



NH Supreme Court affirmed this decision on October 24, 1995, Slip Op. No. 94-199, 140 NH 323 (1995).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

RYE FIRE & POLICE ASSOCIATION
AND ROBERT HOWLAND

Complainant

v.

TOWN OF RYE

Respondent

CASE NO. M-0604:1

DECISION NO. 93-161

APPEARANCES

Representing Rye Fire and Police Association and Robert Howland:

J. Joseph McKittrick, Esq.

Representing Town of Rye:

Michael Donovan, Esq.

Also appearing:

- Jack Tobey, Rye Police & Fire Association
- Betty S. Howland
- Mark N. Zartarian, Rye Police & Fire Association
- Robert Howland, Rye Police & Fire Association
- Janet Thompson, Rye Selectmens Office
- Edward Hublin, Rye, N.H.
- Jane E. Ireland, Rye, N.H.
- Paula S. Snyder, Rye, N.H.

BACKGROUND

Robert Howland and the Rye Fire and Police Association (hereafter referred to collectively as "the Association") filed a unfair labor practice (ULP) complaint against the Town of Rye (Town) on July 20, 1993 alleging a violation of RSA 273-A:5 for failing to pay accumulated sick leave benefits under a collective bargaining agreement (CBA). The Town filed an answer on July 28, 1993 with a request that a hearing not be set until after a special town meeting set for September 18, 1993. After the Town sought and

obtained a continuance from a September 21, 1993 hearing date, this matter was heard by the PELRB on October 26, 1993. At the close of those proceedings, the parties were given until November 1, 1993 to file post hearing briefs which they did.

FINDINGS OF FACT

1. The Town of Rye is a "public employer" within the meaning of RSA 273-A:1 X.
2. The Rye Fire & Police Association is the duly certified bargaining agent for all permanent, full time firefighters and police officers employed by the Town of Rye. Complainant Robert Howland is one such employee.
3. The Association and the Town entered into a CBA on December 27, 1989 effective for the period January 1, 1990 through December 31, 1992. Article 14, Section 1 of that agreement provided that, "when an employee leaves the departments they shall be paid for any unused sick leave accumulated at the rate of 5% per year of full time employment with the town, not to exceed 100%." Article 25, Section 1 of the same CBA provides that it "shall continue in full force and effect from year to year thereafter, unless written notice by certified mail of desire to terminate is served by either party on the other at least ninety (90) days prior to date of expiration." There is no evidence that any such notice has been sent.
4. The Rye Annual Town Meeting held on March 17, 1990 considered and adopted Warrant Article 14 under which it obligated itself "to create an expendable general fund trust fund under the provisions of RSA 31:19-a. . .for the purpose of funding Town Employees' accumulated leave accounts, and to raise and appropriate the sum of five thousand dollars (\$5,000) towards this purpose." Minutes of the meeting which adopted this provision (CBA Article 14) show considerable discussion, inclusive of discussion of why a "use it or lose it" policy might not be appropriate.
5. The New Hampshire Supreme Court issued Appeal of Sanborn Regional School Board, 133 N.H. 513, in August of 1990. Thus, when the Rye Annual Town Meeting approved Warrant Article 11 on

March 16, 1991, it did so because "there was a recent N.H. Supreme Court decision requiring acceptance by the legislative body of multi-year contracts. The appropriations contained in Warrant Article 11 were intended to "ratify the financial terms of the collective bargaining agreement reached on December 27, 1989 between the Board of Selectmen and the Fire and Police Association...." They included wage increases and benefit costs; however, no additional funds were appropriated to the Town Employees' Accumulated Leave Fund (Finding No. 4) nor was that fund mentioned in the 1991 warrant. According to Jack Tobey, a town selectman for 7 years and the Town's negotiator for the 1990-92 contract, the buy back provisions of Article 14 were intentionally not resubmitted to the 1991 Annual Town Meeting because they were considered to have been voted and approved at the 1990 Annual Town Meeting.

6. The record in this case shows no material deviations from the CBA during its administration for calendar years 1991 and 1992 relative to the accumulated sick leave provisions found at Article 14, Section 1. Likewise, the record shows no discussion of that article or its applicability during the Town's 1992 Annual Meeting. Two employees (True and Tompkins) did retire in 1992 and were paid their respective leave accruals. According to the testimony of Janet Thompson, Administrative Assistant to the Selectmen, the payment of these accruals was not taken from the Accumulated Leave Fund, but, instead, was paid from departmental sick leave, holiday or wage line items.
7. The parties have been operating under the terms of the 1990-91 CBA since December 31, 1992 and because no termination letter was sent as provided in Article 25 (Finding No. 3). It is alleged and admitted that, in the current negotiations for a successor CBA, the Town proposed to the Association that Article 14, Section 1 to be retained in its present form.
8. In February of 1993, Howland advised the Chief of Police of his intention to retire later in the year. He had 20 or more years of service which would cap his entitlement at 100%.
9. At the March 20, 1993 Town Meeting, voters passed

a resolution asking the selectmen "to make an in-depth review of the subject of accumulated sick leave," noting, in particular, that payment of large sums, in excess of \$30,000 in one case, "has raised questions."

10. In May of 1993, Howland submitted paperwork stating his intention to retire effective June 19, 1993. The Board of Selectmen acknowledged receipt of his pending retirement and years of service by letter of June 9, 1993. In that letter, the selectmen told Howland that the Chief would pay his accrued vacation, holidays and longevity. As for sick days, the selectmen said, "the change [from] the 1989 Agreement between the Town and the ...Association which extended a payout for accumulated sick leave was a cost item. However, it was not submitted for Town Meeting for approval. The Town has not appropriated funds to pay the amount you claim under the sick leave provision of the Agreement." Appearing before the PELRB, Paula Snyder, now or formerly a selectman and Budget Committee member, testified that an additional \$25,000 was raised and appropriated for the Accumulated Leave Fund in 1993 in order to bring its balance to \$50,000. Howland's claim for sick leave accrual (Assn. Ex. No. 5 and ULP, Item 6) is \$42,731.40.
11. On June 28, 1993, the Rye selectmen heard a grievance brought by Howland relative to his accumulated sick leave entitlement. By letter of June 30, 1993, the selectmen advised Howland that they would not honor his claim for his accumulated sick leave payment and that they were affirming their previous decision "that the provision of Article XIV...which requires payment of accumulated sick leave upon severance is not a valid contract provision because it is a cost item that was neither submitted to or approved by the legislative body of the Town of Rye." In that letter, the selectmen also stated that they "will not consent to arbitration pursuant to the grievance procedure."
12. Article VI of the CBA calls for submission of grievances to final and binding arbitration if the grievance is not sooner resolved to the satisfaction of the aggrieved employee by the selectmen (Article 5, Section 7, Level 3).

13. By letter of July 2, 1993, the Town tendered Howland three (3) checks: \$600 for longevity; \$653.10 for holiday pay; and \$3794.20 for 30.5 days of accrued vacation.
14. In its answer filed July 28, 1993, the Town requested that a hearing on this matter not be scheduled until after September 18, 1993, the date of a Special Town Meeting intended to be petitioned for by the selectmen. At that meeting, voters considered an article (No. 2) "to see if [voters will] ratify and approve the accumulated sick leave payment provision of Article 14 of the collective bargaining agreement reached between the Selectmen and the...Association on December 27, 1989 which provides a new benefit for payment to employees who leave the departments for unused sick leave accumulated at the rate of 5% per year of full time employment not to exceed 100% and further to raise and appropriate the sum of \$30,000 for the 1993 fiscal year for unused sick leave payments for covered police and fire employees who leave the departments during 1993." This was defeated by a vote of 179 to 53. Conversely, Article 3, a provision to authorize payment of one-half an employee's unused sick leave at severance, not to exceed 30 working days (or 50 working days for employees hired before June 30, 1993) was passed by a vote of 97 to 65.

DECISION AND ORDER

The parties concluded their "deal" in 1989 when they settled on the terms for the 1990-92 CBA. Further, they lived under the terms of that agreement not only during 1990-92 but thereafter, until this issue of accumulated sick leave arose relative to Officer Howland. The Town paid, without incident, accumulated sick leave benefits to members of the Police and Fire Departments when they left in 1992. It makes no difference that some or all of the funds used to make those payments came from sources other than the Accumulated Leave Fund. The bottom line is that the Town honored its obligations under the CBA with respect to these two employees. It cannot now ignore those same obligations with respect to Howland. To do so is bad faith, discriminatory and a breach of contract which, separately and collectively, constitute violations of RSA 273-A:5 I (h).

We find the Town's actions at the selectmen's level denying benefits and then denying the grievance as well as later at the

Special Town Meeting to be highly prejudicial against Howland. They were made after he announced his intent to retire and, in the case of the Special Meeting, after he had actually retired. Since the accumulated sick leave benefit became part of the contract on and after December 27, 1989, it is clear that Howland placed reliance on it, that reliance now conspicuously being to his detriment. The conduct which we have described as being prejudicial against Howland is a clear and flagrant impairment of the contract between the Town and the Association and constitutes an impermissible taking as it impacts Howland.

Accordingly, we find not only that the Town committed a ULP by violating RSA 273-A:5 I (h) but also that Howland is owed money under the accumulated sick leave provisions of Article XIV, Section 1 of the CBA. We acknowledge that the parties have identified a discrepancy as to how that financial entitlement ought to be calculated and how much money may actually be owed to Howland.. By way of remedy, we affirm our finding that Howland has a financial entitlement under Article XIV of the contract and direct the parties to proceed forthwith to binding grievance arbitration as to the manner of calculation and amount of the financial entitlement due Howland under the applicable contract provisions.

So ordered.

Signed this 29th day of December, 1993.


EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding.
Members Richard Roulx and E. Vincent Hall present and voting.