



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**TEAMSTERS LOCAL 633 OF
NEW HAMPSHIRE**

COMPLAINANT

v.

TOWN OF NEWMARKET

RESPONDENT

CASE NO. G-0063-3

DECISION NO. 2009-040

APPEARANCES

Representing: Teamsters Local 633 of New Hampshire
Richard J. Laughton, Business Agent

Representing: Town of Newmarket
J. Joseph McKittrick, McKittrick Law Offices, North Hampton, New Hampshire

BACKGROUND

Teamsters Local 633 of New Hampshire (hereinafter the "Union") filed an unfair labor practice complaint on September 11, 2008 alleging that the Town of Newmarket has implemented a policy and benefit program for non-union employees while withholding those same benefits from certain employees within the public works department who had provided notice of their intent to organize. However at the time of the benefit dispersal they had not done so. The Union contends that the Town therefore violated the non discriminatory provisions of RSA 273-A:5, I (c). As relief, the Union requests that the PELRB order the Town to cease and

desist the discriminatory practice and order the Town to provide the disputed benefits to all public works employees.

The Town filed its answer on September 16, 2008 denying the charges, and asserting that the disputed benefits were properly withheld from bargaining unit employees in order to maintain the *status quo* relationship between the parties pending contract negotiations. The Town states that it has not altered the terms of the personnel policy applicable to bargaining unit employees at the time the underlying election petition was filed on February 6, 2008 and that it properly adopted a new personnel policy on May 1, 2008 applicable to all non-bargaining unit employees. The Town asserts that any change in terms and conditions of employment for bargaining unit members must be obtained through negotiations and therefore the PELRB should dismiss the complaint.

A pre-hearing conference was conducted on December 15, 2008 followed by an evidentiary hearing conducted on February 10, 2009, having been continued from an initially scheduled January 13, 2009 hearing date. Both parties were present at the evidentiary hearing and were represented. Each was provided the opportunity to present witnesses and exhibits and had the opportunity to cross-examine witnesses. Offers of proof were presented by each of the parties. Each party made a brief closing statement in lieu of the submission of a post-hearing legal memorandum. At the conclusion of the hearing the members of the board considered all evidence admitted, assigned appropriate weight to each, weighed the credibility of any presenting witnesses and made the following determinations of fact:

FINDINGS OF FACT

1. The Teamsters, Local 633, Newmarket Police Association (hereinafter the "Union") is the exclusive representative, pursuant to RSA 273-A:8, for the bargaining unit comprised of certain Department of Public Works employees.

2. The Town of Newmarket (hereinafter the "Town") is a public employer within the meaning of RSA 273-A:1 X.

3. The Union filed a Petition for Certification on February 6, 2008 and, after being successful in an election conducted on August 7, 2008 the Union was certified on August 15, 2008 as the exclusive representative for the employees at issue in this action.

4. At the time of the filing of the Petition for Certification, the employees were subject to the Town's Personnel Rules and Regulations first adopted on July 7, 1993 and last revised on April 6, 1994.

5. The Teamsters' representative, on behalf of the employees desiring to organize, sent a letter to the Town Administrator expressing the intent of this group to organize. The letter was dated June, 30, 2008.

6. In and about December of 2007, the Town Administrator was aware that certain employees of the DPW intended to attempt to organize and were in the process of forming a bargaining unit.

7. At all times relevant to this matter the Town has employed the Town Manager form of Government and has adopted the SB-2 form of Town Meeting.

8. The budget process for the Town of Newmarket relevant to this complaint began in or about October 2007 with the department heads preparing their departmental budget with the Town Administrator who then completed a comprehensive budget that he presented to the Town Council on or about December 15, 2007. The Town Council then undertook its budget formulation that resulted in a budget document presented to the Town's Budget Committee in February 2008. The Budget Committee deliberated over its content and formulated its own budget document for presentation of the official budget to the Town Meeting deliberation session in April and a vote of the Town Meeting which occurred on May 13, 2008.

9. On February 6, 2008 the Teamsters, on behalf of the public works employees at issue in this complaint filed a Petition for Certification to be named the exclusive representative for the bargaining unit with the PELRB.

10. The budget for the Town that was approved on May 13, 2008 contained sufficient funds to provide for some level of increase in wages for non-unionized town employees.

11. On or about May 21, 2008 the Town Council approved a pay policy for the benefit of "non-union" personnel by granting a 2% cost of living adjustment (COLA) and merit increases of up to 3% at the discretion of the Town Administrator, and excluded these petitioning employees as notice of their intent to organize had been provided previously to the Town.

12. Following several procedures resulting in a modification of the original petition, requested continuances and final resolution of the contested positions for inclusion in the union, an election was conducted on August 6, 2008 at which the a majority voted to elect Local 633 the exclusive bargaining representative and the bargaining unit was formally certified on August 15, 2008.

13. Negotiations to achieve a first collectively bargained agreement between this bargaining unit and the Town were initiated in August and have continued to the date of this hearing without success.

14. While the budget approved at the Town Meeting included funds sufficient to provide COLA increases and merit increases to the employees at issue, the Town made the decision not to distribute any increases to the potential members of the bargaining unit, although it did so to other non-union employees, with the exception of a single payment to one of the subject employees that both parties admit was in error.

15. In or about June 2008 the Town Administrator conducted an educational session for all employees of the Town, including the previously organized police department employees, to discuss the new pay and benefits plan that had been put into place for “non-unionized” employees and if the public works employees became unionized they would remain covered by the previously adopted 1994 plan.

16. After that meeting, confusion continued within, at least, the public works employees as to what benefits they were to receive since they were not a union at that time and that there were sufficient funds in the approved budget to provide new health insurance coverage and wage increases.

17. One member of the proposed public works bargaining unit approached the Town Manager to question the Town’s position in not distributing increases to the employees of the proposed bargaining unit. The Town Administrator referred the employee to Don Pavnell, the Town’s finance director.

18. On or about August 26, 2008 Todd Gianotti, one of the employees at issue here, requested health insurance coverage as included in the policy adopted by the Town on or about May 21, 2008 and was informed that his request was denied because the terms of the new health insurance coverage were not being extended to those who were included in the proposed public works bargaining unit and the policy existing prior to May 21, 2008 did not include the coverage he was seeking.

19. The official Town budget that was approved at Town Meeting had sufficient funds available to pay increases to the petitioning public works employees and to extend the health insurance coverage provided under the new policy to them without any additional action by the Town Meeting and the Town Council chose not to do so.

20. The basis for a lot of the discussion of the Town Council to deny any distribution of budgeted funds to the petitioning public works employees was that they were moving towards a union.

21. Under the existing form of government utilized in the Town of Newmarket, the Town Administrator has discretion to expend funds for wages and benefits to non-unionized employees appropriated by a general warrant and chose not to do so for the petitioning public works employees. Funds appropriated by a specific or "special" warrant article may limit the Town Administrator's discretion.

DECISION AND ORDER

DECISION SUMMARY

The filing of a Petition for Certification by a proposed bargaining unit puts the Town on notice that its actions during the formation and election of an exclusive bargaining unit may classify as interfering with that formation. The actions complained of here are actions within the discretion of the Town Administrator and, as appropriate, of the Town Council through their authority to adopt Personnel Plans notwithstanding the formation stage of this bargaining unit. The withholding of wage increases within the Town Administrator's sole discretion cannot be said to have interfered with the formation of this, now existing, bargaining unit and its successfully elected exclusive bargaining representative to the extent that it violates the provisions of RSA 273-A. As to the issue of health insurance coverage for a woman cohabitating with a member of the bargaining unit, we defer to other authorities or agencies that regulate discriminatory or insurance practices. The complaint is dismissed.

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate claims between the duly elected "exclusive representative" of a certified bargaining unit comprised of public employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I).

In this case, the Union has complained that actions of the Town constitute violations of RSA 273-A:5, I (c) discriminating against employees to discourage membership in the employee organization. By reason of the alleged actions related to the withholding of pay increases to the members of this bargaining unit we accept jurisdiction over the Union's complaint. As to the legality of whether or not other discriminatory violations have occurred in prescribing eligibility for health insurance coverage based upon marital or parental status that are governed by other regulatory agencies, we decline to rule under the facts presented here.

DISCUSSION

This case requires our examination of certain actions undertaken by the Town related to its alleged withholding of cost of living increases and merit increases to the eleven employees who became members of a bargaining unit represented by Teamsters Local 633 as of August 15, 2008. An issue of withholding certain medical insurance benefit coverage to a cohabitant and child of one of its members was put before us, but we decline to consider this issue believing that other regulatory or insurance authorities are imbued with more proper jurisdiction.

Once again (see *Teamsters Local 633 v. Town of Newmarket*, PELRB Decision 2005-050) the budget formulation process of Newmarket forms the backdrop for events relevant to our decision. The budget process for the Town of Newmarket applied to this complaint began in or about October 2007 with the department heads preparing their departmental budget with the Town Administrator who then completed a comprehensive budget that he presented to the Town Council on or about December 15, 2007. The Town Council then undertook its budget formulation that resulted in a budget document presented to the Town's Budget Committee in February 2008. The Budget Committee deliberated over its content and formulated its own

budget document for presentation of the official budget to the Town Meeting deliberation session in April and a vote of the Town Meeting which occurred on May 13, 2008. If adopted by the Town Meeting, the budget would take effect for the fiscal year July 1, 2008 to June 30, 2009

There is no dispute that the budget adopted on May 13, 2008 contained sufficient funds to provide a cost of living increase to non-union town employees and a merit increase up to 3% for presumably well deserving individuals who also were non-union employees. We believe that these funds were contained in a general budget warrant not a special warrant as we received no evidence of the existence of such a special warrant. While the funds intended for such purposes may have been contained in a single line item, there likewise is no evidence that such placement would limit the discretion of the Town Administrator to expend or not to expend these funds under the form of government in place in Newmarket.

There is no dispute that the employees at issue in these proceedings provided the Town with official notice of their intent to organize a bargaining unit by forwarding a copy of their petition to do just that which had been filed with the PELRB dated February 6, 2008. This is a significant event because it is convincing evidence that the Town knew at least as of that date that union organization activity was underway. The filing also serves to initiate that period of time leading up to an election when heightened scrutiny attaches to management's reaction to the notice of intent to form a union, particularly as it relates to existing terms and conditions of work in existence between the parties at that time. This does not mean that a term or condition of work cannot be changed, but rather that a change implemented over the objection of the petitioning employees creates exposure for management to a complaint of improper labor practice. We do not believe that the Town Administrator was prohibited from granting the cost of living increase

or allowing an expansion of health insurance coverage available to these employees because we do not believe it would have been contested. The reverse, i.e. not doing so obviously has created this instant dispute. But the fact is that the Town Administrator has decided not to use funds at his disposal to grant the cost of living increase to these employees at least prior to the completion of negotiations resulting in a first collective bargaining agreement between the parties. The public works employees who were not union employees at the time the budget was adopted, are now represented by the union by virtue of a successful election and subsequent certification by the PELRB on August 15, 2008. The parties entered into negotiations in and about August 2008 and continue through the date of hearing without reaching agreement.

While the now unionized employees assert that the Town acted in a discriminatory fashion we cannot say as a matter of law that the particular acts complained of here constitute a violation of RSA 273-A:5, I(c). Instead, the facts lead us to conclude that while there is nothing that would prevent the Town from implementing the increase, the union cannot compel the Town Administrator to expend funds over which he has discretionary authority. We believe that the Town's actions are legitimate actions undertaken in the furtherance of its responsibility to use discretion where it can to conserve the expenditure of public funds where there is no contractual obligation to do otherwise.

Again the timeline presented to us shows that the budget had not been finally adopted before the employees' intent to organize was known to the Town or official notice was provided to the Town. The uncontradicted offer of proof is that the Town Council knew that an organizational drive was underway and did not attempt to limit the Town Administrator's

discretion with respect to the distribution of wage and benefit adjustments to groups of employees. The timeline also reveals that at the time of the distribution of wage increases, there had yet been no election. We again put a public employer's actions in a bright focus to assure that actions during an organizational campaign do not improperly affect the outcome of the organizational vote. Again, we do not find that the public employer's conduct rose to the level of improper labor practices and therefore was not violative of RSA 273-A:5, I(c). If the Town Administrator had intended his actions to alter the results of the later held election, he was unsuccessful and faces the effort of negotiating a contract with employees who prevailed in their election.

We also take the occasion of this case to express two policies that we believe reside within the provisions of RSA 273-A, our Public Employee Labor Relations Act. First, there is throughout the goals established by this statute a mutual obligation between public employers and their employees' bargaining units of good faith and fair dealing. The application of the so-called "*status quo*" doctrine within this jurisdiction should never become a tool utilized by a public employer to unduly prolong or obstruct the negotiations of both parties towards a collective bargaining agreement whether or not it is an initial contract or a successor contract. Second, both public employers and public employee organizations alike need to continually be aware of the several crucial deadlines inherent in the governmental budget process and this labor relations statute as each can dictate the final determination that must be made by the PELRB, particularly in cases involving organizational activities.

The Union's complaint against the Town for discriminatory actions related to wage increases rising to a level as to constitute a violation of RSA 273-A:5, I(c) is dismissed. As to the issue of health insurance coverage for a woman cohabitating with a member of the bargaining unit we defer to other authorities or agencies that regulate discriminatory or insurance practices governing marital status.

So ordered.

Signed this 6th day of March, 2009.



Doris Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris Desautel presiding with Board Members James M. O' Mara Jr. and Kevin Cash also voting.

Distribution:

Richard J. Laughton, Business Agent, Local 633 Teamsters

J. Joseph McKittrick, Esq.