State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, COUNCIL 93, LOCAL 3657	:	
Complainant	:	CASE NO. A-0550:2
v.	:	DECISION NO. 92-155
TOWN OF LITCHFIELD	:	
Respondent	:	

APPEARANCES

Representing AFSCME Council 93:

James C. Anderson, Staff Representative

Representing Town of Litchfield:

Gary W. Wulf, Labor Relations Consultant

Also appearing:

Ralph Boehm, Town of Litchfield
Lance Myrder, Litchfield Police Department

BACKGROUND

The American Federation of State, County and Municipal Employees (AFSCME), Local 3657, Council 93 (Union) on behalf of employees of the Litchfield Police Department filed unfair labor practice (ULP) charges against the Town of Litchfield (Town) on June 11, 1992 alleging violations of RSA 273-A:5 I (a), (c), (g), (h) and (i). The Town filed its answer on June 26, 1992. This matter was scheduled for hearing before the PELRB on September 29, 1992 and was reassigned to the undersigned Hearing Officer on that date when no quorum of the PELRB was available.

FINDINGS OF FACT

1. The Town of Litchfield is a public employer of employees in its Police Department as defined by

RSA 273-A:1 X.

2. AFSCME, Local 3657 is the duly certified bargaining agent of employees of the Litchfield Police Department and has been such since November 20, 1990. Since that time the parties have yet to conclude negotiations for their first collective bargaining agreement (CBA).

3. Prior to the Union's certification as bargaining agent, employees whose jobs are now in the bargaining unit were covered by a ten-step wage scale covering fourteen labor grades which were not exclusive to bargaining unit job titles.

4. Horizontal progression on the wage scale was not considered to be automatic. Item III (c) of the Town's Personnel Policies provided that "step time periods and the salary schedule are to be used as guidelines only" and that no employee would be moved from step to step "without the approval of both the department head and the Selectmen."

5. Between the date of certification of the union on November 20, 1990 and April 27, 1992, the Selectmen approved step increases for four (4) bargaining unit members (Myrdek and Harding-Reed, 12/91; Dalton, 3/3/92; and Houle, 3/23/92) during the course of negotiations and upon the recommendation of the department head, Chief David Roberts. During this same period of time step increases were also approved for other Town employees not part of the Local 3657's bargaining unit.

6. On April 20, 1992 Chief Roberts recommended a step increase for David Donnelly. Before the Selectmen met to consider this recommendation, one or more of them received a copy of a New Hampshire Municipal Association publication ("Town and City Counsel," No. 5, April 1992) which reviewed the PELRB's Decision in AFSCME, Local 3657 v. Town of Hudson (Decision No. 91-81, October 4, 1991) which caused them to conclude that step increases were not part of the status quo which had to be maintained during the negotiations process even though salaries must be maintained "at the levels they were under an expired collective bargaining agreement." Thereafter, the Selectmen denied the recommended increase

for Donnelly at their meeting on April 27, 1992.

7. Donnelly's being denied a step increase was caused by an interpretation by the Selectmen of a PELRB case (Hudson, Decision 91-81, October 4, 1991) and not by a lack of merit or negative recommendation.

8. Step increases under the wage scale have been granted to non-affiliated non-union employees since April 27, 1992 and would still be available to unit employees had they not unionized in 1990 according to testimony from the Chairman of the Board of Selectmen.

9. One of the provisions of the Town's counter proposal of March 26, 1992 was to freeze steps on the wage schedule for 1992-93.

10. In the course of negotiations, a mediator was requested on April 10, 1992 and appointed on April 16, 1992, some eleven days prior to the Selectmen's action of April 27, 1992 regarding Donnelly. Mediation was not successful in resolving the parties' differences. Fact finding is scheduled for the first week in October.

DECISION AND ORDER

The facts of this case do not present a Hudson situation. There was no expired contract. There was no grievance filed nor an award of an arbitrator. Wage steps were not an automatic progression based on the passage of time. Merit increases have been available to non-affiliated employees during the period in question and, according to testimony (to be commended for its candor), would have been available to employees like Donnelly had they not organized. The merit raises were part of a set of personnel policies which have not changed between the time this particular bargaining unit organized and the date of hearing, i.e., they have not been eliminated or "frozen" by the expiration of a CBA.

The merit steps in this case were discretionary. They required both the recommendation of the department head and the approval of the selectmen. Unlike Hudson, maintaining the merit-based step increases is part of maintaining the status quo because: (1) they are not automatic based only on longevity or experience, (2) they are part of an on-going and unmodified personnel policy covering all town employees who have performed "meritoriously," and (3) to deny the merit based increases because of organizing (some seventeen months after certification) while continuing them for unorganized employees would be contrary to the "Statement of Policy" found at RSA 273-A:1 and would discourage the formation and administration of an employee organization under RSA 273-A:5 I (a)

and (b).

Unlike Durham/UNH Firefighters (Decision No. 87-63, November 5, 1987), there was no notice to the bargaining agent immediately upon certification that all changes in wages, hours and conditions of employment would be held in abeyance until the negotiations process ran its course. The Town inappropriately relies on Durham/UNH Firefighters for the proposition that the "selectmen were within their rights to refrain from granting step increases at any time after certification."

This case is further complicated by the timing of the decision to stop merit increases some seventeen months after certification and after many months of non-productive negotiations. Numerous such increases had been given to unit and non-unit personnel in the interim. On March 26, 1992 the Town proposed freezing step increases for 1992-93. On April 27, 1992 the Town stopped merit based increases based upon an inaccurate interpretation of Hudson. To sanction that action, based on its timing, would be equivalent to permitting the Town to achieve by unilateral action that which it has been unable to achieve at the bargaining table.

The type of increases under consideration in this case are not simple step increases based on longevity. They are not a salary enhancement based purely on duration of employment. Instead, they are incentive-driven increases for which employees are to be rewarded for meritorious performance. It would make little sense, indeed, to say that the employer is free to eliminate the incentive during the course of negotiations and that the employees are free to respond by eliminating their efforts to perform meritoriously. The PELRB examined incentive-driven merit pay in Dover Police Association (Decision No. 92-120, August 31, 1992), albeit a contract case, and required continuance of the benefit notwithstanding the influence of limitations purportedly imposed by external statutory authority, namely, the Americans with Disabilities Act (ADA). The same result should apply in this case; the benefit must be maintained at status quo notwithstanding outside or unilateral decisions until modified through the collective bargaining process.

The finding is:

1. The Town violated RSA 273-A:5 I (a) (e) and (i) by the timing and manner in which it stopped merit-based compensation on or about April 27, 1992.

2. The Town shall forthwith CEASE and DESIST from failing to considering employees in the bargaining unit for merit-based step increases under its personnel policies until these policies

shall have been modified through the conclusion of the collective bargaining process.

So Ordered.

Signed this 5th day of November, 1992.

PARKER DENACO
Hearing Officer