



State of New Hampshire
Public Employee Labor Relations Board

AFSCME Council 93 / Local 1444 Berlin City Employees

v.

City of Berlin

Case No. G-0277-3

Decision No. 2021-047

Appearances: Sean Cronin, Esq., AFSCME Associate General Counsel, Boston, Massachusetts for the AFSCME Council 93 / Local 1444 Berlin City Employees

Mark T. Broth, Esq., Devine, Millimet & Branch, P.A., Manchester, New Hampshire for the City of Berlin

Background:

On August 17, 2020, the AFSCME Council 93/Local 1444 Berlin City Employees (Union) filed an unfair labor practice complaint¹ against the City of Berlin (City) under the Public Employee Labor Relations Act claiming that the City had violated RSA 273-A:5, I (e)(to refuse to negotiate in good faith...) when it asked to postpone a previously scheduled July, 2020 impasse mediation session causing it to be rescheduled for September, 2020. The Union also claims, in its amended complaint, that the City breached the parties' September, 2020 mediation agreement which required, among other things, that the City issue a request for a quote (RFQ) for health insurance on or before October 1, 2020. According to the Union, the City issued the RFQ in December instead of October, 2020. The Union claims that this delay constitutes a violation of

¹ The Union amended its complaint on December 18, 2020. See PELRB Decision No. 2020-296.

RSA 273-A:5, I (e) and (g)(to fail to comply with this chapter or any rule adopted under this chapter). The Union requests that the PELRB find that the City and City Manager James Wheeler violated RSA 273-A:5, I (e) and (g) and order the City: (1) to negotiate in good faith with the Union in a timely manner, (2) to publicly post the Board's findings for 30 days, and (3) to make the Union whole for all costs and expenses incurred to pursue the prohibited practice charge.

The City denies the charges and submits that both parties made a good faith effort to "meet on a regular basis to engage in collective bargaining, during which the parties have engaged in a regular exchange of proposals and counterproposals." According to the City, the rescheduling of the mediation session was "the result of an administrative error on the part of the City's counsel, and in no way reflects on the City's good faith efforts in its negotiations with the Union."

A hearing was held on January 14, 2021. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. Both parties filed post-hearing briefs on February 5, 2021. The parties' Agreed Statement of Uncontested Facts is incorporated into the Findings of Fact² below and the decision is as follows.

Findings of Fact

1. The City is a public employer within the meaning of RSA 273-A:I, X.
2. The Union is the certified exclusive representative for the bargaining unit of certain City employees as reflected in PELRB Decision No. 2019-160 (July 9, 2019).
3. The City and the Union are parties to a Collective Bargaining Agreement (CBA) effective from July 1, 2016 through June 30, 2019.

² Many of the Union's allegations and the parties' stipulations address the events which occurred more than 6 months prior to the filing of this complaint. See RSA 273-A:6, VII ("The board shall summarily dismiss any complaint of an alleged violation of RSA 273-A:5 which occurred more than 6 months prior to the filing of the complaint with the body having original jurisdiction of that complaint.") These stipulations are utilized in this decision solely to provide background information.

4. On November 6, 2018, the Union informed City Manager James Wheeler of its intent to begin negotiations and on January 3, 2019, the Union and the City held their first bargaining meeting, at which time ground rules were agreed to and signed.

5. On January 17, 2019, the parties met for negotiations. A subsequent meeting was scheduled for February 2, 2019. The February 2, 2019 meeting was cancelled at the City's request to afford the opportunity to schedule a health insurance informational meeting which was held on February 14, 2019.

6. The parties met for negotiations on February 21, 2019 and March 19, 2019. No tentative agreement was reached at these meetings.

7. The parties met for negotiations on April 2 and 9, 2019. During the April 9, 2019 meeting, the parties reached a tentative agreement on four items.

8. On April 16, 2019, the parties met again and discussed specific proposals and the general state of City finances.

9. On May 7, 2019, the parties met briefly. They discussed the minutes of the April 9, 2019 and April 16, 2019 negotiations meetings and the concept of a one-year contract. At this meeting, the City Manager informed the Union that he had not yet received the health insurance rates and advised the Union that he would email the health insurance rates later. The Union received health insurance rates on May 13, 2019.

10. On May 20, 2019, the parties met again. April 9, April 16, and May 7, 2019 bargaining sessions' minutes were provided. After discussion, the parties outlined a one-year deal to bring to the Union membership and to the City Council.

11. On June 3, 2019, the Union membership unanimously voted to decline the one-year offer.

12. On June 10, 2019, the parties met again and discussed specific proposals and the general state of City finances.

13. The next bargaining meeting took place on October 31, 2019. The City Manager explained the State education funding issues and advised that the City was not in a good financial situation as the unexpended funds balance was below the State's recommendation.

14. On December 10, 2019, the parties met to continue negotiations. The parties were unable to reach agreement.

15. On February 14, 2020, the Union emailed its "last best offer" to the City Manager. After an exchange of emails to coordinate a phone call, a phone conversation occurred resulting in impasse being declared by the Union. The parties agreed to proceed with mediation and to select a mediator.

16. The major stumbling blocks of the parties' negotiations were wage increases, cost of health insurance, and the existing snow removal overtime assignment system.

17. The parties agreed to utilize the services of Mediator James Cooper, who offered March 30 or April 6, 2020 as potential dates for a mediation session.

18. The City retained the services of Attorney Mark Broth to assist in mediation.

19. On March 4, 2020, Union Staff Representative Christopher Kilmer was in Berlin for an insurance meeting. Mr. Kilmer and Mr. Wheeler discussed dates for mediation provided in an email from Attorney Broth's office. During the conversation, Mr. Wheeler advised that both dates, March 30 and April 6, 2020, worked for the City. Later that afternoon, Mr. Wheeler advised Attorney Broth's office that the dates did not work because "[w]e have City Council and we are in budget season so prefer any other day." See Agreed Statement of Uncontested Facts at 19. The City Council work session minutes from March 30, 2020 and April 6, 2020 meetings show normal City business, rather than budget, being discussed.

20. On May 4, 2020, Mr. Kilmer contacted the Mediator and Attorney Broth's office to confirm that a mediation session was scheduled for July 23, 2020. Both the Mediator and Attorney Broth's Legal Assistant confirmed.

21. On July 14, 2020, Mr. Kilmer contacted the Mediator and Attorney Broth's office via email to confirm the July 23, 2020 mediation session at the Berlin City Hall. The Mediator confirmed. Attorney Broth's office did not reply to this email.

22. On July 20, 2020, Mr. Wheeler sent an email to Mr. Kilmer to confirm the mediation session on July 23 and to consider using online tools. Mr. Kilmer immediately responded that the session had been confirmed and addressed the online tools concept for mediation. Later that day, Mr. Wheeler inquired how many were expected for the Union's committee and Mr. Kilmer advised that five people were expected to participate for the Union.

23. The Mediator contacted the Union to confirm the July 23 mediation session and to advise that all attendees should wear masks and maintain social distancing. Mr. Kilmer, in his July 21, 2020 reply to the Mediator, passed along the concept of online tools brought forward by Mr. Wheeler. The Mediator replied that he would proceed with an in-person mediation session, as scheduled, with safety precautions. Attorney Broth and his legal assistant were both included in this exchange.

24. On July 21, 2020, Attorney Broth informed Mr. Kilmer that Attorney Broth's office had failed to timely confirm the scheduled mediation session with Mr. Wheeler. He also stated that additional time was necessary to prepare for a productive mediation. According to Mr. Wheeler, he did not receive a confirmation of July 23 mediation session from Attorney Broth due to an error, and consequently, was not prepared for the mediation. As a result, the mediation session was rescheduled for September 15, 2020.

25. The Union filed this unfair labor practice complaint with the PELRB on August 17, 2020.

26. On September 15, 2020, the Union and the City met with the Mediator in an effort to advance stalled negotiations.

27. As a result of the mediation, the parties reached the following agreement:

1. City agrees that it will issue a Request for Quote (“RFQ”) for health insurance for DPW [department of public works] employees on or before October 1, 2020.

2. City agrees that any decision with respect to selection of a health insurer shall be negotiated with the Union.

3. City will make available the representative of the health insurer available [sic] to DPW employees to discuss options and coverage at a meeting to be held at a mutually agreeable time and place.

4. City agrees that City Manager will duly appoint a representative attend [sic] all negotiations.

5. Negotiations shall be efficiently conducted via teleconference or via face to face as may be appropriate and determined by either the City or the Union.

6. City and Union agree to meet their good faith obligation under RSA 273.

7. City and Union agree that the Union’s Unfair Labor Practice currently pending before the PELRB shall be held in abeyance.

8. City and the Union agree that the parties’ most recent agreement which expired by its terms on June 30, 2019 shall continue in full force and effect through June 30, 2021.

See Union Exhibit 20. The agreement reached at the mediation was only an interim step in the bargaining process and the parties had not yet reached agreement on a successor CBA.

28. Pursuant to the parties’ mediation agreement, on September 16, 2020, the parties jointly requested that the PELRB defer proceeding in this case. This request was granted. See PELRB Decision No. 2020-216.

29. On November 16, 2020, the Union asked the City Manager about the health insurance RFQ. The City Manager replied that he was currently going back and forth with the

Health Trust on information he had requested and that he had a call with them scheduled for the following day. He also stated that he would receive responses regarding costs from the insurance companies when the companies issue guaranteed maximum rates the following month.

30. Based on the City Manager's response, the Union expected that the City Manager would have replies to the RFQ by December 1, 2020. Because there was no communication from the City by December 1, on December 3, 2020, the Union contacted the City Manager requesting an update. The City Manager advised that the RFQ is out now (on the City website) and responses to RFQ were due on December 30, 2020.

31. In 2020, due in part to the Covid-19 pandemic, the City administration was understaffed, the City did not have a Finance Director, and Mr. Wheeler, in addition to his City Manager duties, had to perform the duties of the Public Works Director and Finance Director, as well as deal with Covid-19 related issues.

32. According to Mr. Wheeler, after entering the September 15, 2020 mediation agreement and before issuing the RFQ for health insurance, he conducted research and determined that it did not make sense to issue the RFQ until December because health insurance companies would not have quotes available until December, 2020. He did not communicate his "findings" to the Union or request the Union's consent to postpone the issuance of the RFQ. Instead, he unilaterally decided to issue the RFQ in December, and not on October 1, 2020 as per the mediation agreement.

Decision and Order

Decision Summary:

The evidence is insufficient to prove that the City failed to negotiate in good faith in violation of RSA 273-A:5, I (e) when it rescheduled the July 23, 2020 impasse mediation session. However, the City breached its duty to negotiate in good faith when it failed to communicate with

the Union regarding changes to the parties' impasse mediation agreement and unilaterally changed a material term of this agreement.

Jurisdiction

Under RSA 273-A:6, I, the PELRB has primary jurisdiction of all unfair labor practice claims alleging violations of RSA 273-A:5.

Discussion:

The Union claims that the City's actions during the parties' collective bargaining process, including its postponement of a previously-scheduled impasse mediation session, violated its duty to negotiate in good faith with the bargaining unit representative and failed to comply with this chapter. The Union also claims that the City breached the parties' mediation agreement by issuing the RFQ for health insurance in December instead of October, 2020 as required under the terms of the mediation agreement.

RSA 273-A:5, I provides in relevant part that “[i]t shall be a prohibited practice for any public employer:.. (e) [t]o 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; ... (g) [t]o fail to comply with this chapter or any rule adopted under this chapter...”

Further, RSA 273-A:3, I provides that:

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.

Relevant factors in the analysis of a party's "effort to reach agreement" include, among others, "cooperation in scheduling, duration of bargaining sessions, cooperation in the exchange of information necessary to formulate and understand bargaining proposals, the level of

communication and discussion during negotiations, and the attitude and demeanor of negotiators.” See *Rye Educational Support Staff Association, NEA-New Hampshire v. Rye School District*, PELRB Decision No. 2018-200, at 8 (October 24, 2018). See also *School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557, 572 (1983); *NLRB v. Katz*, 369 U.S. 736, 741-743, 747 (1962).

In this case, the parties have been engaged in negotiations on a successor CBA from the beginning of 2019. Since the beginning of negotiations until the declaration of impasse, the parties reached agreement on ground rules, met a reasonable number of times (at least 13) at fairly regular intervals, exchanged proposals and information and, ultimately, reached a tentative agreement, which was voted down by the Union membership. These facts demonstrate that the parties, at least until the declaration of impasse, bargained in good faith.

The Union asks the PELRB to find that the City’s cancellation of the July 23, 2020 impasse mediation session, which resulted in a two-month delay in mediation, was a breach of the City’s obligation to bargain in good faith. I find the Union’s argument unpersuasive. The July 23, 2020 mediation session was cancelled due to an unfortunate miscommunication between the City Manager and Attorney Broth’s office. The mediation was promptly rescheduled and took place on September 15, 2020. Under these circumstances, the rescheduling of a mediation session, without more, does not constitute a breach of the City’s good faith bargaining obligation.

The Union further claims that the City breached its duty to bargain in good faith and failed to comply with this chapter or any rule adopted under this chapter because the City did not issue the RFQ until December 1, 2020 contrary to the parties’ mediation agreement. Mediation as well as bargaining table activity and fact-finding are “each different phases of the overall negotiation process.” See *SEA of NH, Inc., SEIU Local 1984 et al. v. State of New Hampshire*, Decision No. 2017-094 at 7 (May 26, 2017), affirmed, *Appeal of New England Police Benevolent Assn, Inc.*,

171 N.H. 490 (2018). The obligation to negotiate in good faith extends to the mediation portion of the negotiation process. Furthermore, communication between the parties is an essential element of any good-faith negotiation process. See *Rye Educational Support Staff Association, NEA-New Hampshire v. Rye School District*, supra, PELRB Decision No. 2018-200.

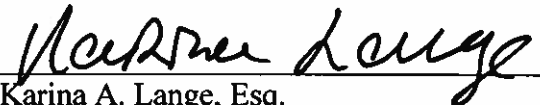
In this case, the parties participated in an impasse mediation session. As a result of the mediation, the City agreed to issue the RFQ for health insurance on or before October 1, 2020 and the Union agreed to a request for the deferral of the proceedings in this case. The Union fulfilled its obligation and, on September 16, 2020, the parties jointly requested that the PELRB defer the proceeding. The PELRB granted this request. However, the City did not issue the health insurance RFQ, as promised, on or before October 1, 2020. The City Manager unilaterally decided that the RFQ should be issued in December and not on October 1, 2020, even though the health insurance cost was one of the reasons the parties have not been able to reach a successor CBA and the parties needed the health insurance cost information in order to continue negotiations. Furthermore, the City Manager did not communicate his “findings” to the Union, did not seek the Union’s approval to postpone the issuance of the RFQ, and did not tell the Union about this delay until later and, even then, only because the Union had followed up.

The City’s failure to communicate with the Union regarding a potential modification of one of the material terms of the mediation agreement and the City’s unilateral modification of this term are strong evidence of a lack of “effort to reach agreement on terms of employment” as required under RSA 273-A:3, I. Although the City’s Covid-related staffing issues are understandable, they don’t excuse the City from its statutory duty to negotiate in good faith, including its duty to communicate with the Union and seek its approval prior to changing the terms of the impasse mediation agreement.

For the foregoing reasons, the City breached its duty to negotiate in good faith and failed to comply with this chapter in violation of RSA 273-A:5, I (e) and (i), respectively. The City shall cease and desist from further violations, shall negotiate in good faith with the Union as required under RSA 273-A:3, I, and shall post this decision in the workplace of affected employees for 30 days. The Union's request for costs and attorney's fees is denied. See *International Chemical Workers Union Council, UFCW, Local 1046C v. Merrimack County Nursing Home and County of Merrimack*, PELRB Decision No. 2009-069 at 7 (April 9, 2009).

So ordered.

Date: 03/29/2021


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