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Reverses PELRB Decision No.  
2005-113

THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board  
No. 2005-819

APPEAL OF THE TOWN OF HAMPTON  
(New Hampshire Public Employee Labor Relations Board)

Argued: June 7, 2006  
Opinion Issued: August 23, 2006

Sheehan Phinney Bass + Green, P.A., of Manchester (Elizabeth A. Bailey  
on the brief and orally), for the appellant.

McKittrick Law Offices, of North Hampton (J. Joseph McKittrick on the  
brief and orally), for the appellee.

DALIANIS, J. The appellant, Town of Hampton (town), appeals a decision of the New Hampshire Public Employee Labor Relations Board (PELRB), in which the PELRB ordered the town to cease and desist from directly dealing with members of the Hampton Police Association (the union). We reverse.

The record contains the following facts: At the town's 2005 annual meeting, voters rejected a proposed warrant article concerning payment for private police details. As a result, the town notified the union, which acts as the exclusive bargaining representative for all police officers in the Hampton Police Department (HPD), that no private details would be assigned to union members for the remainder of the 2005 fiscal year. The union thereafter demanded impact bargaining, and the parties participated in a bargaining session on May 4, 2005. At the bargaining session, the parties discussed

proposals for alternative solutions regarding the issue of private police details, but failed to reach an agreement.

The president of the union, Officer Steven Henderson, was present at the bargaining session. On May 18, 2005, Henderson, using the HPD's official e-mail system, distributed an e-mail addressing an article about the bargaining session which had been published in a local newspaper. The e-mail stated, in relevant part:

The inaccuracies in the article have been noted. . . . The two dollar quote was an outright lie. A part time officer gets 29 dollars currently, 22 dollars was proposed, [t]he difference is \$7 dollars. A sergeant can get up to \$40 an hour, proposal \$27 [sic] the difference would be \$13. The real issue is liability insurance, [workers' compensation]. Who takes care of your family or you if you are injured on duty[?] God forbid if someone was killed.

Henderson sent the e-mail to all HPD personnel, union members and non-union members alike.

On May 19, 2005, the town's Chief of Police, William Wrenn, posted a response to Henderson's e-mail on the HPD's official bulletin board. The response, which was addressed to "All Hampton Police Officers," stated, in relevant part:

I am writing to you to correct the misinformation that you were given by Ptl. Henderson regarding the private detail proposal that would have addressed the private detail problem. A local businessman . . . came up with a plan that would have paid ALL OFFICERS \$27 PER HOUR FOR WORKING DETAILS. He would have made all the necessary deductions and would pay ALL THE INSURANCES INCLUDING WORKER'S COMPENSATION AND LIABILITY INSURANCE. . . . This is the proposal the Town made to your Union's representatives on May 4<sup>th</sup>. It was rejected by them.

The union filed a complaint with the PELRB on June 1, 2005, alleging that the town, through Wrenn's memorandum, engaged in an unfair labor practice in violation of RSA 273-A:5 (1999). The PELRB conducted an evidentiary hearing, and, on September 8, 2005, issued an order finding that the town had committed an unfair labor practice. Specifically, the PELRB concluded that Wrenn's memorandum contained "promises of benefit," that the memorandum was directed to union members rather than to elected union leadership, and that such "direct dealing" violated RSA 273-A:5, I(e). The PELRB ordered the town to cease and desist from "directly dealing" with the union membership, and further directed that the order be posted on the HPD's

official bulletin board. The town filed a motion for reconsideration, which the PELRB denied.

On appeal, the town argues that the PELRB erred in determining that Wrenn's memorandum constituted direct dealing with the union membership in violation of RSA 273-A:5, I(e). "When reviewing a decision of the PELRB, we defer to its findings of fact, and, absent an erroneous ruling of law, we will not set aside its decision unless the appealing party demonstrates by a clear preponderance of the evidence that the order is unjust or unreasonable." Appeal of Nashua Police Comm'n, 149 N.H. 688, 689 (2003) (quotation omitted); see also RSA 541:13 (1997). Though the PELRB's findings of fact are presumptively lawful and reasonable, we require that the record support its determinations. Appeal of City of Laconia, 150 N.H. 91, 93 (2003).

It is a prohibited practice for a public employer to refuse to negotiate in good faith with the exclusive representative of a bargaining unit. RSA 273-A:5, I(e). Accordingly, a public employer must refrain from negotiating with any union member who is not designated as an exclusive representative. Appeal of Franklin Education Assoc., 136 N.H. 332, 335 (1992). "Dealing directly with employees is generally forbidden because it seriously compromises the negotiating process and frustrates the purpose of [RSA chapter 273-A]." Id. (citation omitted.) However, the mere act of communication by an employer with its employees is not a per se unfair labor practice under RSA 273-A:5. Appeal of AFL-CIO Local 298, 121 N.H. 944, 946 (1981).

Having reviewed the record, we conclude that the PELRB erred in determining that the town dealt directly with union members in violation of RSA 273-A:5, I(e). It is undisputed that Henderson distributed his e-mail to all HPD employees, including non-union members and Wrenn, using the HPD's official e-mail system. Henderson did not indicate that he was sending the e-mail in his capacity as union president, and the e-mail does not purport to communicate to union members information pertaining to ongoing collective bargaining. Rather, Henderson specifically notes in the e-mail that he is addressing alleged inaccuracies in a published newspaper article.

Wrenn, in turn, directed his response at alleged misinformation in Henderson's e-mail. It provides information about a proposal that, among other things, "would have" addressed the private detail problem, "would have" paid officers a certain hourly wage, and "would have" paid for insurance benefits. Wrenn closed his response by noting that the union had rejected the proposal. Nothing in the response indicates that collective bargaining pertaining to private police details was ongoing – in fact, no further sessions were scheduled – and Wrenn, having described the proposal entirely in the past tense, does not suggest that it would be available for future consideration.

An attempt by a public employer to negotiate directly with union members rather than with their exclusive representative constitutes an unfair labor practice, because all such actions thwart the collective bargaining purposes of RSA chapter 273-A. See Appeal of Franklin Education Assoc., 136 N.H. at 336. In Appeal of Franklin Education Assoc., we found that impermissible "direct dealing" had occurred when a public employer unilaterally contacted and applied pressure to union members with regard to contracts that were to be the subject of renegotiation. Id. at 336-37. In this case, however, Wrenn composed and posted his letter in response to arguably inflammatory and allegedly inaccurate comments that Henderson had disseminated throughout HPD. Moreover, his letter pertained not to ongoing or future negotiations between the town and the union, but, rather, failed past negotiations. As such, we conclude that the PELRB erred in finding that the town violated RSA 273-A:5, I(e) by engaging in direct dealing with union members.

In finding that the town engaged in direct dealing, the PELRB, citing 29 U.S.C. § 158(c) (2000), concluded that the language in Wrenn's letter pertaining to hourly wages and insurance benefits constituted a "promise of benefit." Section 158(c) "implements the First Amendment by requiring that the expression of 'any views, argument, or opinion' shall not be 'evidence of an unfair labor practice,' so long as such expression contains 'no threat of reprisal or force or promise of benefit' . . . ." N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (quoting 29 U.S.C. § 158(c)). Because we are reviewing only an alleged unfair labor practice under RSA 273-A:5, and because RSA chapter 273-A contains no clause analogous to 29 U.S.C. § 158(c), we need not consider whether Wrenn's comments constituted a "promise of benefit." Even if RSA chapter 273-A did contain an analogous clause, we would simply restate our conclusion that Wrenn had merely responded to perceived misinformation regarding past negotiations, and, as such, promised no future benefit.

Reversed.

BRODERICK, C.J., and DUGGAN, GALWAY and HICKS, JJ., concurred.



NH Supreme Court reversed this decision  
on 8-23-2006, Slip Op. No. 2005-819.  
(NH Supreme Court Case No. 2005-819)

**State of New Hampshire**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Hampton Police Association

Complainant

v.

Town of Hampton

Respondent

Case No. P-0719-19

Decision No. 2005-113

APPEARANCES

For the Union: J. Joseph McKittrick, Esquire, McKittrick Law Offices

For the Town: Elizabeth A. Bailey, Esquire, Sheehan Phinney Bass +Green, PA

BACKGROUND

This case is before the Board based upon an improper practice charge filed by the Hampton Police Association (hereinafter "the Union") against the Town of Hampton (hereinafter "the Town") on June 1, 2005 alleging that the Town violated RSA 273-A:5 I (a), (b), (c), (e), (g) and (h) as a result of a memorandum posted by the Town's police chief to "All Hampton Police Officers" on May 19, 2005.<sup>1</sup> The Union contends that the posting demonstrates that the Town has not negotiated in good faith with the recognized and certified bargaining representative, and that it has otherwise attempted to address and coerce the Union's membership by direct communication. In its essence, the dispute before the Board questions the legality of the police chief undertaking this direct communication to members of a certified bargaining unit. The Town filed its answer to the Union's improper practice charge on June 10, 2005, wherein it denied any violation of the law and asserted that the police chief's communication was a valid exercise of management's right to communicate with its employees. The Union requests that the Board find that the Town committed an improper labor practice, order the police chief to cease and desist from communicating similar information to members of the union in such a manner and that the

<sup>1</sup> During the course of the pre-hearing conference, Union counsel indicated that the allegation relative to the Town's abolishment of private duty details (See Improper Practice Charge, Attachment, ¶ 26) was not being pursued in the instant forum. Accordingly, this portion of the Union's charge shall be considered withdrawn.

Board order the Town to post a copy of its decision in this matter in an area generally used for public notices for a period of thirty days. For its part, the Town requests that the Union's complaint be dismissed and requests an award of reasonable attorney's fees.

A pre-hearing conference was conducted on July 13, 2005 at which time the parties agreed that this matter was primarily one which presented an issue of law as they were in agreement as to the relevant facts. The parties requested that they be allowed to go forward on offers of proof, a submission of joint exhibits and stipulated facts, and oral argument with the submission of legal memoranda for the Board's consideration and decision. A final hearing followed on July 19, 2005 at which time the Board allowed the case to proceed on offers of proof, accepted, without objection, the submission of two joint exhibits and the submission of the parties' eleven stipulated facts. These facts appear below as "Findings of Fact" #1-#11. At the final hearing both parties were represented by legal counsel, presented the stipulated facts and exhibits and had the opportunity to present witnesses and conduct cross-examination in the event a dispute arose following offers of proof or in the event the Board required testimony. During the presentation of counsel, a discrepancy became apparent relating to Joint Exhibit # 1 which was subsequently withdrawn and in its place a Joint Exhibit #1X was substituted by agreement. Thereafter, brief oral argument was made and the record closed after a ruling by the Chairman that supplemental legal briefs were not necessary to the Board's deliberations unless it later deemed them to be so.

#### FINDINGS OF FACT

1. That the Town of Hampton (hereinafter "Town") is a public Employer as defined by the provisions of 273-A et. seq.
2. That the Hampton Police Association, Inc. (hereinafter "Association") is the Exclusive Bargaining Representative for two (2) bargaining units: the first consisting of all Police Sergeants; the second consisting of all full time and all part time Police Officers.
3. That the Association and the Town are parties to two (2) separate CBAs for the units noted above for the period April 01, 2003 to March 31, 2006.
4. That on or about April 12, 2005, the Association made a demand to commence Impact Bargaining,
5. That the parties met for Impact Bargaining May 04, 2005.
6. That the specific issues raised and/or discussed are not relevant to the instant Unfair Labor Charge before the PELRB.
7. That the parties reached no agreement on the issues presented for bargaining, but did discuss various proposals for alternative procedures or solutions.
8. That Steven Henderson is the President of the Association and was one of the individuals on the Association's Impact Bargaining team present on May 04, 2005.

9. That Chief William Wrenn is the Chief of Police for the Town of Hampton and was one of the individuals on the Town's Impact Bargaining team present on May 04, 2005.
10. That after the bargaining session of May 04, 2005, President Henderson reported to his membership on the issues raised during the bargaining session, by an e-mail dated May 18, 2005 which has been marked as Joint Exhibit # 1. (Later replaced during the hearing with Joint Exhibit #1X)
11. That on or about May 19, 2005, the Town's Chief of Police, William Wrenn posted a letter to "All Hampton Police Officers" on the Department's official bulletin board which has been marked as Joint Exhibit # 2.
12. The e-mail communication initiated by the union president was sent in response to an article that appeared in a local paper.
13. The union president chose to communicate his message using the Town's computer system and to communicate to all departmental employees including non-bargaining unit members.
14. The union president had historically used this mode of communication for union business for convenience.
15. The Town's computer e-mail program has a pre-established default addressees' grouping of "ALL" meaning each department employee receives the communication. There was at the time no such pre-established grouping for only bargaining unit members.
16. The police chief's memorandum that was posted on the bulletin board (See Joint Exhibit #2) was undertaken in response to the union president's e-mail. (See Joint Exhibit #1X).
17. The contents of both communications related to positions taken by each party during the so-called "impact bargaining" undertaken to address, among other things, an issue relating to private details that was a subject of this bargaining.
18. The police chief chose to communicate his message to all police officers and not to the Association president or other leadership of that group.

#### DECISION AND ORDER

#### JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate violations of RSA 273-A:5, I 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).

## DISCUSSION

The focus of this case is narrow. The Association has complained that on or about May 19, 2005 the police chief communicated to all of the Town's police officers, in his management representative capacity. The contents of his communication (Joint Exhibit #2) were expressed in writing on official stationery and publicly posted in a manner designed to be accessible and viewable to all police officers, including members of the bargaining unit. The contents of this management communication related to matters subject to the "impact bargaining" negotiations between the parties and was communicated in direct response to a previous e-mail authored by the association president and distributed via the Town's computer intranet. The union president had directed his earlier e-mail to an audience that knowingly included all of the departmental employees including the police chief. Each person's communication alleged that the other party had provided misinformation or misrepresented the actual positions of the parties at negotiations.

Labor law has long recognized a foundation principal that once a bargaining unit has elected an exclusive representative, management is bound to conduct all negotiations, including communications regarding issues in negotiations through the duly certified exclusive representative. In this case, that would be the president of the association, chairman of the negotiating committee or their designees. Notwithstanding this longstanding precedent, in this case the police chief chose not to do so. Instead, he undertook to author remarks that the Board fairly reads to be directed to members of the association and not limited to the association's chosen leadership at that time. The court has expressed its disfavor of so-called "direct dealing" when it acknowledged that, "[i]f an employer can negotiate directly with its employees, then the statute's purpose of requiring collective bargaining is thwarted." Appeal of Franklin Education Association, 136 N. H. 332,336. To fail to negotiate in good faith by ignoring the commonly understood requirement to communicate substantive positions on specific issues in negotiation only through the bargaining unit's recognized leadership is a violation of RSA 273-A:5, I(e).

The police chief's memorandum contains representations that management's proposal "would have paid ALL OFFICERS \$27 PER HOUR FOR WORKING DETAILS...and would pay ALL THE INSURANCES, INCLUDING WORKER'S COMPENSATION AND LIABILITY INSURANCE" (emphasis as appears in the original). We believe such wording constitutes a "promise of benefit" (See 29 U.S.C. § 58 (c) for promises are what characterizations of hourly compensation and insurance benefits are when communicated by management to employees, especially in a negotiations context. To the extent that there ever has been reliance by the New Hampshire courts on that federal statute for guidance in the past, See Appeal of the City of Portsmouth, Board of Fire Commissioners, 140 N.H. 435,439, we distinguish the applicability of that rationale in the instant case. While we may agree that broad communication of some arguments, views or opinions by management are permissible under some circumstances, those circumstances are not present here. We cannot cloak such "promises of benefit" as are obviously stated here with material woven from representations that the chief's language is merely exemplary of the common free flowing repartee between management and employees necessary to the efficient day to day operation of the department.



Before concluding, we think it noteworthy to address the actions of the Association's president with the intent of eliminating such conflicts in the future and contributing to harmonious and cooperative labor relations between these two parties. While the law governing the use of public employer computer systems by employees, e.g. intranet, for the conduct of union business may be said to be in a nascent phase, we do not believe that the "convenience factor" can long support the act of broadcasting argumentative comments relating to management statements or conduct under the banner of communication of "union business". Future communication by the president knowingly intended to reach individuals outside of the bargaining unit cannot be seriously considered to be "union business" nor afforded those protections normally accorded genuine union communiqués. The parties should expressly resolve the protocols for usage of the intranet and if present use is to continue, the intranet should be reconfigured to allow directed communication to members of the Association or, the Association shall abandon convenience as its rationale for its low level of service and delete non-unit members from the distribution list for its "union business" e-mails.

We find that the police chief's actions constitute the commission of an improper labor practice by the Town. The Town, and its representatives, shall cease and desist from directly dealing with the Association's members in the manner as factually found in this case, or in undertaking conduct that could reasonably be considered by this Board as the equivalent. A copy of this decision shall be posted for a period of thirty (30) days on the Department's official bulletin board, or the same bulletin board on which the police chief's memorandum had been posted if they are not one in the same.

So ordered.

Signed this 8th day of September, 2005.

  
Bruce K. Johnson, Alternate Chairman

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

Distribution:

J. Joseph McKittrick, Esq.  
Elizabeth A. Bailey, Esq.



**State of New Hampshire**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NH Supreme Court reversed  
Decision 2005-113 on  
8-23-2006, Slip Op. No.  
2005-819.  
(NH Supreme Court Case No.  
2005-819)

Hampton Police Association

Complainant

v.

Town of Hampton

Respondent

Case No. P-0719-19

Decision No. 2005-133

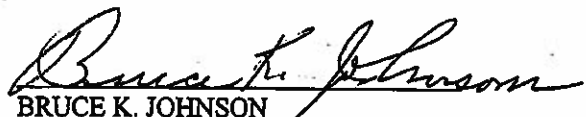
**ORDER ON MOTION FOR REHEARING**  
**OR RECONSIDERATION**

The Board conferred for the purpose of considering the Respondent's "Motion for Rehearing or Reconsideration" and took the following actions:

1. Pursuant to RSA 541 and N.H. Admin R. Pub 205.02, it reviewed the Town of Hampton's Motion for Rehearing or Reconsideration filed on October 5, 2005
2. It examined its previous decision, PELRB Decision No. 2005-113, issued in this matter on September 8, 2005.
3. It reviewed the previous filings of the parties in this matter.
4. It DENIED the Town's motion.

So ordered.

Signed this 19th day of October, 2005.

  
BRUCE K. JOHNSON  
Alternate Chairman

By unanimous decision. Alternate Chairman Bruce K. Johnson presiding. Members E. Vincent Hall and James M. O'Mara, Jr. voting.

**Distribution:**

J. Joseph McKittrick, Esq.  
Elizabeth A. Bailey, Esq.