



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Teamsters Local 633 of New Hampshire
(Pittsfield Police Department)

v.

Town of Pittsfield

Case No. G-0193-1
Decision No. 2012-219

Appearances: William R. Cahill, Jr., Esq., for the Complainant
Paul T. Fitzgerald, Esq., for the Respondent

Background:

The Union filed a complaint on April 9, 2012 charging that the Town committed unfair labor practices in violation of RSA 273-A:5, I (h)(to breach a collective bargaining agreement) and (i)(to make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule.) According to the Union, the Board of Selectmen improperly issued a directive which terminated Article 16 "Private Detail."¹ The Union requests that the PELRB order the Town to cease and desist from violating RSA 273-A:5, I and to make all affected police officers whole.

The Town denies the charges. According to the Town, the Union is not entitled to maintain the complaint given certain no grievance language contained in the parties' collective

¹ The Union's loss of earned compensatory time claim has resolved based upon the Town's representations at hearing. As reflected in the record and confirmed in the Union's post-hearing brief, the Town Administrator agreed that unit employees will be compensated at year end for any earned but unused compensatory time.

bargaining agreement. The Town asserts its actions were otherwise consistent with its contractual obligation and management rights and were required given certain provisions of municipal budget law set forth in RSA 32:1 *et. seq.* The Town requests that the PELRB dismiss the complaint and award the Town any fees and expenses incurred in defending the charge. A hearing was held on the Union's complaint on June 21, 2012 and the both parties' filed post-hearing briefs on July 25, 2012. The decision in this case is as follows:

Findings of Fact

1. The Union is the exclusive representative of certain law enforcement personnel in the Pittsfield Police Department, including full-time patrolmen and part-time patrolmen, by virtue of this Board's July 14, 1999 certification.

2. The Town is a public employer pursuant to RSA 273-A:1, IX.

3. The Town's annual budget process begins with the Board of Selectmen's budget proposal which is submitted to the Town Budget Committee. The Budget Committee is responsible for conduct of public hearings and preparation of the final proposed budget presented to voters at town meeting.

4. The parties' collective bargaining agreement covers the time period from January 1, 2011 to December 31, 2012 (2011-12 CBA). *See* Joint Exhibit 3 (full copy of immediately prior 2007-2010 CBA) and Joint Exhibit 4 (2011-2012 CBA). Negotiations concluded in early 2012.

5. As reflected in Joint Exhibit 4, the Board of Selectmen that negotiated and approved the 2011-12 CBA were Edward L. Vien, Chair, Frederick Hast, Gerald LeDuc, and Paul A. Rogers. The only change the parties negotiated to Article 16, titled "Private Details," in the 2011-12 CBA is to the Private Detail wage rate, which was increased from \$33.00 per hour to \$36.00 per hour.

6. Article 16 – Private Details in the 2011-12 CBA provides as follows:

Full-time and part-time Police Officers may, through the Chief of Police, be provided with the opportunity to work outside paid details for private employers in accordance with rules, regulations, and rates of pay established from time to time by the Board of Selectmen. The Board of Selectmen shall annually review the rates of pay for outside paid details.

Additionally, full-time and part-time Police Officers may, through the Chief of Police, be permitted to work outside paid details for other municipalities; State Agencies; public activities and fairs to be paid through other governmental units or private sources in accordance with rules, regulations, and rates of pay established by others not under the control of the Town, the Union or this Agreement.

When Police Officers are paid by the Town of Pittsfield for work hereunder such pay shall be \$36.00 per hour [per June 20, 2012 agreed statement of facts set forth in Joint Pre-Hearing Worksheet, Joint Exhibit 4, and record at hearing] for all work performed and such payment shall be tendered as a part of the employees regular weekly payroll following the submission of approved time sheets.

Nothing contained within this Article shall be subject to grievance, arbitration, fact-finding, or mediation.

7. As the Town Administrator testified, and as confirmed by the exhibits, private details have always been available to unit employees at no cost to the Town and also contribute money to the Town's general fund. This is because third parties like PSNH and FairPoint pay the full cost of private details, and private detail payments result in a net surplus to the Town after payment to unit employees of the Article 16 wage rate and related payroll expense. See Joint Exhibit 5, p. 8 (in 2011 private details generated gross third party payments of approximately \$80,000 resulting in surplus of \$33,000 after payment of special detail expenses of approximately \$47,000); Joint Exhibit 9, p. 2 (listing of private detail requests between March 22 and May 17, 2012).

8. In the event private details are worked by non-Town employees (like, for example, employees of the Merrimack County Sheriff's Department as reflected on Joint Exhibit 9) the Town has some administrative obligations to coordinate the work detail but all payments flow through the Merrimack County Sheriff's Department. The Town does not realize any net general fund revenue as happens when Town employees work the private details.

9. The amount of private detail work that will be required in the Town in a given year is unknown, as it depends upon the plans and activities of third parties like PSNH and FairPoint.

10. Police Department bargaining unit employees have always been able to increase their earnings through private detail work. This has occurred on a regular basis since at least 2005. For example, Officer DiGeorge, who testified at hearing, earned approximately \$16,000 in Article 16 detail work in 2011.

11. Private detail work has always been coordinated by the Chief of Police, and there is no history of Board of Selectmen involvement, interference, or restriction as to private detail work. The Chief has always served as the contact for third party requests for private details, has always notified unit employees about the availability of such work, and has always been generally responsible for the coordination of such work and its assignment to unit employees.

12. Nothing in the record indicates the Board of Selectmen has ever acted to formally adopt a rule or regulation as to Article 16. The practice and procedure followed since 2005 as to the administration of Article 16 has proven to be acceptable to all parties and appears to also have resulted in a distribution of such work among interested unit employees in a manner that all involved find to be consistent with Article 16 and otherwise fair and proper.

13. Private detail work has always served as an important and valuable component of wages for bargaining unit employees like Officer DiGeorge. It has always been the experience and expectation of both parties that Article 16 will operate in a way that preserves the continued access of unit employees to the additional earnings that can be obtained through private detail work.

14. The Town tracks private detail payments made by third parties like PSNH and FairPoint as well as payments to or on behalf of bargaining unit employees who perform such private detail services through accounting entries in the Police Department Budget. For example, see

Joint Exhibit 7 cover page "2012 Proposed Revenues" at Line 39 ("Police Dept Special Details"). Line 39 shows third party payments of \$79,614.28 in 2011; 2012 year to date third party payments of \$10,699.00 through April 5, 2012; and \$1.00 of such payments budgeted for 2012. An example of how payments to employees are recorded can be seen on p. 10 of Joint Exhibit 7 at Line 188 (Police Department's 2012 Budget "Special Details."). Line 188 shows payments of \$49,479.22 in 2011; 2012 year to date payments of \$6,534.00 through June 21, 2012; and \$1.00 budgeted for the year 2012.

15. The actual dollar amounts for the accounting entries referenced in Finding of Fact 8 will remain unknown until the conclusion of 2012. The Town Budget Committee is responsible for the Line 39 and Line 188 \$1.00 notations/entries on the 2012 budget documents.

16. There is no evidence that the Board of Selectmen (Vien, Hast, LeDuc, Rogers) proposed or discussed with the Union the termination or suspension of Article 16 Private Details in any respect during negotiations for the 2011-12 CBA. Instead, during contract negotiations the Union and the then Board of Selectmen reached an agreement on an increase in the Article 16 Private Details wage rate in good faith.

17. At the March 17, 2012 Town Meeting voters approved Article 12, which set forth cost items arising from the 2011-12 CBA. The only cost item listed was \$187.85, representing a longevity increase. Selectmen Vien informed voters that there were no salary or health insurance increases. He mentioned that the (Article 16) detail rate had been increased by \$2.00 (actually \$3.00 per Joint Exhibits 3 and 4), but voters were not asked to vote or otherwise approve this change in the detail rate.

18. At the March 17, 2012 Town Meeting Linda Small and Larry Konopka defeated Edward L. Vien and Frederick Hast in a contested election for two seats on the Board of Selectmen. Per

the 2012 Town Meeting minutes, newly elected officials like Linda Small and Larry Konopka were promptly sworn into office. See Joint Exhibit 5, p. 16.

19. At the March 17, 2012 Town Meeting voters approved Article 30 and an annual general fund budget of \$3,497,302.00, which is exclusive of amounts like the cost items of the 2011-12 CBA approved under Article 12. See Joint Exhibit 5 at p. 8 and 16. As of June 21, 2012 the Town's year to date general fund expenditures totaled \$1,524,343.00. See Joint Exhibit 7, third page.

20. Three days after the March 17, 2012 Town Meeting the new Board of Selectmen met and unanimously issued the following directive (Joint Exhibit 8, paragraph 3):

The Police Chief is prohibited from allowing the town of Pittsfield sworn police officers from accepting special detail assignments in the town of Pittsfield. Any special detail request, or circumstance, shall only be filled by a sworn police officer from another community.

21. At hearing the Town, through the Town Administrator, justified its action to terminate Article 16 Private Details work by citing RSA 32. In substance, the Town claims that allowing Article 16 Private Details work to continue will or could result in the over expenditure of 2012 Town Meeting appropriations in violation of RSA 32.

Decision and Order

Decision Summary:

The Town's conduct constitutes an unfair labor practice in violation of RSA 273-A:5, I (h) and (i) on account of the Board of Selectmen's March 20, 2012 unilateral suspension and termination of Article 16 Private Details. The Town is ordered to allow unit employees to continue to work private details and to make bargaining unit employees whole for earnings lost during the time period between March 20, 2012 and the date when unit employees resume working private details per this decision. Any proposed changes to Article 16 Private Details shall be addressed through the bargaining process.

Jurisdiction:

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

Discussion:

The first issue for consideration is the Town's request for dismissal based upon the Article 16 language stating that "[n]othing contained within this Article shall be subject to grievance, arbitration, fact-finding, or mediation." This dismissal request is denied consistent with the decisions and orders entered in *Exeter Professional Fire Fighters Association, IAFF, Local 3491 v. Town of Exeter*, PELRB Case No. G-0071-1. In particular, see PELRB Decision No. 2009-118 (reversed on appeal); the January 7, 2011 order in *Appeal of Exeter Professional Firefighters Association, IAFF, Local 3491*, New Hampshire Supreme Court Case No. 2009-0774; and PELRB Decision No. 2011-133. The court's order stated that "[b]ecause a grievance is not necessarily the same as an unfair labor practice complaint, we cannot conclude that waiving the right to grieve also waives the right to bring an unfair labor practice complaint, absent language clearly and unmistakably waiving the right." The court's determination in the *Exeter* case is applicable to the current case since the Article 16 language does not "clearly and unmistakably" waive the right to file an unfair labor practice complaint.

Resolution of the merits of the current dispute begins with analysis of Article 16, with due regard and consideration given to the parties' bargaining history, their good faith bargaining obligations, and past practice. The parties' respective obligations under the 2011-12 CBA are determined based upon general rules of contract construction, and their agreement contains an implied covenant of good faith and fair dealing. *Appeal of Sanborn Regional School Board*, 133 N.H. 513, 518 (1990).

We begin by examining the language of the collective bargaining agreement, as it reflects the parties' intent. This intent is determined from the agreement taken as a whole, and by

construing its terms according to the common meaning of their words and phrases. The interpretation of a collective bargaining agreement, including whether a provision or clause is ambiguous, is ultimately a question of law for this court to decide.

Appeal of NH Division of State Police, 160 N.H. 588, 591 (2010)(quotations and citations omitted). Past practice can clarify a contractual ambiguity, and a “widely acknowledged and mutually accepted past practice” could “serve to amend any perceived unambiguous language of the CBA.” *Appeal of New Hampshire Department of Safety*, 155 N.H. 201, 208-211 (2007). “In general, resort to past practice evidence is appropriate to clarify ambiguity” and to “establish a binding term and condition in situations where the collective bargaining agreement is silent...” *Derry Education Association/NEA-NH v. Derry Cooperative School District #1*, PELRB Decision No. 2009-152 (citation omitted). The principles and application of past practice to the resolution of collective bargaining disputes has been explained and discussed in a number of prior PELRB cases. Past practice is not mere prior conduct but is something of sufficient duration that is a “consistent, repeated, mutually understood and accepted practice which is binding upon the parties even though not contained within the parties’ written collective bargaining agreement.” *Exeter Police Association v Town of Exeter*, Case No. P-0753-17, Decision No. 2009-183.

There is a well understood factor that comes into play in labor relations and that is what is universally referred to in labor law as “past practice.” The parties’ actions are closely scrutinized by this board because of the important role “past practice” plays in the unionized workplace. All cases that involve a determination of this board as to whether a past practice existed between the parties are heavily fact driven. When faced with this question we seek to find (1) whether the parties had knowledge of the existence of the practice and, (2) whether the parties demonstrated their acceptance of that practice by their actions over a protracted period of time. We do not view past practice in the workplace as merely an interpretive device by which to examine the language the parties used in their CBA’s. Past practice is often akin to a “gap filler” or implied term and condition of work between public employers and public employees who have had, or will have, many cycles of negotiations as long as the employees have an exclusive bargaining representative.

See Hampton Police Assoc. Inc. et al v. Town of Hampton, PELRB Decision No. 2010-029.

The first sentence in Article 16 (“Full-time and part-time Police Officers may, through the Chief of Police, be provided with the opportunity to work outside paid details for private employers...”) establishes that the Chief of Police (and not the Board of Selectmen) controls the distribution of private detail work to unit employees. The subsequent reference to “rules and regulations” means that the Chief’s authority is tempered by any “rules and regulations” the Board of Selectmen may have adopted. A rule is “an authoritative regulation for action, conduct, method, procedure, arrangement, etc.” *Webster’s New World Dictionary of the American Language*, 2d. College Ed. 1980. A regulation is “a rule, ordinance, or law by which conduct, etc, is regulated.” *Id.* Neither the phrase “rules and regulations,” nor any other portion of Article 16, expressly or implicitly grants to the Board of Selectmen the authority to unilaterally discontinue Article 16 and thereby terminate work detail opportunities for unit employees. As reflected by the cited definitions, the general meaning and use of a rule or regulation is to establish procedures and methods. In this way, rules and regulations presume the existence and continuation of private detail work for unit employees; in the absence of such work there is no apparent need for any rules and regulations. Interpreting the right to adopt a rule or regulation as to Article 16 to also include the right to effectively repeal Article 16 is inconsistent with the plain and common meaning of those terms. For all of these reasons, the Board of Selectmen’s March 20, 2012 directive does not qualify as a valid “rule or regulation” under Article 16.

For the foregoing reasons, the Town exceeded its authority under the 2011-12 CBA, and Article 16 in particular, when it issued the disputed directive. Evidence about the parties’ past practice and their bargaining history supports and is consistent with the finding that Article 16 detail work should remain available to unit employees until such time as the parties have bargained a different arrangement. As noted, past practice evidence can serve to clarify an

ambiguity² and determine the parties' rights and obligations where the agreement is silent. To the extent that Article 16 is ambiguous given the parties' differing interpretations of the language under consideration, any such ambiguity must be resolved against the Town. The Union's position that Article 16 private detail work must continue to be available to unit employees until such time as a different agreement is reached is strongly supported by the established and accepted past practice. It is also consistent with Town's good faith bargaining obligations and the implied covenant of good faith and fair dealing.

Although Article 16 has been in place for years, the record does not reflect that the Board of Selectmen has ever adopted any formal rules or regulations pertaining to the operation of Article 16, or at least none that were submitted into the record at hearing. There are, however, clearly established and accepted procedures which the parties have regularly followed relating to the intake of private detail work and the communication of the availability of such work to unit employees, all as described by Officer DiGeorge at hearing. It appears that such procedures and arrangements have proven to be sufficient for both parties. Private detail work has been coordinated through the Chief of Police, and no prior examples were given of the Board of Selectmen suspending or interfering with unit employees' access to private detail work. The parties have also negotiated changes to the private detail rate a number of times, and they most recently agreed to increase the rate to \$36.00 per hour. Collectively this past practice evidence indicates that the parties understood and intended that Article 16 private detail work would remain regularly available to unit employees as a source of additional wages and that substantive changes to Article 16 would be addressed in negotiations, as has happened with the wage rate.

This assessment is reinforced by evidence of the most recent negotiations. Both parties bargained as though private detail work would continue, and there were no proposals suggesting

² "A clause is ambiguous when the contracting parties reasonably differ as to its meaning." *Appeal of Nashua*, 149 N.H. 688 (2003)(quotations and citations omitted).

that the Board of Selectmen would restrict unit employees' access to such work in the future or had the right to do so. The fact that the parties bargained about the wage rate shows that both the Union and the then Board of Selectmen clearly believed, consistent with accepted and established past practice, that Article 16 was viable and relevant and would continue to serve as a basis for additional earning opportunities for unit employees. Given this bargaining history, it would be inconsistent with the Board of Selectmen's good faith bargaining obligations for the Board to conduct negotiations based upon the premise that Article 16 detail work will continue and upon the conclusion of negotiations take action that is directly to the contrary. Such conduct is also contrary to the implied covenant of good faith and fair dealing.

The remaining issue for consideration is whether the current Board of Selectmen's action was justified and/or required given the provisions of RSA 32:1 *et. seq.*, which provides in relevant part as follows:

32:8 Limitation on Expenditures. – No board of selectmen, school board, village district commissioners or any other officer, employee, or agency of the municipality acting as such shall pay or agree to pay any money, or incur any liability involving the expenditure of any money, for any purpose in excess of the amount appropriated by the legislative body for that purpose, or for any purpose for which no appropriation has been made, except as provided in RSA 32:9-11.

32:13 Contracts; Expenditures Prior to Meeting. –

I. This subdivision shall not be construed to imply that a local legislative body, through its actions on appropriations, has the authority to nullify a prior contractual obligation of the municipality, when such obligation is not contingent upon such appropriations and is otherwise valid under the New Hampshire law of municipal contracts, or to nullify any other binding state or federal legal obligation which supersedes the authority of the local legislative body.

This issue relates to whether Article 16 work details constituted a cost item under RSA 273-A:1, IV which required an appropriation at the 2012 town meeting in order to be implemented, or enforced. Under the statute, 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 *Appeal of City of Franklin*, 137 N.H. 723 (1993) the court reviewed the practical application of this definition in the context of a dispute over the enforceability of a teacher’s contract:

RSA 273-A:1, IV defines "cost item" as "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." The parties to this appeal do not dispute that the monetary provisions of the 1991-92 CBA between the school district and the association are "benefit[s] acquired through collective bargaining," and they all acknowledge that the city council is the "legislative body of the public employer with which negotiations [were] being conducted." The disagreement revolves around the words "whose implementation requires an appropriation" and, more particularly, the word "requires." The association and the school district argue that the monetary provisions at issue are not "cost items" because no additional appropriation by the city council would be required to implement them. The city, on the other hand, maintains that the provisions are "cost items" because they could not have been implemented without an appropriation. Our examination of the statute and related case law persuades us that the city is correct.

Appeal of City of Franklin, 137 N.H. 723, 727 (1993).

Contract provisions which place a demand upon public funds are those such as regular wages, benefits like insurance coverage, or a clothing allowance. These are all examples of RSA 273-A:1, IV cost items which require an appropriation for implementation. A central purpose of RSA 273-A is the identification of the “demand” the agreement “places upon public funds” so that voters are informed when voting on approval of a negotiated agreement. *See Appeal of Sanborn Regional School Board*, 133 N.H. 513, 521 (1990)(addressing approval of costs contained in multi-year agreements). Unlike the foregoing examples, Article 16 work details do not place a demand upon public funds, as the expense of the work details is paid by private third parties, not the Town. Since Article 16 is not an RSA 273-A cost item, no appropriation is required in order for the implementation of Article 16 to occur. This is consistent with what actually happened at the 2012 Town Meeting. The cost items contained in the 2011-12 CBA were presented to voters in Warrant Article 12. Article 16 was not listed as a cost item, although

its continued existence was acknowledged by Selectmen Vien, who commented about the increase in the work detail rate. If Article 16 was a cost item, then the increase in the detail rate (like an increase in regular unit employee wage rates or other benefit increases) would have been included in the Article 12 Warrant Article for voter approval.³ Since Article 16 work details are not a cost item within the meaning of RSA 273-A:1, IV they do not constitute an obligation “contingent upon” an appropriation for purposes of RSA 32:13, I. Therefore the Town cannot rely on RSA 32 as authority to nullify its Article 16 contractual obligations to the Union.

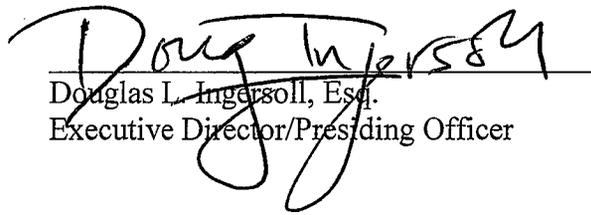
In conclusion, the Town has committed an unfair labor practice in violation of RSA 273-A:5, I (h) and (i). The continued availability of private detail work to unit employees is a term and condition of employment which cannot be unilaterally changed by Board of Selectmen action. The Town’s actions exceeded its authority given its contractual rights and obligations, as discussed. The Union’s request for relief is granted, and the Town is ordered to cease and desist in its enforcement of the disputed directive set forth in paragraph 3 of Joint Exhibit 8. Article 16 private detail work shall remain available to unit employees subject to any changes that are made through the bargaining process. Additionally, because unit employees have been deprived of earnings they could have obtained through private detail work (see Joint Exhibit 9, listing private detail work that was not made available to unit employees) the Town shall make such employees whole by payment of an amount equivalent to private detail work unit employees have lost during the time period between March 20, 2012 and the date when unit employees resume working private details per this decision.

³ Under the status quo doctrine, during any interval between the expiration of a collective bargaining agreement and voter approval of the cost items contained in a successor agreement, the terms and conditions established by the expired agreement, including those based in whole or part upon past practice, remain enforceable and are binding upon the Town. *See Appeal of Alton School District*, 140 N.H. 303, 307 (1995). Therefore, even if the increase to the Article 16 wage rate constituted a cost item requiring voter approval (which the Town does not claim), Article 16 otherwise remains enforceable at the prior wage rate of \$33.00 per hour.

The Town shall post this decision for 30 days in a conspicuous place(s) where bargaining unit employees work.

So ordered.

September 27, 2012



Douglas L. Ingersoll, Esq.
Executive Director/Presiding Officer

Distribution:

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