NH Supreme Court affirmed this decision on 04-18-2014. (Supreme Court Case No. 2013-253)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, Council 93, Local 3657 Brookline Police Officers Association (Brookline Police Department)

v.

Town of Brookline

Case No. G-0128-5
Decision No. 2013-025

Appearances: Karen Clemens, Esq., Associate General Counsel, AFSCME Council 93, Boston, Massachusetts for the Complainant

Mark Broth, Esq., Devine, Millimet & Branch, P.A., Manchester, New Hampshire for the Respondent

Background:

On July 10, 2012 the Union filed an unfair labor practice charge claiming the Town violated certain provisions of the Public Employee Labor Relations Act, RSA 273-A (PELRA or the Act). The complaint involves a bargaining unit comprised of certain police department employees which was certified by the PELRB in 2001 and subsequently amended by the PELRB in 2002. The Union complains that in the midst of ongoing efforts to bargain a successor contract the Town unilaterally suspended the bargaining process and now refuses to recognize and engage with the Union and bargaining unit employees in collective bargaining under RSA 273-A. As relief, the Union requests that the PELRB: 1) find that the Town has committed an unfair labor practice(s) because it has violated the cited provisions of RSA 273-A:5, I; 2) order the Town to bargain in good faith; 3) order the Town to post this decision; 4) order the Town to make the Union whole for any and all cost and expenses the Union has incurred in the

prosecution of this unfair labor practice complaint; and 5) provide such further relief as the PELRB deems necessary and appropriate.

On July 11, 2012 the Union filed a motion requesting a cease and desist order pending a hearing on its unfair labor practice charge. The Union asked that the PELRB order the Town to maintain the status quo pending the hearing on the merits.

The Town denies the charge and contends its actions are justified because there are less than 10 employees in the bargaining unit. The Town argues that PELRB rules do not establish a procedure by which a public employer may challenge the continued certification of a bargaining unit which has failed to include at least ten employees during the time period following the PELRB certification of the bargaining unit. The Town states that the only way for it to litigate the issue is by refusing to bargain with the Union and precipitating an unfair labor practice charge. The Town objected to the Union's motion for a cease and desist order, arguing that the Union is not entitled to any relief pending a hearing.

The PELRB granted the Union's motion for a cease and desist order, and ordered as follows:

> The terms and conditions of employment established under the parties' most recent collective bargaining agreement shall remain in effect as per the status quo doctrine pending a hearing and decision on the Union's complaint. The Town does not have the right to unilaterally set the terms and conditions of employment, and it shall refrain from doing so. The Town shall otherwise comply with all its obligations under the 2005 amended certification and RSA 273-A pending a hearing and decision, including its obligation to participate in statutory mediation to address an impasse in bargaining.

See PELRB Decision No. 2012-183 (July 27, 2012).

This case was scheduled for a pre-hearing conference on August 14, 2012 *and for* adjudicatory hearing on August 28, 2012. The PELRB subsequently granted the Union's assented to motion to continue the pre-hearing conference and adjudicatory hearing, and the

parties' subsequently agreed to submit the case for decision based upon stipulated facts, exhibits, and written briefs. The decision in this case is as follows.

Findings of Fact

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

2. In 2001 the PELRB approved a bargaining unit containing at least 10 Town of Brookline police department employees and certified the Brookline Police Officer's Association as the bargaining unit's exclusive representative. See Joint Exhibit 10 (PELRB Decision No. 2001-104, October 18, 2001). The PELRB certification order includes the following language:

> Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the exclusive representative named herein on terms and conditions of employment for the members of the bargaining unit, as herein described, and shall recognize the right of such exclusive representative to represent employees in the settlement of grievances.

3. In 2002 and in 2004 the PELRB amended the bargaining unit description to reflect the results of modification proceedings. See Joint Exhibit 15 (PELRB Decision No. 2002-039 – sergeant position removed) and Joint Exhibit 17 (PELRB Decision No. 2004-050 – corporal position added).

4. In 2005 the PELRB approved the Pub 301.04 affiliation of the Brookline Police Officers Association with the American Federation of State, County and Municipal Employees (AFSCME), Council 93, Local 3657 (Brookline Police Officers Association) as reflected in PELRB Decision No. 2005-057and PELRB Decision No. 2005-058. See Joint Exhibits 21-22.

5. As reflected by Joint Exhibit 23, the number of employees holding bargaining unit positions since 2005 has fluctuated and with perhaps a few exceptions has consistently been below ten, as is currently the case.

6. By letter dated July 6, 2012 (Joint Exhibit 2) the Town administrator informed the Union that it would no longer participate in the collective bargaining process or process grievances to arbitration as set forth in a July 6, 2012 letter to the Union:

> We have received your Request for Mediation dated June 11, 2012.
>
> In reviewing our collective bargaining responsibilities, the Board respectfully submits that the Union no longer meets the minimum qualifications for certification under RSA 273-A, which prohibits the PELRB from certifying bargaining units with fewer than 10 members. As you know, the police bargaining unit has had fewer than 10 employees for more than 10 years and there is no plan to increase the force to 10 or more officers. As a result, the Board does not believe it is required to continue to engage in collective bargaining or in processing the pending grievances that have been submitted for arbitration.
>
> The Town intends to notify the PELRB that as the existing bargaining unit consists of fewer employees than required by RSA 273-A, the Town declines to participate in mediation or further participate in the grievance and arbitration process.

7. By memo dated July 6, 2012 (Joint Exhibit 3) the Board of Selectmen notified bargaining unit employees that it was ending the collective bargaining process for the reasons stated in the Town Administrator's July 6, 2012 letter to the Union:

> The Town of Brookline takes great pride in its Police Department and considers its members to be highly valued employees. It is for this reason that we are notifying you of some imminent changes impacting the Police Department that we hope will mutually benefit the Town and the employees.
>
> As you may know, the police bargaining unit has had fewer than 10 employees for more than 10 years and there is no plan to increase the force to 10 or more officers. By letter from the Town Administrator dated July 6, 2012, the Board of Selectmen (Board) notified AFSCME Council 93 of its position that the Union no longer meets the minimum qualifications for certification under RSA 273-A, which prohibits the PELRB from certifying bargaining units with fewer than 10 members. Accordingly, the Board does not believe it is required to continue to engage in collective bargaining or in processing the pending grievances that have been submitted for arbitration. The Town intends to notify the PELRB that as the existing unit consists of fewer employees than required by RSA 273-A, the Town declines to participate in mediation or further participate in the grievance and arbitration process.
>
> Ending the collective bargaining process does not mean that the Town values its Police Department any less. It is the Board's intention to keep the wages, work hours, insurance benefits and other benefits described in the agreement in place until at least year end. Specifically, the provisions set forth in Articles 9-23, 25-26, as amended, shall remain in effect until further notice. The grievance procedure described in Article 24 , Sections 24.2-

24.4 shall remain in effect. Decisions of the Board shall be final. Union dues will no longer be deducted from your pay as of the pay period beginning July 8th.

Decision and Order

Decision Summary:

The PELRB has jurisdiction over the Union's complaint. We find the Town committed unfair labor practices when it refused to participate in collective bargaining with the duly certified exclusive representative, refused to recognize the duly certified bargaining unit, unilaterally changed the terms and conditions of employment for bargaining unit employees, and terminated the deduction of Union dues.

Jurisdiction:

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

Discussion:

Under the provisions of the PELRA it is a prohibited practice for any public employer, like the Town:

> (a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;
> (b) To dominate or to interfere in the formation or administration of any employee organization;
> (c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization;
> (d) To discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under this chapter;
> (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;
> (f) To invoke a lockout;
> (g) To fail to comply with this chapter or any rule adopted under this chapter;
> (h) To breach a collective bargaining agreement;
> (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.

See RSA 273-A:5, I. The Union asserts the Town violated sections (a), (b), (c), (e), (g), (h),and (i) as a result of the Town's refusal to recognize the bargaining unit and the changes in working conditions described in the Town Administrator's letter and the Board of Selectmen's memo.

The Town argues that the PELRB lacks jurisdiction over the Union's complaint because the number of bargaining unit employees is below 10. The Town reasons that the minimum number of employees (10) required for the formation of a new bargaining unit pursuant to RSA 273-A:8 also means the PELRB does not have jurisdiction over a subsequent unfair labor practice charge if the number of unit employees is less than 10. The Town relies upon several decisions from the National Labor Relations Board to support its position.[1] In substance, the Town contends that it has been discharged from its responsibilities and obligations under the Act, that it is no longer subject to statutory collective bargaining, and that it is free to unilaterally determine the terms and conditions of employment for unit employees.

In construing the requirements of RSA 273-A as to the number of bargaining unit employees required, we begin with the plain language of its provisions which we consider "in the context of the statute as a whole." *See Appeal of Derry Educ. Ass'n,* 138 N.H. 69 (1993)(citations omitted). Under RSA 273-A:8, I "[t]he board or its designee shall determine the appropriate bargaining unit and shall certify the exclusive representative thereof when petitioned to do so under RSA 273-A:10." The legislature further provided that:

> *In no case shall the board certify a bargaining unit of fewer than 10 employees* with the same community of interest. For purposes of this section, probationary employees shall be counted to satisfy the employee minimum number requirement. In no case shall such probationary employees vote in any election conducted under the provisions of this chapter to certify an employee organization as the exclusive representative of a bargaining unit.

Id. (emphasis added). The plain language of this provision of the Act clearly relates the 10 employee requirement to the certification process. *See Appeal of Town of Deerfield,* 162 N.H.

[1] *Chemetron Corp.,* 268 NLRB No. 47, 114 LRRM 1273 (1983); *Crescendo Broadcasting, Inc.,* 217 NLRB No. 110, 89 LRRM 1155 (1975); and *Crispo Cake Cone Co.,* 201 NLRB No. 33, 82 LRRM 1198 (1973).

601 (2011)(whether the 10 employee minimum is met is determined as of the time the PELRB certifies the unit).

RSA 273-A:8, I is the only portion of the Act which imposes a minimum employee requirement, and it does not state or provide that the 10 employee minimum is either a continuous requirement or a necessary predicate to PELRB jurisdiction over an unfair labor practice complaint filed subsequent to bargaining unit certification. The same is true with respect to the other provisions of the Act, including those which specifically define and address unfair labor practices. *See* RSA 273-A:5 and 6 (providing that the PELRB "shall have primary jurisdiction of all violations of RSA 273-A:5"). Nothing in these statutory provisions divests the PELRB of its jurisdiction over an unfair labor practice charge when the underlying bargaining unit has less than 10 employees. Likewise, although the duration and status of the exclusive representative's certification is specifically addressed in RSA 273-A:10, VI (a) and (b) there is nothing in this portion of the Act which directs the discontinuation of the bargaining unit if the number of employees falls below 10:

> (a) Certification as exclusive representative shall remain valid until the employee organization is dissolved, voluntarily surrenders certification, loses a valid election or is decertified.
>
> (b) The board shall decertify any employee organization which is found in a judicial proceeding to discriminate with regard to membership, or with regard to the conditions thereof, because of age, sex, race, color, creed, marital status or national origin; or has systematically failed to allow its membership equal participation in the affairs of the employee organization.

See RSA 273-A:10, VI.

We can safely presume that at the time the legislature adopted RSA 273-A, it did so with an awareness that employee populations are not static but fluctuate up and down over time for a variety of reasons, which may in turn cause the number of employees in a certified bargaining unit to fall below 10. Nevertheless, the legislature did not find it necessary or appropriate to

have the PELRB factor in the number of bargaining unit employees for any reason or purpose other than during the formation of the bargaining unit. If the legislature intended that bargaining units consist of 10 employees at all times subsequent to completion of the certification process "it could have so stated." *See Appeal of Derry Educ. Ass'n,* 138 N.H. 69 (1993). Likewise, the legislature could have provided that the PELRB loses its jurisdiction to adjudicate unfair labor practice charges involving a previously certified bargaining unit if the number of bargaining unit employees falls below 10, but the "legislature, however, chose not to do so." *Id.*

The Town included legislative history material with its post-hearing brief which reflects that at the time RSA 273-A was enacted it was the legislature's intent to require a minimum of 10 employees to form a bargaining unit. We think the statute is clear on this point and that resort to legislative history is unnecessary to establish this proposition, but we note that this legislative history (10 employees are required to form a bargaining unit) is consistent with our reading of the statute. The statements in the legislative history on the number of employees all relate to how many employees are necessary to form a bargaining unit. The legislative history excerpts offered by the Town also reflect that a number of bills which subsequently sought to change the 10 employee figure to a lesser amount did not pass. There is nothing in these legislative history excerpts which establishes a legislative intent that a certified bargaining unit will become null and void in the event the number of employees ever falls below 10, or that the PELRB loses its jurisdiction to adjudicate unfair labor practice charges involving bargaining units with fewer than 10 employees.

Our analysis of the Act in this case is consistent with our prior decision in an earlier case. *See State Employees Association of New Hampshire, Local 1984, on behalf of Ashland Town Employees v. Town of Ashland,* PELRB Decision No. 1999-120 (November 23, 1999). The rational for the PELRB ruling in that case included the following:

The record, as well as the law, does not support the Town's contention that it is no longer obligated to bargain now that the number of employees in the bargaining unit has fallen below ten. The number of employees met the statutory requirements both when the unit was formed and when the election results were certified. Using a discrete number, whether it be ten (10) or otherwise, necessarily poses the potential for argumentative situations when the number of employees in question is on the cusp of the statutory requirement. In order to avoid such situations and/or unwarranted or inappropriate machinations in order to impact the statutorily set number, this Board follows a number of protective procedures, and has done so historically.

Initially, we note the statutory provisions. RSA 273-A provides that we shall not certify "a bargaining unit of less than ten employees." Our actions have been consistent with that mandate. Then, as noted in the Union's post-hearing brief (page 4) and in Finding No. 7 above, the statute provides that certification "shall remain valid" until certain actions shall have occurred, none of which have happened in this case.

Next, we look to the public policy leading to the passage of RSA 273-A. The Statement of Policy found at Chapter 490:1 of the Laws of 1975 contemplated "foster[ing] harmonious and cooperative relations" and "requiring public employers to negotiate in good faith...." If we were to subscribe to the Town's arguments about the "rule of ten," this legislative policy as well as the obligations imposed by RSA 273-A:3 are susceptible of being frustrated and avoided merely by an on-going fluctuation or tinkering, for whatever reason(s), above or below the statutorily required ten employees. This would make the obligation to bargain an ever changing "moving target" vis-à-vis the requirement to negotiate in good faith. In order to avoid such a situation, we take a "snapshot" of the status of the bargaining unit as of the time it is organized and recognized, whether by mutual agreement or by decision. If this "snapshot" passes the "rule of ten" test, then the obligation to bargain attaches; to hold otherwise would make that obligation an unacceptable "moving target." In this vein, we cannot and do not accept the Town's assertions (Town brief page 5) that private sector principles adopted and used by the National Labor Relations Board (NLRB) should apply to this case. The NLRB standard is set at two (2) employees to help answer voter anonymity and to insure the ability for "collective negotiations." Its tests for negotiating turn on certain "commerce" and "enterprise" concepts not utilized in the New Hampshire public sector and not appropriate in attempting to define a "public employer" in this state.

In making our decision we also consider the NLRB decisions cited by the Town and we conclude that they do not affect our construction of the PELRA. The Town argues that we should rely on the NLRB decisions because the PELRA is "open to interpretation" as to the number of employees required in order for a certified bargaining unit to remain viable. We disagree that the PELRA is "open to interpretation" as claimed by the Town. Just because the Act does not provide for the discontinuation of a bargaining unit when the number of unit employees falls below 10 does not mean it is "open to interpretation."

Even assuming, for purposes of discussion, that it is appropriate to look to NLRB decisions for guidance in this case, we conclude these decisions do little to advance the Town's argument. *Chemetron Corp.,* 268 NLRB No. 47, 114 LRRM 1273 (1983); *Crescendo Broadcasting, Inc.,* 217 NLRB No. 110, 89 LRRM 1155 (1975); and *Crispo Cake Cone Co.,* 201 NLRB No. 33, 82 LRRM 1198 (1973) are decisions which provide that a private employer does not have to bargain with a unit comprised of a single employee provided the employer has shown the reduction to one employee is permanent. Unlike the PELRA, the National Labor Relations Act authorizes the formation of bargaining units with as few as two employees. The fact that private employers are not obligated to bargain with bargaining units that have been permanently reduced to one employee does not mean or establish that under the PELRA a public employer's bargaining obligations are suspended or eliminated in the event the number of bargaining unit employees ever falls below 10.

In accordance with the foregoing, neither the provisions of RSA 273-A:8 nor any other part of the Act: 1) directs the PELRB to decertify a bargaining unit if the number of employees in the unit ever falls below 10; 2) provides that the PELRB loses its jurisdiction to enforce provisions of the Act in a unfair labor practice dispute involving a certified bargaining unit which now has fewer than the 10 employees required to form a bargaining unit; or 3) relieves a public employer of its obligations under the Act in the event the number of employees in a certified bargaining unit ever falls below 10. The PELRB certification remains in full force and effect. It is a final order which has not been vacated or modified by any subsequent decision or order of the PELRB or any state court.

We find that the Town has committed unfair labor practices in violation of RSA 273-A:5, I (a), (b), (e), (g), (h),and (i). The Union's charge that the Town violated section (c) of RSA 273-A:5, I is dismissed. The Town violated section (a) because it has improperly deprived

employees of their right to participate in the collective bargaining process through the duly certified bargaining unit, to benefit from the provisions of negotiated collective bargaining agreements and to be free from unilateral changes to the terms and conditions of employment. The Town violated section (b) because it terminated the deduction of union dues which we find to be an interference in the administration of the Union's organization. The Town violated section (e) because of its refusal to participate in the collective bargaining process, a clear failure of its obligation to negotiate in good faith with the Union. The Town violated section (g) because of its disavowal of existing and valid PELRB orders which establish the bargaining unit under discussion and the Union as its exclusive representative. The Town violated section (h) because it has repudiated the terms and conditions of employment for employees established through the collective bargaining process and unilaterally made changes in such conditions instead of adhering to the negotiated terms and conditions. The rules the Town established and implemented in July 2012 as reflected by Joint Exhibits 2-4 constitute a violation of section (i).

The Town shall cease and desist in its refusal to recognize the bargaining unit and the Union as exclusive representative and shall participate in the collective bargaining process under the Act, including the statutory impasse resolution process per RSA 273-A:12. The Town shall make whole all bargaining unit employees affected by the Town's unilateral changes in the terms and conditions of employment. The Town shall post this decision for thirty days in a conspicuous place where employees affected by this decision work.

So ordered.

February 11, 2013.

Charles S. Temple, Esq., Chair

By unanimous vote of Chair Charles S. Temple, Esq. and Board Members Kevin E. Cash and Carol M. Granfield.

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