



State of New Hampshire  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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AFSCME Local 3657	*	
Merrimack Police and Fire Officers	*	
	*	
Complainant	*	
	*	Case No: G-0002-1
v.	*	
	*	Decision No. 2004-190
Town of Merrimack	*	
	*	
Respondent	*	

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APPEARANCES

For AFSCME Local 3657 Merrimack Police and Fire Officers:  
Katherine McClure, Associate General Counsel, AFSCME Council 93

For the Town of Merrimack:  
Mark T. Broth, Esq., Devine Millimet & Branch, PA

BACKGROUND

AFSCME Council 93, Local 3657, Merrimack Police & Fire Officers (hereinafter "Union") filed an improper labor practice charge on June 10, 2004 alleging that the Town of Merrimack (hereinafter "Town") committed an unfair labor practice, in violation of RSA 273-A:5 I (a), (b), (c), (e), (g), (h) & (i), when it rejected a tentative contract settlement reached between the parties. More specifically, the Union states that on or about June 18, 2003, the parties commenced negotiations for a successor agreement and executed negotiation ground rules. Thereafter, as indicated by the Union, the parties participated in numerous negotiation sessions and on November 20, 2003 reached a tentative agreement. However, on December 22, 2003, the Union alleges that it was notified by the Town that the tentative agreement had been rejected by the Board of Selectmen. As a result of such conduct, the Union alleges that the Town has knowingly and willfully committed an unfair labor practice by bargaining in bad faith,

and specifically by unanimously rejecting its own proposal that had been tentatively agreed to at the bargaining table. As remedies, the Union requests that the PELRB, among other things, to sustain the instant complaint, to order the Town to bargain in good faith, and to order the Town to take all necessary steps to ensure that the parties' tentative agreement is presented at the next town meeting.

The Town filed its answer denying the Union's charge on June 25, 2004. Although the Town does not generally dispute the chronology of events as described in the Union's charge, it specifically denies each and every allegation made by the Union that it has violated RSA 273-A. By way of further answer, the Town submits that the negotiation ground rules conditioned approval of any tentative agreement on ratification by the Board of Selectmen and ratification of any cost items by Town Meeting; that the Board of Selectmen exercised its prerogative to reject the tentative agreement; and that following such rejection, the Union had the option of either resuming negotiations or declaring impasse and availing itself of the dispute resolution mechanisms set forth in RSA 273-A:12. It states a tentative agreement negotiated between the parties' respective bargaining teams not ratified by either the Union or the Board of Selectmen is simply no evidence that the negotiators did not negotiate in good faith. Accordingly, the Town requests that the instant improper practice charge be dismissed.

A pre-hearing conference was conducted at the PELRB offices on July 14, 2004 and both parties were represented by counsel at that time. During the course of the pre-hearing conference, the Union withdrew that portion of its complaint that referred to an alleged violation of RSA 273-A:5 I (c) ("To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose or encouraging or discouraging membership in any employee organization"). The Town also raised the argument that the relief being sought by the Union is beyond the jurisdiction and authority of the PELRB.

The evidentiary hearing was convened on October 21, 2004 at the offices of the Public Employee Labor Relations Board in Concord. At that hearing both parties were represented, provided the opportunity to present witnesses and offer exhibits and had the opportunity to cross-examine witnesses. The Board then reviewed all filings submitted by the parties and considered all relevant evidence, including the parties' "Joint Stipulated Facts" as submitted and incorporated below as Findings of Fact #1-12. The Board then closed the record following arguments of counsel and determined the following:

#### FINDINGS OF FACT

1. AFSCME Local 3657 ("the Union") is the certified representative of the Merrimack Police and Fire Officers under Certification Case No. A-0575 issued by the Public Employee Labor Relations Board.
2. The Town of Merrimack is a public employer within the meaning of RSA 273-A:1:X.

3. The Town of Merrimack and the Union were parties to a Collective Bargaining Agreement (CBA) covering the period of July 1, 2001 through June 30, 2004.
4. The Town of Merrimack has adopted the SB-2 form of Town meeting.
5. On March 23, 2003, the Union notified the Town of it's intent to negotiate a successor to the CBA which was to expire on June 30, 2004.
6. On June 18, 2003, the Town and the Union held their initial bargaining session. The parties established ground rules for negotiations.
7. During negotiations, both parties exchanged proposals and counterproposals in accordance with the established ground rules dated as follows:
 

<u>Union</u>	<u>Town</u>
July 14, 2003	August 20, 2003
August 4, 2003	October 7, 2003
October 20, 2003	October 23, 2003
November 20, 2003 1 <sup>st</sup>	
November 20, 2003 2 <sup>nd</sup>	
8. During the negotiation process, the Town's Chief Negotiator, William Wardwell, advised he would be meeting with the Board of Selectmen relative to these negotiations.
9. During the negotiation session held on October 23, 2003 the Town's representative, William Wardwell, presented the Union with two wage proposals.
10. On November 20, 2003, the parties reached a tentative agreement. The Town established a "Change Summary" outlining the tentative agreement between the parties. (See Joint Exhibit # 8)
11. On December 22, 2003, the Town notified the Union, via telephone and e-mail, that during the public meeting held December 18, 2003, the Town's Board of Selectmen had rejected the tentative agreement. The Board of Selectmen's vote to reject the tentative agreement was unanimous.
12. On February 12, 2004, the Union voted to accept the tentative agreement. On February 12, 2004, the Union gave notice to the Town, via telephone to the Chief Negotiator, William Wardwell, that Local 3657 had voted to accept the tentative agreement.
13. The parties executed "Agreed Ground Rules for Contract Negotiations" on June 18, 2003. Paragraph # 6 of that document states that "Each side's negotiating team has authority to reach tentative agreements, but any contract to be final must, from the Town's standpoint, be approved by the Board of Selectmen and

adopted, as to cost items, at a Town meeting, and from AFSCME's standpoint, be ratified by AFSCME Local 3657 membership." (See Joint Exhibit # 4).

14. The parties' Ground Rules also provide in Paragraph #7 that " It is understood that in the event that no agreement is reached and mediation/factfinding becomes necessary, neither party shall be bound or limited by their 'T.A.' to any item." (Joint Exhibit # 4).
15. The parties' Ground Rules also provide in Paragraph # 11, in relevant part, that "The parties agree that exclusive of counter proposals and modifications/revisions to original proposals, all original proposals by both parties will be submitted no later than the third negotiating session". (Joint Exhibit #4).
16. On July 24, 2003 the Town's Board of Selectmen conducted a non-public meeting at which it voted by a 3-2 vote to provide wage increase parameters to its collective bargaining negotiator of a "minimum of 2% and a maximum of 4.5%" (Minutes for the Board of Selectmen's Non-Public Meeting-Joint Exhibit #11).
17. On October 16, 2003 the Town's Board of Selectmen conducted a non-public meeting at which it voted unanimously to direct its collective bargaining negotiator to "negotiate for a 3% raise per year for three years with no money-based evaluation system and with no option for reopening." Minutes for the Board of Selectmen's Non-Public Meeting-Joint Exhibit #12).
18. Following the directive of the Board of Selectmen, the negotiator offered the union an alternate wage option of a 3% wage increase for each of the three years of the proposed contract. (Joint Exhibit #6).
19. The parties executed a "tentative agreement" on November 20, 2003 that incorporated the 3% wage increase and eliminated the performance bonus among other provisions, including but not limited to the absence of an option for reopening negotiations during the term of the contract and provision affecting the medical insurance provision of prescription benefits.
20. The Board of Selectmen rejected the tentative agreement on December 18, 2003 and informed the union of that action by e-mail of their chief negotiator.
21. The Town's negotiator credibly testified that he was surprised by the action of the Board of Selectmen in rejecting the tentative agreement that he had negotiated for them at their direction.
22. The parties' ground rules do not specifically detail requirements upon either party regarding continued negotiations and proposal exchanges, following rejection by a party of tentatively agreed contract terms negotiated under these ground rules, nor do they limit statutory rights of either party to seek mediation/fact-finding.

23. Following the Board's rejection of the tentatively agreed contract terms, neither party declared impasse nor suggested to the other party that it intended to request mediation/fact-finding at that time. At the time of the hearing the parties had not undertaken additional negotiations.

### ORDER

### JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A:1 *et seq.*) provides, that the PELRB has sole original jurisdiction to adjudicate claims brought against a public employer pursuant to RSA 273-A:5, I, by the exclusive representative of a certified bargaining unit comprised of individuals employed by that "public employer" as defined in RSA 273-A:1, I. (See RSA 273-A:6).

### DECISION SUMMARY

The parties undertook negotiations of a successor collective bargaining agreement pursuant to mutually acceptable "ground rules" constituting a valid contract between the parties. The ground rules expressly reserved to the Board of Selectmen and the Union membership the right to reject the product tentatively agreed to by the respective negotiating teams. Following the tentative agreement of the negotiating teams and presentation of the tentative agreement to the Board of Selectmen, the Board of Selectmen rejected its terms. We find no breach of the good faith obligation to bargain on the part of the Town's negotiator either during negotiations or in the presentation of the tentative agreement for ratification. While the Board of Selectmen were acting within their valid reservation of rights to approve the tentative agreement reached by the respective negotiating team when they voted to reject the tentative agreement, the conduct of the members of the Board of Selectmen came perilously close to constituting bad faith bargaining. This is particularly so in light of the recent similar case of *International Brotherhood of Police Officers, Local 320 v. Town of Merrimack*, Case No. 0723-8, decided 11/22/04. We are concerned by the actions of the Board of Selectmen in setting parameters for negotiating by its chief negotiator and soliciting the union's acceptance of a wage position to only later disavow its own wage offer as those actions affect the degree of credibility and strength of trust that between parties is crucial to all collective bargaining negotiations, this day and those to follow. The additional costs in time, effort and money necessary to rebuild credibility and trust squandered at the table will in the end be bourn by the citizens through their tax burden. However, we do not find that these events alone, under the specific circumstances of this case, conclusively establish a violation of the statute. Since we do not find that a violation of RSA 273-A occurred, the Union's complaint of the commission of an improper labor practice is denied.

## DISCUSSION

It is a common, if not a preferred, practice between negotiators representing public employers and exclusive bargaining representatives to establish, in writing, so-called "ground rules" to which they will subsequently adhere during their negotiation of collective bargaining agreements. Indeed such ground rules constitute an agreement, in and of itself, between the parties. In form it is dated and executed and its content expresses, in part, standards of conduct or obligations of the parties related to their negotiations. Adherence to such mutual ground rules reflects, again in part, the statutory obligation the parties have to negotiate in good faith pursuant to RSA 273-A: 5(e). Beyond that statutory obligation, there is an obligation assigned to all parties to contracts to act in good faith in adhering to the terms of their agreements under our system of jurisprudence.

In this case, the parties executed ground rules on June 18, 2003 that expressly reserved the approval of any tentative agreement achieved by their respective negotiators. (See Finding of Fact # 13). After negotiations had been initiated and were continuing between the parties, on October 16, 2003 the Board of Selectmen directed its chief negotiator to make a specific wage offer to the union, which he subsequently did and the union accepted that offer. At the negotiations table, on or about November 20, 2003, a tentative agreement was reached for a successor collective bargaining agreement. Nevertheless, when the tentative agreement was presented to the Board of Selectmen, they unanimously rejected it on December 18, 2003 and informed the union of that action.

It appears to us that the Board of Selectmen changed their position subsequent to their directions to their negotiator on October 16, 2003. There is no evidence that they were, at that time, planning to reject a tentative agreement containing terms they, themselves, had introduced into the negotiations. Clearly that would have constituted bad faith. While there is evidence that the Chairman of the Board of Selectmen expressed his own motivation for rejecting the tentative agreement two months later as relating to insurance costs, there is no evidence that he was aware of those costs at the time he voted to direct the negotiator to obtain a tentative agreement with the terms that were contained in that November 20, 2003 document. Additionally, there is no evidence before us as to the motivation of the other three members of the Board of Selectmen who voted to reject the tentative agreement.

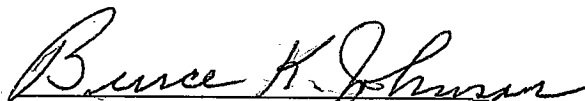
No doubt all parties have learned a great deal of the character of the others involved in this process as a result of the actions that have brought the parties to this point. It is our experience that certain expectations arise through long negotiations on both sides of the table. And, while it is the human condition that such expectancies will reach fruition, they remain only expectancies under language contained in the "ground rules" controlling these negotiations that expressly subjects a tentative agreement to approval of the Board of Selectmen. The effect of their actions goes far beyond the mere

surprise felt by their own chief negotiator. It damages his credibility with the union in future discussions and significantly damages the ability of others in the process to trust the decision makers.

If it could have been proven that more probably than not the Board of Selectmen planned to move the negotiation parameters or that the chief negotiator was sent, unwittingly, to negotiate within parameters that the Board knew it would not approve, then our finding would be different. Further, to take from this case a belief that under any set of circumstances, in spite of the approval reservation in its ground rules, the Board of Selectmen could reject a tentative agreement arrived at through negotiations and be immune from a successful complaint of a lack of good faith would be an error. At some point actions by decision makers away from the bargaining table contribute to "surface bargaining". This is a type of bargaining that benefits no one and does constitute a violation of the statute. While we are concerned by the actions of the Board of Selectmen because they do not further the goals of collective bargaining between a public employer and its employees, we cannot conclude from the evidence before us that they amount, at this time, to a violation of the provisions RSA 273-A:5. Therefore, we hereby DENY the union's complaint of unfair labor practice against the Town.

So Ordered.

Signed this 16th day of December, 2004.

  
Bruce Johnson, Alternate Chairman

By unanimous vote. Alternate Chairman Bruce Johnson presiding with Board Members E. Vincent Hall and James O'Mara also voting.

Distribution:

Katherine McClure, Associate General Counsel, AFSCME Local 3657

Mark T. Broth, Esquire