NH Supreme Court affirmed this decision on 10-28-2014.
(NH Supreme Court Case No. 2013-690)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Professional Fire Fighters of Hudson, IAFF Local 3154

v.

Town of Hudson

Case No. G-0077-9
Decision No. 2013-112

Appearances: John S. Krupski, Esq.,
Molan, Milner & Krupski, PLLC for the Complainant

Mark T. Broth, Esq.,
Devine, Millimet & Branch, PA for the Respondent

Background:

On October 30, 2012 the Professional Fire Fighters of Hudson, IAFF Local 3154 (Union) filed an unfair labor practice complaint under the Public Employee Labor Relations Act (Act) because the Town refuses to implement an arbitration decision which awarded step increases to unit employees during the current status quo period. The arbitrator concluded there was a valid past practice pursuant to which the Town was required to provide step increases during the current status quo period, particularly when the Town had already provided step increases to employees during the first two years of the current status quo period.

According to the Union, the arbitrator properly concluded that there was a past practice pursuant to which status quo steps were paid, the Town properly warned and funded the step increases, the Town waived its discretionary power as to the payment of steps during status quo, the Town is precluded from contesting the legality of the arbitrator's decision because the Town

did not contest substantive arbitrability but instead authorized the arbitrator to decide the dispute and bind the parties when it participated without protest in the arbitration proceedings.

The Union charges the Town has violated RSA 273-A:5, I (h) and (i). As relief, the Union asks that the PELRB find that the Town committed an unfair labor practice, order the Town to comply with the arbitrator's award, and award attorney's fees to the Union.

The Town denies the charges.[1] According to the Town, the arbitration award violates the requirements of RSA 273-A:3, II (b) and is contrary to public policy. The Town maintains that the Town's legislative body was never adequately warned about and never approved the funding of step increases during the status quo, the award requires the Town to make an unauthorized expenditure of public funds, and the award exceeds the Town's legal obligations under the status quo doctrine.

A hearing was held on February 5, 2013 at the offices of the PELRB in Concord. Both parties submitted post-hearing briefs, and the decision in this case is as follows.

Findings of Fact

Parties:

1. The Town is a public employer within the meaning of RSA 273-A:1.X.

2. The Union is the exclusive representative of certain employees of the Town Fire Department, including dispatchers, lieutenants and firefighters.

Town Fiscal Year and Budget:

3. The Town operates on a July 1 to June 30 fiscal year and each fiscal year is referenced by the year in which the fiscal year ends (fiscal year 2010 is July 1, 2009 to June 30, 2010).

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[1] The Town included a "counterclaim" in its answer to the complaint. However, as stated in the pre-hearing order (PELRB Decision 2012-262, November 29, 2012), PELRB rules do not allow for the filing of a counterclaim, and it is being treated as part of the Town's answer and defense to this case, and not an unfair labor practice charge.

4. Every March at town meeting voters approve the budget for the following fiscal year.

5. The published version of the Town operating budget for fiscal years 2007 through 2012 included monies sufficient to fund step increases for bargaining unit members.

Collective Bargaining Agreements:

6. The Union and the Town are parties to a collective bargaining agreement effective from July 1, 2006 to June 30, 2009 (2006-09 CBA). See Joint Exhibit 3.

7. The 2006-09 CBA was preceded by four earlier CBAs dating back to 1991. Beginning in 1992, the parties were in status quo because of a failure to finalize a successor agreement five times. The four status quo periods prior to the 2006-09 CBA were for intervals of 6 months, 34 months, 3 years, and 2 years. The parties have been in status quo since the expiration of the 2006-09 CBA.

Step Increases:

8. All bargaining unit members received step pay increases between July 1, 2009 and August of 2011, despite the fact that the 2006-09 CBA had expired. By letter dated August 4, 2011 the Town informed the Union that the Town would no longer pay wage increases, including steps, during the status quo period.

9. The Town did not provide or award step increases to employees covered by the police department bargaining unit following the expiration of the police department collective bargaining agreement at the end of June, 2010.

Arbitration:

10. The Union grieved the Town's refusal to pay step increases, and in 2012 the dispute proceeded to grievance arbitration.

11. The Town did not oppose grievance arbitration of the step increase dispute, and there is no evidence that the Town placed the Union on notice that the Town would not comply with any arbitration decision which awarded the sought after step increases.

12. By decision dated April 30, 2012 the arbitrator awarded the affected employees the disputed step increases. See Joint Exhibit 2. The arbitrator concluded that: 1) a binding past practice could exist during a status quo period; 2) that the law does not require step increases during status quo but does not "require the employer to refrain from paying step increases;" 3) the evidence supported a finding of a binding past practice pursuant to which step increases were paid during the four prior quo periods and the first portion of the current status quo period; 4) the Town failed to exercise any right it had under the law to discontinue the past practice at the beginning of the current status quo period and instead continued the past practice by paying step increases through August of 2011; and 5) discontinuation of the past practice in the two years into current status quo period would result in disparate treatment of similarly situated employees with respect to administration of the pay plan.

13. The arbitrator's analysis reflects that while the Town funded the payment of steps during the current and prior status quo period, the parties never had an express "evergreen" clause or its equivalent in their prior contracts or recently expired contract which was presented to and duly approved by the Town's legislative body.

14. Town refuses to comply with the arbitrator's award.

Decision and Order

Decision Summary:

The arbitrator's award violates a strong and dominant policy, namely the need for approval by the local legislative body of the expenditure of public monies to fund benefits like step increases for bargaining unit employees both during a contract's express term and during

any interval between collective bargaining agreements. Accordingly, the Union's unfair labor practice complaint is dismissed.

Jurisdiction:

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

Discussion:

In deciding the Union's unfair labor practice charge, and in evaluating whether the Town's non-compliance with the arbitrator's award is justified, it is necessary to determine whether the award contravenes "a strong and dominant public policy as expressed in controlling statutes, regulations, common law, and other applicable authority." *Appeal of Merrimack County*, 156 N.H. 35, 44-45 (2007)(arbitrator's award reinstating a terminated county employee did not contravene a strong and dominant public policy). *See also Appeal of the Town of Pelham,* 154 N.H. 125 (2006); *Appeal of Amalgamated Transit Union, Local 717*, 144 N.H. 325 (1999); *Eastern Associated Coal Corporation v. United Mine Workers of America District 17 et al,* 531 U.S. 57 (2000). We find there is a strong and dominant public policy of relevance to the present case, namely the need for approval by the local legislative body of the expenditure of public monies to fund benefits like step increases for bargaining unit employees both during a contract's express term and during any interval between collective bargaining agreements. We further find that the arbitrator's award contravenes this public policy and is unenforceable, notwithstanding the Union's arguments to the contrary.

Relevant provisions of the Act include the following:

> 273-A:1, IV: "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.
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> 273-A:3, II (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.

Relevant court decisions include *Appeal of Laconia Patrolmen Association,* N.H. Supreme Court Slip. Op. No. 2012-057 (February 8, 2013); *Appeal of Alton School District,* 140 N.H. 303 (1995); *Appeal of Milton School District,* 137 N.H. 240 (N.H. 1993); and *Appeal of Sanborn Regional School Bd.,* 133 N.H. 513 (1990).

In *Appeal of Sanborn,* the court observed that to be effective, voter ratification (voters at the school district annual meeting in *Sanborn*) "requires full knowledge of the financial terms of the collective bargaining agreement." *Id.* at 520. The court also stated that "[i]n requiring submission of cost items to the voters for approval, the legislature has recognized that the voters' interests may not always be in accord with the desires of the school board. In so doing, the legislature has created one more dynamic that further complicates the collective bargaining process. Nevertheless, this requirement is clear and unequivocal." *Id.* at 521.

In *Appeal of Milton,* the court ruled that an automatic renewal clause contained within an expired collective bargaining agreement "fits squarely within" the Act's definition of a cost item set forth in RSA 273-A:1, IV. The court held that the district, as one of the contracting parties, was not bound by its own agreement (the automatic renewal clause) because the town, acting through voters at the district's annual meeting, had not ratified the district's agreement to the automatic renewal clause:

> Although our decision in *Sanborn* makes it plain that the town is not bound by the automatic renewal clause, neither *Sanborn* nor RSA 273-A:3, II(b) explicitly answers the question whether the district and the association, the parties to the contract, are bound. Under RSA 273-A:3, II(b), neither party may enforce a CBA if the legislative body rejects the cost items in it, see Appeal of Franklin Education Assoc., 136 N.H. 332, 334, 616 A.2d 919, 920-21 (1992) (legislative body rejected cost items contained in contracts; the contracts, "contingent upon the items' approval, are not binding"), but the statute does not specifically address

> the situation before us, where the cost items were never submitted to the town in the first place. We conclude, however, that the two situations are functionally equivalent. It would elevate form over substance to make a distinction here between the town specifically rejecting a cost item and the town simply never approving the item. Either way, the town has not approved the cost item, and either way, a binding, but unfunded CBA could prove injurious to the school system as a whole. Accordingly, we determine that the district was not bound by the automatic renewal clause. Given our interpretation of RSA 273-A:3, II(b), the association's arguments regarding consideration and general contract law are irrelevant.

Appeal of Milton at 244-245.

Appeal of Laconia Patrolmen's Association and *Appeal of Alton School District* involve the "judicially imposed" status quo doctrine. Under the status quo doctrine, the payment of steps following the expiration of a collective bargaining agreement is a matter reserved to the public employer's discretion, and a public employer is not obligated to provide step increases unless the parties have made a legally binding alternative arrangement. In *Appeal of Alton School District,* the court identified three legally binding alternative arrangements which will avoid the imposition of the status quo doctrine as it relates to step increases:

> To avoid judicially imposed "status quo" there are three collectively bargained alternatives. The first, as was attempted in *Alton*, is the "evergreen" provision, where the collective bargaining agreement, at the end of the stated term, renews itself automatically until the successor agreement is ratified. Obviously, as we say above, this agreement must be ratified by the legislative body, said body being fully informed of its terms and aware of its financial impact, or, in bargaining parlance, *Sanbornized*. The second is the limited "evergreen" provision that we see in the Rochester contract. This provides for an extension of the contract during the period of negotiation. This also must have the informed ratification of the legislative body and bears the risk of the specter of judicially imposed "status quo" should bargaining be abandoned. The third is a "status quo" clause where the precise terms of the post-term relationship are spelled out by the parties. This is also a cost item requiring informed legislative ratification, but, being bargained, would avoid further dispute.

Alton at 316. In the absence of legislative ratification, collective bargaining agreement provisions which call for the payment of steps during any status quo period are unenforceable. *Appeal of Alton* at 309.

A recent board declaratory ruling concerning a public employer's obligation to continue the payment of status quo step increases is also instructive. *See Town of Hampton v. State Employees Association of New Hampshire, SEIU Local 1984,* PELRB Decision No. 2010-031 (February 8, 2010)(appeal withdrawn). Although *Hampton* did not involve a review of an arbitrator's award, it is noteworthy because the nature and extent of a public employer's past practice obligation to continue the payment of step increases during a status quo period was at issue. The board deciding that case concluded that even though the practice of paying step increases during status quo met the requirements of clarity, consistency, and acceptability, it nevertheless did not obviate the need for legislative ratification of the costs associated with the payment of steps during the status quo:

> We do find that a past practice arose between the parties. A past practice has special significance in labor law. A past practice embodies the elements of "clarity, consistency, and acceptability." (Elkouri & Elkouri, How Arbitration Works, Sixth edition, p.608). It is also characterized as being binding on both parties if the practice is "(1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." (Id.) There is sufficient evidence that the Town's attention was drawn to the fact that some employees had not received their step increases between April 2006 and October 5, 2006 when the union representative told the Town Manager and Town negotiator during a negotiations session for a successor CBA. Upon determining this to be true, the Town granted the step increases to those employees and made their payments retroactive to April 1, 2006. The Town continued to pay step increases to all employees when they reached the required time in service in each of the years 2006, 2007, 2008 and 2009. Both parties were well aware that the steps were being paid throughout this period. Unfortunately for the SEA we cannot find that the existing body of law we are charged to apply allows the type and nature of this past practice to continue to be treated as enforceable and essentially "trump" what the court has said to date regarding the non-enforceability of evergreen clauses such as the clause we encounter in this case.
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> [W]e are restrained to declare the law as it is; and we do by finding that the Town is no longer *required* to pay step increases after March 31, 2010 lacking the approval of a successor agreement providing the extension of that benefit into the future. However, we deny the full relief requested by the Town to return to wage

levels existing on April 1, 2006. Any and all other requests of the parties for relief are denied.

We believe that collectively these controlling authorities reveal and express a strong and dominant public policy pursuant to which approval by the local legislative body of the expenditure of public monies to fund benefits like step increases for bargaining unit employees both during a contract's express term and during any interval between collective bargaining agreements is required in order to have an enforceable agreement. In the absence of such local legislative approval, any arbitration award which requires a public employer to provide such a benefit is not enforceable. There is in this case insufficient evidence to support a finding that the Town properly warned the legislative body (voters at town meeting) about the cost of status quo step increases. There is no finding in the arbitrator's award to this effect, and there was a lack of such evidence in the record established during the PELRB hearing. Union arguments about the availability of funds in the department budget to pay status quo step increases miss the point. Such funding is not the equivalent of or a legal substitute for, the *Sanborn* process. The relevant inquiry is whether voters gave their approval after first being duly warned, or informed, about the expense at issue, not whether funds can be found in the department budget to pay the step increases.

The public policy at issue in this case applies regardless of whether the underlying public employer agreement to provide status quo step increases is based on past practice or an express contract provision. This is a distinction without a difference for the purposes of this case. The controlling inquiry is whether the public employer agreed, within the framework of the statutory collective bargaining relationship, to provide a benefit which involves the expenditure of public funds. A past practice pursuant to which status quo steps are provided and a duly approved evergreen clause which provides status quo steps place the same demand on public funds. Past practice is, in substance, part and parcel of collective bargaining. Terms and conditions

established by past practice are treated, in labor relations, as much a part of a collective bargaining agreement as the agreement's express written provisions. *See, e.g., Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960)(a past practice is deemed a part of the collective bargaining agreement even though it is not expressly set forth in the agreement).

The Union argument that the Town waived its discretionary power to pay status quo step increases does not change the outcome in this case. Any such waiver is of the same legal significance as an express agreement to provide status quo step increases. Both are subject to the requirements of the public policy under discussion.

The Union also argues the Town has waived its right to contest the enforceability of the arbitrator's award because, in effect, the Town participated in the arbitration proceedings without objection, and therefore must be deemed to have given up any right to challenge the arbitration award. First, we note that the Town did not provide an express waiver of its right to contest the enforceability of the arbitrator's award on public policy grounds. We decline to imply such a waiver based on the Town's participation in the arbitration. The logical time for a party to an arbitration proceeding to question enforceability of an arbitrator's award is after the award has issued, which is what happened in this case. At that time the parties will be fully informed as to the precise nature and scope of the award as well as its basis (as would be any tribunal like the PELRB which may hear such a challenge). To find otherwise would mean the Town was required to either cause an unfair labor practice charge (wrongful refusal to arbitrate) by declining to participate in arbitration or to bring an unfair labor practice charge (wrongful demand for arbitration) against the Union. We also have reservations about whether such a charge would present a justiciable controversy when the arbitration has not been conducted and no award issued. Second, the Union's waiver argument is tantamount to imbuing the arbitrator with the power or authority to override a strong and dominant public policy, like the one at issue

in this case. We believe this would be improper. We therefore conclude that the Town was entitled to proceed with the arbitration without prejudice to its right to challenge the enforceability of the award on public policy grounds.

In accordance with the foregoing the arbitration award violates a strong and dominant public policy and is unenforceable. Therefore the Town did not commit an unfair labor practice when it refused to implement the award. The Union's complaint is dismissed.

So ordered.

July 11, 2013.

David J.T. Burns, Esq., Chair

By unanimous vote of Alternate Board Member David J.T. Burns, Esq. and Board Members Richard J. Laughton, Jr. and James M. O'Mara, Jr.

Distribution:

John S. Krupski, Esq.
Mark T. Broth, Esq.