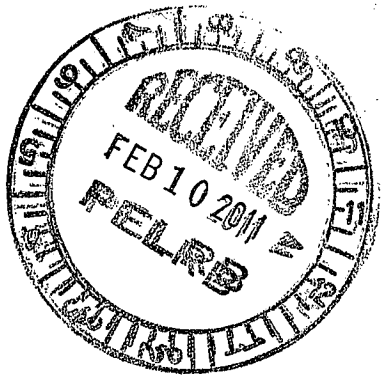
Appeal of PELRB Decision No. 2010-031 withdrawn



THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2010-0338, Appeal of State Employees' Association of New Hampshire, Inc., SEIU Local 1984, the court on February 9, 2011, issued the following order:

The parties have filed a stipulation withdrawing their appeal and cross-appeal. To the extent the parties seek to have the docket reflect the status of the PELRB order, docket markings should be filed with the Public Employee Labor Relations Board.

Appeal and cross-appeal withdrawn.

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

Eileen Fox,
Clerk

Distribution:
New Hampshire Public Employee Labor Relations Board #G-0113-1
John S. Krupski, Esq.
Attorney General
Elizabeth A. Bailey, Esq.
File

Appeal to NH Supreme Court withdrawn on 2-9-2011.
(NH Supreme Court Case No. 2010-0338)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

TOWN OF HAMPTON

PETITIONER

CASE NO. G-0113-1

v.

DECISION NO. 2010-031

STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, INC., SEIU LOCAL 1984

RESPONDENT

APPEARANCES

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

Representing: State Employees Association of New Hampshire, Inc., SEIU Local 1984
John S. Krupski, Esq., Milan, Milner & Krupski, PLLC
Concord, New Hampshire

BACKGROUND

The Town of Hampton (Town) filed a Petition for Declaratory Ruling [sic] with the Public Employee Labor Relations Board (PELRB) on July 21, 2009. The State Employees

Association of New Hampshire, Inc., SEIU Local 1984 (SEA) filing its response, entitled Objection to Petition for Declaratory Judgment and Motion to Dismiss on August 9, 2009. The Town requests the PELRB to declare whether the so called "evergreen clause" appearing in the parties' negotiated collective bargaining agreement (CBA) dated March 11, 2003 to be effective for the period April 1, 2003 through March 31, 2006 is enforceable; and consequently, whether the Town is required to continue to pay members of the bargaining unit periodic "step" increases during the current *status quo* period.

The SEA asserts that the Town's petition fails to meet the PELRB jurisdictional standard expressed in Admin R. Pub 206.1 requiring that the petitioner must set out the specific statute, rule or order at issue and a clear and concise statement of facts giving rise to the petition. The SEA also claims that the Town's petition "is in actuality" an unfair labor practice claim which would require the PELRB to apply a statute of limitations on acts occurring six months prior to the filing of an unfair labor practice complaint. (See RSA 273-A:6,VII). The SEA further asserts that because the Town has paid and continues to pay step increases under the terms of the last CBA negotiated between the parties and urges that the Town should be "stopped" from what would amount to a change in the terms and practice between the parties.

On August 14, 2009, the Town filed a Motion to Stay the PELRB proceedings to which the SEA objected on August 28, 2009. The PELRB denied the request for stay by PELRB Decision No. 2009-0178 and thereafter set the date of hearing for October 15, 2009. On September 29, 2009 the SEA filed a separate Motion for Clarification which the PELRB hereby grants. The parties agreed to submit their respective cases through offers of proof, submission of

exhibits and legal briefs. The parties submitted a brief "Joint Statement of Stipulated Facts" which is incorporated into this decision and order.

On October 15, 2009 the parties and their representatives appeared at the offices of the PELRB in Concord and presented their cases to the board. At the outset, the Town reiterated its request for a stay pending the completion of other court proceedings, by way of a Motion for Review of the hearing officer's denial of the stay. The board upheld the hearing officer decision the effect of which was to reiterate the denial of the stay sought by the Town. The record was left open by the board to allow the parties to submit post-hearing legal briefs. The record was closed on October 29, 2009 upon receipt of a memorandum from each party. The board considered the record and finds as follows:

FINDINGS OF FACT

1. The Town is a "public employer" as that term is defined by RSA 273-A:1, X, and is the public employer of the employees represented by the exclusive representatives named as the respondent in this action.

2. The State Employees' Association of New Hampshire, Inc., SEIU Local 1984, is the exclusive representative for a bargaining unit comprised of certain positions within the Town's Department of Public Works more specifically described in the parties' collective bargaining agreement, Article I. (Joint Exhibit #1)

3. The Town and SEA are parties to a CBA signed on March 11, 2003, effective for the period April 1,2003 through March 31,2006.

4. The parties' CBA, by its terms, expired on March 31, 2006.

5. The parties' CBA contains what is commonly referred to as an "evergreen clause" which states: "19.1 This contract as executed by the parties shall remain in effect from April 1, 2003 to March 31, 2006 or until replaced by a successor contract."

6. The Town of Hampton is a so-called "SB2" municipality so named after a legislative bill number that enabled municipalities to elect to conduct a separate deliberative session as part of its Town Meeting process followed some thirty or so days by a voting or referendum session where a written private polling on specific warrant articles takes place completing the legislative appropriation phase of a municipal budget process.(see RSA 40:13)

7. In March of 2003 the funding for the parties' CBA was referenced in Town Warrant Article #34 the relevant language of which provided that the additional cost for salaries and benefits in that CBA for the year 2003 would be $97,803. The article also contained the following language:

> Note: the above agreement is for the years 2003, 2004, and 2005. The additional amounts necessary to fund the cost items for the following years are:

2004: $88, 770 over the amount for contract year 2003 for salaries and benefits.
2005: $85, 844 over the amount for contract year 2003 and 2004 for salaries and benefits.

8. Another provision of the budgetary process of an SB2 municipality is that in the event the operating budget presented to the Town Meeting for a vote is not approved, the Town budget "defaults" to an amount for the succeeding year equal to the previous year's budget plus any contractual obligations.

9. The parties conducted discussions and formal negotiations for a successor contract following the expiration on March 31, 2006 without success notwithstanding reaching a tentative agreement between negotiators that was not ratified for 2008.

10. The Town did continue to pay scheduled step increases in salaries and benefits as embodied in the parties' expired CBA for the subsequent years of 2007, 2008 and 2009.

11. The parties had a negotiation session for a successor agreement on October 5, 2007 at which time a representative of the bargaining unit informed the Town that members of the bargaining unit scheduled to receive step increases had not been awarded them. The Town's response was that it had made a mistake and the qualifying members were given their step increase and a check representing an increase retroactive to April, 1 2006.

12. The Town paid step increases out of appropriations for the SEA bargaining unit members set aside either in its approved operating budget or from its approved default budget, whichever was the result of the Town Meeting action for the years 2007, 2008 and 2009.

13. The Town operated under a default budget for years 2006, 2007, and 2009.

14. The Town operated under an approved operating budget for the year 2008 and paid the qualifying employees their respective step increases despite the rejection of the Town meeting of the Warrant Article containing a specified increase recommended by the Town administration commensurate with the tentative agreement reached with the SEA for a successor CBA, the cost items of which were contained in the rejected warrant article.

15. The present Town Manager is an experienced municipal administrator and began his service with the Town in March of 2006.

16. The Town's collective bargaining counsel, Mr. James Higgins is an experienced labor contract negotiator.

DECISION AND ORDER

DECISION SUMMARY

The board finds under the specific facts for its consideration here that the "evergreen clause" is not enforceable with respect to the obligation to continue to pay any future employee step increases occurring after the date of this decision. The Town's request to return to the pay levels for each employee in this bargaining unit as of March 31, 2006 is denied.

JURISDICTION

The PELRB has jurisdiction to hear and decide the Town's Petition for Declaratory Ruling pursuant to RSA 541-A and Admin. Rule Pub 206.01.

DISCUSSION

Before addressing the declaratory ruling request directly the board makes the following rulings on SEA's preliminary motions. The Motion for Clarification, dated September 29, 2009 is granted. SEA's Motion to Dismiss the Town's petition, embedded within its response to the original petition, on the grounds of timeliness and failure to reference a specific statute in its pleading are denied. The timeliness argument is based upon its assertion that the Town's filing is in actuality a complaint of unfair labor practice and therefore a limitation on actions should be imposed. The Town's filing is a request for declaratory ruling. The respondent's argument that the pleading does not technically comply with the requirement that requests for declaratory rulings contain a reference to a specific statute fails for reason that the petitioners pleadings do make reference to RSA 273-A:1, IV, RSA 273-A:3, II(b) and otherwise is plead with sufficient clarity to alert the respondent to the issue presented for determination by the board.

Proceeding then to the request itself, the Town's petition requires the board to consider the following question: Is the "evergreen clause" appearing in the parties' expired 2003 to 2006

CBA enforceable as to bargaining unit members' step increases? In most instances "evergreen clauses" have not been enforceable as to items like an employee's scheduled step increase since *Appeal of Sanborn Regional School Board*, 133 N.H. 520 (1990) which stated that all cost items of a CBA must be approved by the legislative body. The court later found that the doctrine of status quo does not require payment of salary increases based on additional years of experience ("step increases") after a CBA expires. See *Appeal of Milton School District*, 137 N.H. 240 (1993).

In the Town of Hampton that legislative body consists of the Town's voters acting in the two stage Town Meeting procedure which the Town elected under the state's so-called "SB2" enabling law. Once electing to be an "SB2" municipality, the Town's legislative procedure is to first conduct a deliberative session to consider budget items and fashion the contents of most warrant articles and then approximately thirty days later conduct a separate voting or referendum session where a written private polling on specific warrant articles takes place, completing the legislative appropriation phase of the Town's budget process. Without a favorable vote of the electorate on a warrant article covering the costs of a collective bargaining agreement, there is no approval of expenditures contained within that warrant article.

Since the *Sanborn* and *Milton* cases there is still some question as to the extent of the public employer's obligation to explain the cost items contained in collective bargaining agreement. The court provided some help in refining *Sanborn* decision in the *Appeal of Alton School* District, 140 N.H. 303 (1995). The *Alton* case stands, among other things, for the proposition that ratification or approval by the legislative body of cost items within a collective bargaining agreement only occurs if the legislative body, had "full knowledge" of the cost item

terms of the CBA. In that case "full knowledge" meant the legislative body must know of the cost items' financial implications at the time it approved them.

We believe that responsibility to determine whether the requisite knowledge existed in this matter at the time the voters of Hampton voted at Town Meeting is a question of fact for us to determine. On review of the evidence presented, we find insufficient evidence upon which to find that the voters could be charged with the requisite degree of knowledge as previously held by the court.

Having found as we have, the parties' "evergreen clause" is not enforceable unless an exception to the present law can be established by SEA. We first consider the issue raised by SEA that during the *status quo* period extending from April 1, 2006 to the present time, the state's legislature passed a new law that resulted in a change to RSA 273-A:12,VII. This change provided that for all CBA's entered into after July 15, 2008,

> ...if [an] impasse is not resolved at the time of the expiration of the parties' agreement, the terms of the collective bargaining agreement shall continue in full force and effect, including but not limited to the continuation of any pay plan included in the agreement,

SEA argues that since the expiration of the CBA in March of 2006 the doctrine of *status quo* combined with the fact that the Town has been paying step increases in each of the subsequent years since then out of approved operating or default budgets operates to create a new CBA each year. The parties' evergreen clause states at Article 19.1 that ,"[t]his contract as executed by the parties shall remain in effect from April 1, 2003 to March 31, 2006 or until replaced by a successor contract." Under the court's existing holdings regarding *status quo* doctrine we do not believe that this language allows us to find that a series of one year sequential CBA's between the parties was created by action of the town for each of the years 2006 through 2009 whether

operating under an approved budget or a default budget. The parties were operating under the doctrine of "*status quo*" following the expiration of the CBA in March of 2006. "*Status quo*" generally means that the permissible terms and conditions existing between the parties continue and not that the expiring CBA would renew each year thereafter. Therefore we do not find that there has ever been a contract entered into after July 15, 2008, the effective date of the new statute, and the SEA argument that the new provision of RSA 273-A:12, VII therefore does not provide an exception to the unenforceability of "evergreen clauses."

We do find that a past practice arose between the parties. A past practice has special significance in labor law. A past practice embodies the elements of "clarity, consistency, and acceptability." (Elkouri & Elkouri, How Arbitration Works, Sixth edition, p.608). It is also characterized as being binding on both parties if the practice is "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." (Id.) There is sufficient evidence that the Town's attention was drawn to the fact that some employees had not received their step increases between April 2006 and October 5, 2006 when the union representative told the Town Manager and Town negotiator during a negotiations session for a successor CBA. Upon determining this to be true, the Town granted the step increases to those employees and made their payments retroactive to April 1, 2006. The Town continued to pay step increases to all employees when they reached the required time in service in each of the years 2006, 2007, 2008 and 2009. Both parties were well aware that the steps were being paid throughout this period. Unfortunately for the SEA we cannot find that the existing body of law we are charged to apply allows the type and nature of this past practice to continue to be treated as enforceable and essentially "trump"

what the court has said to date regarding the non-enforceability of evergreen clauses such as the clause we encounter in this case.

We have been frustrated for some time with cases such as this that reveal to reasonable fact-finders what can only be characterized in this instance, at best, as ineptness on the part of public employers. The Town and its several agents including experienced town managers, finance personnel, and labor negotiators provide facts in their testimony and through exhibits that present us with a situation where management creates a labor relations debacle. The Town claims that, collectively, management was ignorant of thousands of dollars being expended over a period in excess of 36 months. Further, this public employer clearly has shirked its responsibility to make a legitimate effort to inform the voters over the years of what has been its practice. Indeed, it exploits the benefit of the doubt first provided to public employers by the court in the *Sanborn* and *Milton* cases that negotiations with duly certified employee representatives should take place on a level field. There can be no level field in labor negotiations when public employers with the power to draft the language of warrant articles and the responsibility to inform town meeting voters of the estimated costs of future years of collective bargaining agreements to which their agents have previously agreed can neglect their duty and then benefit at the expense of individual employees who have foresworn not to strike nor withhold their service and talent.

Nonetheless we are restrained to declare the law as it is; and we do by finding that the Town is no longer *required* to pay step increases after March 31, 2010 lacking the approval of a successor agreement providing the extension of that benefit into the future. However, we deny the full relief requested by the Town to return to wage levels existing on April 1, 2006. Any and all other requests of the parties for relief are denied.

So Ordered.

Signed this 11th day of February, 2010.

JACK BUCKLEY
CHAIRMAN

By unanimous vote. Chairman Jack Buckley presiding. Members James M. O'Mara, Jr., and Kevin E. Cash present and voting.

Distribution:
Elizabeth A. Bailey, Esq.
John S. Krupski, Esq.

Appeal to NH Supreme Court withdrawn on 2-9-2011. (NH Supreme Court Case No. 2010-0338)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

TOWN OF HAMPTON

v.

CASE NO. G-0113-1
DECISION NO. 2010-070

STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, INC., SEIU LOCAL 1984

Order on Pending Motions

Both parties have moved for rehearing of PELRB Decision No. 2010-031 under Pub 205.02. The Town has also moved for clarification as to a date reference which appears at the end of the decision. The board has reviewed the parties' respective filings and denies the Town's motion for rehearing, denies the Town's motion for clarification, and denies the SEA's motion for rehearing.

So Ordered.

April 20, 2010

Jack Buckley, Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members James M. O'Mara, Jr., and Kevin E. Cash present and voting.

Distribution:
Elizabeth A. Bailey, Esq.
John S. Krupski, Esq.