



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**Professional, Administrative and
Technical Employees of Derry, SEIU Local 1984**

v.

Town of Derry

**Case No. G-0057-5
Decision No. 2014-278**

Appearances:

Glenn R. Milner, Esq.,
Milner and Krupski PLLC
Concord, New Hampshire for the Complainant

Thomas M. Closson, Esq.,
Jackson Lewis P.C.
Portsmouth, New Hampshire for the Respondent

Background:

On March 25, 2014 the Professional, Administrative and Technical Employees of Derry, SEIU Local 1984 (Union) filed a complaint under the Public Employee Labor Relations Act (RSA 273-A). The Union alleges that the Town improperly refused to execute and implement a collective bargaining agreement following a 3-2-1 vote of the Town Council (Council) on a motion to approve the agreement. The Union argues that the Council's 3-2-1 vote was a valid and binding approval of the agreement, notwithstanding any Town Charter provisions stating a majority vote of all Council members (four votes) is required for appropriation requests. The Union argues "[s]ince no appropriation of money was necessary in order to fund the contract in

the current budgetary year, there was no need to have a vote to appropriate money."¹ In the alternative, the Union asks the PELRB to rule that the Town violated its good faith bargaining obligations given its conduct during the ratification process because, according to the Union, the Council failed to approve an agreement which satisfied all of the Council's bargaining requirements. The Union requests that the PELRB order the Town to sign the contract and comply with its terms or, in the alternative, find that the Town has violated its obligations to bargain in good faith and has committed an unfair labor practice in violation of RSA 273-A:5, I (e).

The Town denies the charges. The Town maintains that the Council did not approve the tentative agreement given the requirements of RSA 273-A:3, II (b) and (c) and the Town Charter requirement relevant to appropriation requests. The Town also denies that it violated its good faith bargaining obligations during the ratification process. The Town requests that the PELRB deny the Union's claims and dismiss the complaint.

This case was originally scheduled for hearing on May 15, 2014. However, the parties subsequently agreed to waive hearing and submit the case for decision on stipulated facts and briefs, with reply briefs due in early September, 2014. Our decision is as follows.

Findings of Fact

1. The Town is a "public employer" as defined by RSA 273-A:1, X.
2. The Union is the certified bargaining representative for Town employees in the following positions:

Animal Control Officer, Recreation Coordinator, Executive Secretary, Engineering Tech II, Cable Facility Coordinator, Human Services Administrator, Environmental Engineer, Senior Accountant, Network Administrator, Deputy Assessor, Director of Parks & Recreation, Director of Emergency Medical Services, Tax Collector/Municipal Agent,

¹ See Union's post-hearing brief.

Superintendent of Operations, GIS/IT Manager, Engineering Coordinator, Director of Code Enforcement, Assessor, Director of Planning, Police Captain, Business Development Coordinator, Deputy Director of Public Works, Deputy Fire Chief, Prosecutor (civilian), and Director of Communications & Information Technology.

See PERLB Decision No. 2010-084 (April 23, 2010).

3. The parties' current collective bargaining agreement ("CBA") covers the time period from July 1, 2007 through June 30, 2011, but remains in full force and effect pursuant to CBA Article 23(1).

4. The parties have been in negotiations since March 21, 2011 for a successor CBA. After 14 negotiation sessions the Union declared impasse. Mediation was held on November 20, 2012 and December 20, 2012, but was unsuccessful. Fact finding was held on March 22, 2013 and the decision was issued June 28, 2013. The Union unanimously voted to accept the articles on which there was a tentative agreement and to accept the fact finder's report.

5. On July 25, 2013, the Union chief negotiator sent a written request to make a presentation directly to the Council pursuant to RSA 273-A: 12, I (a) (1). At the August 6, 2013 Council meeting, the Council denied this request without discussion. Immediately thereafter and without discussion, the Council voted to reject the fact finder's report.

6. After further negotiations the parties then reached a tentative agreement on January 21, 2014 which covered the February, 2014 to June 30, 2017 time period. It includes the following wage increase schedule: 2.5% increase on the first Sunday following contract signing, 1.5% increase effective July 1, 2014, and a 2% increase effective July 1, 2015.

7. The Union ratified the tentative agreement and on February 4, 2014 the Town's chief negotiator/interim town administrator presented the tentative agreement to the Council. The Council then voted to table consideration of the tentative agreement until the February 18, 2014 meeting.

8. At the February 18, 2014 Council meeting the following occurred:

-The acting Town Administrator gave a 50 minute power point presentation of the tentative agreement stressing three points, namely (1) the obligation under RSA 273-A to negotiate in good faith, (2) that the bargaining unit employees are an important asset, and (3) the tentative agreement is a good deal for the Town. He also reviewed the Council's bargaining goals and stated that all goals of the Council had been met within the tentative agreement. He explained and demonstrated through the power point presentation how each goal was obtained.

-Councilor Osborne moved to table the vote to the next meeting; that motion failed.

-Councilor Osborne then raised a so-called "charter objection" to voting on the tentative agreement because the public did not have an opportunity to have input into the debate of the approval; that motion also failed.

-Councilor Wetherbee moved that the Council approve the tentative multi-year agreement and authorize the Town Administrator to sign the agreement on behalf of the Town.

-The Council vote on Councilor Wetherbee's motion was 3 votes in favor and 2 votes against, with 1 abstention and 1 Councilor absent.

9. On February 25, 2014, town's attorney provided an opinion that the vote on Councilor Wetherbee's motion was an appropriation vote which requires a majority vote of the entire seven member Council, or four votes.

10. At the March 4, 2014 Council meeting, the Council Chair referenced the February 25, 2014 town attorney's opinion and stated that the February 18, 2014 vote to approve the tentative agreement had failed.

11. The Town Charter provides, in part:

SECTION 5.9 Rules; Meetings; Quorum

(A) The Town Council shall from time to time establish rules for its proceedings. Regular meetings of the Town Council shall be held at a time and place fixed by the Council but which shall be not less frequent than once monthly. Special meetings of the Town Council may be held on the call of the Town Administrator, or the Chairman of the Council, or on the call of any three or more members, by written notice delivered to the place of residence or business of each member at least 48 hours in advance of the time set. Sessions of the Town Council shall be open to the public, in accordance with RSA 91-A. Every matter coming before the Town Council for action shall be put to a vote, the result of which shall be duly recorded.

(B) A majority of all the members of the Town Council shall constitute a quorum. The

affirmative vote of a majority of all the members of the Town Council shall be necessary to adopt any appropriation. Except as otherwise provided by law or this Charter, any other action or measure may be adopted by a majority vote of those present.

SECTION 9.6 Appropriations After Adoption of Budget

No appropriation shall be made for any purpose not included in the annual budget as adopted, unless approved by a two-thirds majority of all the members of the Town Council after a public hearing. The Town Council shall, by resolution, designate the source of any money so appropriated.

SECTION 9.7 Transfer of Appropriations

No expenditure shall be made, and no obligation for expenditure shall be incurred, except pursuant to a duly adopted appropriation or a transfer of appropriation permitted by this section.

With the approval of a majority of the Town Council, the Town Administrator may transfer any unencumbered appropriation balance or any portion thereof from one department to another. The Town Administrator may transfer any unencumbered appropriation balance or any portion thereof within a department, provided that funds are available to support the transfer, that the amount to be transferred is not essential for the effective operation of the department's functions, and that the transfer is not otherwise contrary to State law. (amended 9-11-2012)

SECTION 10.8 Definitions

Unless another meaning is clearly apparent from the manner in which the word is used, the following words as used in this Charter shall have the following meanings:

(E) Majority Vote. Unless otherwise expressly provided, the words "majority vote" shall mean a majority of those present and voting with a quorum of the body present.

Decision and Order

Decision Summary:

The tentative agreement includes RSA 273-A: 1, IV "cost items" subject to approval by the Council per RSA 273-A:3, II (b) and (c). The Council did not approve the tentative agreement in whole or in part by its 3-2-1 February 18, 2014 vote given Charter requirements on appropriation requests. There is insufficient evidence to support a finding that the Council's conduct during the ratification process constituted a violation of the Town's good

faith bargaining obligations under RSA 273-A:5, I (e). The complaint is dismissed.

Jurisdiction:

The PELRB has primary jurisdiction of all RSA 273-A:5 alleged unfair labor practices per RSA 273-A:6, I.

Discussion:

I. Tentative Agreement Approval Requirements:

The tentative agreement provides for wage increases of 2.5% increase on the first Sunday following contract signing, 1.5% increase effective July 1, 2014, and a 2% increase effective July 1, 2015. The Union argues that these kinds of contract costs should not be treated as RSA 273-A:1, IV "cost items" subject to Council approval under RSA 273-A:3, 11(b) and (c) given the availability of money in the current budget year to fund such costs, at least in the current budget year. The Union suggests that any funding needs or issues that may arise in future budget years can be addressed at subsequent Council meetings when and if necessary. The Town disagrees with this analysis and contends the tentative agreement contains "cost items" which must be approved by a vote of at least four Council members before the tentative agreement is fully approved and binding.

Under RSA 273-IV a 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." RSA 273-A:3, II (b) and (c) address the process for cost item approval, and provide as follows:

(b) Only cost items shall be submitted to the legislative body of the public employer for approval at the next annual meeting of the legislative body, unless there is an emergency as defined in RSA 31:5 or RSA 197:3. If the legislative body rejects any part of the submission, or while accepting the submission takes any action which would result in a modification of the terms of the cost item submitted to it, either party may reopen negotiations on all or part of the entire agreement.

(c) If the public employer is a local political subdivision with a city or town council form of government cost items shall be submitted within 30 days to the city council or aldermen or to the town council for approval. Within 30 days of the receipt of the submission, the city council, aldermen, or the town council shall vote to accept or reject the cost items. If the city council or aldermen or the town council rejects any part of the submission, or while accepting the submission takes any action which would result in a modification of the terms of the cost item submitted to it, either party may reopen negotiations on all or part of the entire agreement.

The court addressed the scope and application of these statutory provisions, and rejected arguments similar to those now made by the Union, in *Appeal of Franklin Education Association, NEA-NH*, 136 N.H. 332 (1992)("Franklin I") and in *Appeal of City of Franklin*, 137 N.H. 723 (1993)("Franklin II").

In Franklin I, the Franklin Education Association (Association) unsuccessfully argued that the city council (the local legislative body) was bound by a tentative agreement covering the 1989-92 school years, despite a council vote rejecting the contract's cost items, because the council knew the school board would pay first year salary increases using money the council had previously appropriated for the school board's use:

The association's argument misses a central component of the Sanborn² holding: the legislative body of a municipality (in this case, the council) is bound by a multi-year contract only if it knew about the cost items for each year of the CBA at the time it voted to appropriate money for the contract's first year. Here, the council did appropriate money that was eventually used by the school board to fund the cost items of the CBA's first year. There is no evidence, however, that the council knew of those cost items--let alone the cost items for the second and third years of the CBA--in September 1989 when it approved the appropriation; the parties did not reach even a tentative agreement until January 1990. We therefore hold that the council did not impliedly ratify the CBA's cost items. As the council explicitly rejected those cost items in May 1990, the April 1990 teachers' contracts, contingent upon the items' approval, are not binding.

Franklin I at 334 (citations omitted).

² *Appeal of Sanborn Regional School Bd.*, 133 N.H. 513 (1990).

In Franklin II, the Association's demand that the School District use existing money³ to fund a 1991-92 tentative collective bargaining agreement, which included "monetary provisions for salary increases and related costs," was also doomed. As in Franklin I, the city council voted to reject the 1991-92 tentative agreement. The School District then filed a petition with the PELRB asking for a ruling on whether it could legally fund the tentative agreement as the Association had requested. The PELRB ruled that it could, but the court reversed this decision on appeal:

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.

We find that the statutory language supports the city's contention that the provisions are "cost items" because, in the literal sense, implementation of the provisions "requires an appropriation." That is, the provisions could not be implemented without an appropriation at some point in time.

Franklin II at 727. The court further stated that:

...the legislature has specifically determined that the school district must submit "cost items" to the city council for approval, not just its annual proposed budget. RSA 273-A:3, II (b). In June 1991, when the city council appropriated the money needed to fund the 1991-92 school budget, the CBA had not yet been ratified. As "cost items" are, at a minimum, "benefits acquired through collective bargaining," RSA 273-A:1, IV, no "cost items" could have been submitted to the city council at that time.

Thus, the city council did not have an opportunity to exercise its statutory right to review the monetary provisions of the CBA until the fall of 1991, when the CBA actually came into existence.

³ The money was the result of a prior city council appropriation and the departure of some veteran teachers.

Id. at 729-730. Consistent with Franklin I and II and the provisions of RSA 273-A:1, IV and 273-A:3, II (b) and (c), the Union's request to enforce the tentative agreement, in whole or in part, is denied. The wage increases in the tentative agreement are "cost items" under RSA 273-A:1, IV. The fact that there may be funds available in the current year's budget⁴ to pay the negotiated wage increases does not alter the applicable legal requirements for approval. As Franklin I and II make clear, neither an earlier appropriation nor the availability of funds in an existing budget is a substitute for the "cost item" approval process set forth in RSA 273-A:3, II (b) and (c). At least four Council member votes were required to approve the tentative agreement in this case.

II. The Good Faith Bargaining Claim:

The Union also charges that the Council violated its obligation to bargain in good faith and has committed an unfair labor practice in violation of RSA 273-A:5, I (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations). In particular the Union complains about the Council's conduct during the ratification process, inclusive of the February 18, 2014 vote and the Council Chair's subsequent announcement the tentative agreement had not been approved, and the outcome of the Council's vote. The Town argues that the Council acted within its authority, that it had no obligation to approve the tentative agreement, that negotiations lasted for three years, and that there were changes to the composition of the Council. The Town maintains that in these circumstances a finding that the Town had not bargained in good faith cannot be justified.

The statutory obligation to bargain is set forth in RSA 273-A:3, I, which provides as

⁴ The budget year as of February, 2014.

follows:

It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. "Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.

We are not persuaded that either the manner in which Council conducted the February 18, 2014 vote or the Council Chair's subsequent determination that the motion to pass the tentative agreement had failed is a violation of the Town's good faith bargaining obligations. The Charter clearly calls for a majority vote of all the members of the Council, or a minimum of four votes, on appropriation requests. There are no provisions in the PELRA which are violated by this Charter requirement or by the Chair's subsequent reporting of the outcome of the motion to approve the tentative agreement based on applicable Charter provisions.

As to the Union's complaint about the outcome of the vote, a charge that a public employer has refused to approve an agreement it has previously authorized raises obvious concerns about the bargaining process and could serve as the basis for a finding that the employer has violated its good faith bargaining obligations. On the other hand, such a claim runs counter to the law which states that "the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession." In this case, we do not believe the record submitted by stipulation provides a sufficiently comprehensive overview of the parties' relatively lengthy bargaining history, evidence we deem highly relevant given the charge being made. We also observe that in this case, as is typical in collective bargaining negotiations, the bargaining teams were charged with reaching an agreement that was subject to ratification by the Union and the Council. There is also the statutory approval requirement of cost items per RSA 273-A:3, II (b) and (c). It is quite a leap for the Union to say, in substance,

that formal Council ratification was nevertheless a mere formality in this case. The statements of the acting Town Administrator/Chief Negotiator included in the stipulated record only go so far. Assuming the Council could, in effect, legally bind itself in advance to approve an agreement reached by the bargaining teams, there is insufficient evidence that the Council in fact did so. The possibility that a tentative agreement reached by bargaining teams will ultimately be rejected during the ratification phase of negotiations always looms large over the collective bargaining process, and it appears to us that is what happened in this case.

III. Conclusion:

For the foregoing reasons, the Union's request for an order directing the Town to duly execute and implement the tentative agreement is denied. There is insufficient evidence to support the Union's charge that the Town otherwise violated its good faith bargaining obligations per RSA 273-A:5, I (e). The complaint is dismissed.

December 29, 2014

/s/ Michele E. Kenney
Michele E. Kenney, Esq., Chair

By unanimous vote of Chair Michele E. Kenney, Chair and Board Members Senator Mark Hounsell and Carol M. Granfield.

Distribution:

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