

TOWN OF ROCKLAND AND ROCKLAND TOWN EMPLOYEES ASSOCIATION, H.L.P.E., MUP-6620 (6/1/89). DECISION ON APPEAL OF HEARING OFFICER'S DECISION.

13.1 chief executive officer
53.7 submitting warrant article as affecting contract
54.67 step increases
67.2 failure to support contract
82.1 affirmative action
82.11 back pay
92.51 appeals to full commission

Commissioner participating:

Paul T. Edgar, Chairman
Maria C. Walsh, Commissioner
Elizabeth K. Boyer, Commissioner

Appearances:

John J. Keefe - Representing the Rockland Town
Employees Association, HLPE
Richard J. White, Esq. - Representing the Town of Rockland

DECISION ON APPEAL OF
HEARING OFFICER'S DECISION

Statement of the Case

Hearing Officer Sherrie Rose Talmadge issued her decision in this case on April 7, 1988.¹ The hearing officer found that the Town of Rockland (the Town) violated Sections 10(a)(5) and 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) when the Town's Board of Selectmen failed to support at Town Meeting the funding of a November 10, 1986 agreement (the Agreement) with the Rockland Town Employees Association. H.L.P.E. (the Association). The hearing officer further found that the Town violated Sections 10(a)(5) and (1) of the Law when the Board of Selectmen subsequently failed to take all available steps to fund the Agreement. The hearing officer ordered, *inter alia*, that the Town make whole the employees who were the subject of the Agreement for the loss of earnings they suffered as a result of the Town's unlawful conduct. The Town filed a notice of appeal of the hearing officer's decision on April 19, 1988, and a supplementary statement on May 16, 1988, challenging the legal basis of the hearing officer's decision and the remedy ordered. The Association did not file a supplementary statement. For the reasons set forth below, we affirm the hearing officer's decision.

The full text of the hearing officer's decision appears at 14 MLC 1651.



Town of Rockland and Rockland Town Employees Association, H.L.P.E.,
16 MLC 1001

Findings of Fact²

We adopt the hearing officer's findings of fact and summarize them briefly as follows.³

The Association is the exclusive bargaining representative of certain employees of the Town, including library assistants at the Rockland Memorial Library. In the Fall of 1986, three full-time library assistants, Gertrude Batts, Marjorie Kelly and Janice Josselyn, sought to have their positions upgraded pursuant to procedures specified in the parties' collective bargaining agreement to reflect the increased responsibility and specialization of their job duties since their job descriptions were written in 1980. After securing the support of the Library Director, Janet Husband, they consulted with Tracy Stebbins, an employee of the Association, and met with Stebbins and Selectmen Pauline Pigeon and Katherine Young to discuss the proposed upgradings.

Husband, Batts, Kelly and Stebbins met with the full Board of Selectmen in Executive Session on November 10, 1986 and discussed with the Selectmen new job descriptions, comparative salary data and Husband's endorsement of the employees and the upgradings. As a result of the meeting, the five members of the Board of Selectmen,⁴ Batts, Kelly, Stebbins and HLPE President John J. Keefe signed the following agreement:⁵

In accordance with section 23.5 of the current Rockland Town Employees Association, HLPE agreement, the following upgrades were agreed to at the November 10, 1986 Executive Session of the Board of Selectmen:

2

Neither party contests the Commission's jurisdiction in this matter.

3

The Town does not challenge the hearing officer's findings of fact in its supplementary statement, but does allege certain additional facts and inferences which were not found by the hearing officer. We address the additional facts and inferences below.

4

The Selectmen who signed the Agreement are Chairperson Frederick L. Clark, Frederick A. Damon, Ray Gagnon, Katherine Young and Pauline Pigeon.

5

Although not specifically labeled as an "addendum" or "side agreement," it is apparent from the actions of the parties that they have treated the pay upgrade agreement as a collective bargaining agreement to which the provisions of G.L. c.150E, §7 apply. Cf., Town of Ipswich, 11 MLC 1403 (1985), aff'd sub nom. Town of Ipswich v. Labor Relations Commission, 21 Mass. App. Ct. 1113 (1986) ("side letter" was a complete collective bargaining agreement to which G.L. c.150E, §7 applied).



Town of Rockland and Rockland Town Employees Association, H.L.P.E.,
16 MLC 1001

Janice Josselyn from a grade 5 to grade 8
Gertrude Batts from a grade 5 to a grade 8
Marjorie Kelly from a grade 5 to grade 8

The salaries for Grades 5 and 8 were set forth in the parties' collective bargaining agreement.

After receiving a copy of the fully executed agreement several days after the November 10th meeting, Husband called the Town Accountant and asked him about the procedure for implementing the upgrades. The Town Accountant advised Husband not to begin paying the employees at their newly upgraded pay rate, but to let the Board of Selectmen submit an article at the next Special Town Meeting requesting funds to cover the upgrades. Husband then consulted with the Library's Board of Trustees, six elected officials to whom Husband directly reports, who advised her to proceed as instructed by the Town Accountant. She discussed with the Trustees whether she should take the funds out of the Library's operating budget for the current year, but they advised her that as long as the Board was going to request a further appropriation to fund the upgrades, there was no need to expend the library's operating budget.

A Special Town Meeting was held in the Town of Rockland on April 6, 1987. The Board of Selectmen prepared and submitted the following Article No. 4 for inclusion on the Town Warrant for consideration at the Meeting:

Will the Town vote to transfer and appropriate from Free Cash the sum of \$2,959.38 to provide for increases due to job evaluation changes during fiscal year 1986-1987 or take any other action relative thereto.
Board of Selectmen

Finance Committee Recommends Disapproval.

The nature of this emergency is mandated by MGL Chapter 150E to insure contractual obligations are met, and avoid litigation.

At the Special Town Meeting, Moderator Paul Cusick read the text of Article No. 4 aloud, including "Finance Committee recommends disapproval," and stated, "[f]irst action is on the Finance Committee recommendation. All those in favor of passing over Article 4 signify with a show of hands. You have voted to pass it over."⁶ There was no discussion about the Article prior to the vote to pass it over.⁷

6

The Town asserts in its supplementary statement that the Commission should infer from the absence of an allegation in the Complaint that the Selectmen voted against the Finance Committee recommendation. There is no evidence in the record regarding the Selectmen's votes, however, and the absence of a Complaint allegation (continued; 7, see page 1004)



Town of Rockland and Rockland Town Employees Association, H.L.P.E.,
16 MLC 1001

At a later point during the Town Meeting, following a vote on Article No. 16, Library Trustee James Concannon moved for reconsideration of Article No. 4 and made the following statement:

This article blew by me before I knew it and I had pledged to the ladies in the library that I would speak on their behalf. To the best of my knowledge they negotiated fair, equitable and legally [sic] with the Selectmen of the Town of Rockland and to my mind the salary increase and salary upgrading allowed them was legal and binding and I can only assure you that if this article is not reconsidered and voted that these ladies intend to take the Town to Court and that is going to cost you something in litigation probably more than the base amount here. Thank you very much.

No one other than Concannon spoke regarding Article No. 4. Following Concannon's statement, by a show of hands 187 voted in favor of reconsideration and 102 voted not to reconsider, five votes short of the two-thirds majority required on a motion for reconsideration.⁸

Following the April 6, 1987 Town Meeting, Husband again spoke with the Library Trustees regarding funding for the upgrades. The Trustees reviewed the library budget for the remaining year and determined that they had enough money in the current budget to cover the increased pay for the three employees. Husband processed retroactive pay requests and increased the weekly rate for the three employees pursuant to the Agreement, beginning with the week ending May 23, 1987. Husband brought the payroll, which reflected the retroactive pay and the increased weekly rate, to the Treasurer's office in accordance with the normal payroll procedure. The Treasurer's office refused to implement the new payroll, and the

6 (continued)

does not supply any basis for a factual finding. Therefore, we decline to conclude that the Selectmen voted in support of funding.

7 (from page 1003)

The Town outlined in its supplementary statement the procedure for "passing over" an Article at a Rockland Town Meeting. The Town asserts that the Finance Committee usually obtains a vote that requires the first vote on any Article to be a vote on its recommendation, which is routinely conducted quickly and without debate to enhance the possibility that the Finance Committee's recommendation will be adopted. The record, however, contains no evidence about the "passing over" procedure. Therefore, we are unable to include the Town's supplementary statement allegations as findings of fact.

8

The Town argues again in its supplementary statement that the Selectmen must have voted in favor of funding, i.e., in favor of the motion for reconsideration, based on the lack of an allegation in the Complaint regarding their votes. For the reasons explained in note 6, supra, we decline to adopt such a finding.



Town of Rockland and Rockland Town Employees Association, H.L.P.E.,
16 MLC 1001

three employees were paid only their pre-upgrade salary. The Assistant Treasurer informed Husband that Michael Embury, Executive Secretary to the Board of Selectmen, would not authorize the payroll containing the increases. Embury reviews all expenditures and appropriation of funds for the Town.

As of the date of hearing, the three employees had not received payment for their upgrade from Grade 5 to Grade 8. Josselyn retired as of June 30, 1987. Batts and Kelly were still employed at the library as of the hearing date.

Opinion

The hearing officer correctly examined the Selectmen's failure to speak in favor of the Agreement at Town Meeting, and their failure to secure funding for the pay upgrades, in light of the well-established principle that a public employer has the obligation to take all steps necessary to secure funding for a negotiated agreement.⁹ Once an agreement has been reached, the employer's obligation to seek funding is unconditional, and its failure to take all necessary steps to support and secure funding for the agreement violates its duty to bargain in good faith and constitutes repudiation of the agreement. Mendes v. Taunton, 366 Mass. 109, 119 (1974); City of Chelsea, 13 MLC 1144, 1149 (1986); Worcester School Committee, 5 MLC 1080, 1083 (1978). We have declined in the past to dictate the specific method by which funding must be secured, but rather have examined each case to determine whether the employer has satisfied the obligation to seek funding in good faith. City of Medford, 9 MLC 1792, 1795 (1983); Worcester School Committee, 5 MLC at 1085.

The Selectmen's Failure to Support The Agreement at Town Meeting

The Town contends in its supplementary statement that under the totality of circumstances, the Selectmen's actions in submitting the funding article with an emergency declaration at a Special Town Meeting fulfilled the obligation to support the Agreement, particularly where there was no vocal opposition to the article and where there was no evidence that the Selectmen attempted to sabotage passage of the article.¹⁰ The Town argues that the hearing officer erred by imposing on the Selectmen a duty to speak in favor of the article in Town Meeting.

9

G.L. c.150E, §7(b) specified, inter alia,

The employer...shall submit to the appropriate legislative body within thirty days after the date on which the agreement is executed by the parties, a request for an appropriation necessary to fund the cost items contained therein...If the appropriate legislative body duly rejects the request for an appropriation necessary to fund the cost items, such cost items shall be returned to the parties for further bargaining...

10

The Town also argues that the Commission can infer that the Selectmen

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Town of Rockland and Rockland Town Employees Association, H.L.P.E.,
16 MLC 1001

An employer's obligation to seek funding for an agreement goes beyond the ministerial act of submitting a funding article to the legislature. E.G., Town of Kingston, 6 MLC 1388 (1979) (the employer failed to take steps to support adequately certain cost items of a contract, where the Selectmen moved at Town Meeting to accept an article to fund most cost items, but were silent as to a second article to fund a career incentive provision in the contract); Turners Falls Fire District, 4 MLC 1658 (1977) (the employer violated the Law by failing to speak before the legislative body in opposition to a motion to decrease the amount of an appropriation article that the employer had submitted and which was necessary to fund a collective bargaining agreement). Cf. Town of North Attleborough, 4 MLC 1585 (1977) (Selectman did not violate obligation to support funding when he made a sincere, but erroneous, attempt to explain the implications of a proposal to Town Meeting, which resulted in the employer's inability to implement certain provisions of a collective bargaining agreement); Town of Webster, 4MLC 1543 (1977) (Town did not violate obligation to support funding when the Chairman of the Advisory Board spoke against collective bargaining agreements at Town Meeting, while the Chairman of the Personnel Board, an agent of the Selectmen, spoke unsuccessfully in favor of the agreements, where there was no evidence of complicity between the Advisory Board and the Board of Selectmen).

The Board of Selectmen functions as the chief executive officer of the Town of Rockland and thus is the party responsible for negotiating in good faith and implementing collective bargaining agreements. The Town Meeting is the legislative body from whom the Board must request appropriation approval. In the instant case the Board of Selectmen submitted the appropriation request to the Town Meeting, but it was accompanied by a recommendation from the Finance Committee to disapprove.¹¹ In light of the Finance Committee's recommendation to disapprove, the Board of Selectmen had a duty to do more than silently present the warrant article. In the context of the Finance Committee's opposition, a reasonable person could interpret

10 (continued)

voted in favor of the article twice at the Town Meeting and therefore the Commission should find that the Selectmen fulfilled their obligations. Since there is no record evidence to support a factual finding or inference concerning votes by the Selectmen, however, we cannot consider this aspect of the Town's argument. See notes 6 and 8, supra.

11

The Town argues that there was no "vocal" opposition to the warrant article expressed at the Town Meeting. Cf. Turners Falls, supra (where a motion was made at the legislative meeting to reduce the requested appropriation to a sum insufficient to fund the incremental cost of the collective bargaining agreement). But the duty to support a funding request does not diminish merely because the opposition to the request is expressed in writing, in advance of the legislative body's meeting, and read aloud at the meeting. The duty to seek funding for the contract encompasses an obligation to express support for the funding request, particularly in the face of any expressed opposition.



Town of Rockland and Rockland Town Employees Association, H.L.P.E.,
16 MLC 1001

the Selectmen's silence as indicative of the Selectmen's agreement with the position of the Finance Committee. Thus the Selectmen failed to fulfill their obligation to convey clearly their support for the funding article. By choosing to fund the negotiated agreement through an additional appropriation, the Selectmen obligated themselves to support the request for the appropriation. When they failed to take adequate steps to seek funding, the Selectmen failed to fulfill their obligation to bargain in good faith in violation of Section 10(a)(5).

The Town also contends that the Selectmen cannot be required to speak in favor of the funding article at Town Meeting. The Town relies on Labor Relations Commission vs. Dracut, 374 Mass. 619 (1974), in which the Supreme Judicial Court held, on public policy grounds, that successor Selectmen were not required to speak in favor of collective bargaining agreements negotiated by their predecessors.¹² The court in Dracut expressly declined to decide the question of whether public officials who contractually agree to support the terms of a collective bargaining agreement may be required to support a request to fund the agreement. 374 Mass. at 625 n.6.

A decision that requires the Board of Selectmen to speak in favor of an agreement they negotiated, and to which they are a party, neither infringes on the Selectmen's First Amendment rights nor impairs a public official's obligation to exercise independent judgment concerning whether to support a collective bargaining agreement. In this case, the Selectmen exercised their independent judgment when they agreed to the negotiated upgrades. G.L. c.150E requires that employees must seek funding of their negotiated agreement. To permit the employer to negotiate an agreement and, after its finalization, to avoid it by failing to take necessary steps to fund it, would permit unilateral repudiation of collective bargaining agreements by public employers. The Law does not permit such repudiation; instead it requires the employer's unconditional support for funding. Worcester School Committee, 5 MLC at 1083. By our decision we do not require any Selectman to speak as an individual in favor of the Agreement. Instead, we require that the Selectmen as a governmental body and as the collective bargaining agent who negotiated the Agreement for the Town, support the funding article. In the face of opposition from the Finance Committee such support cannot be silent; it must be vocalized. Our requirement that the governmental body/public employer perform its obligations under the Law in its official capacity does not impair the First Amendment rights of any individual Selectman.¹³ As we have noted in the past, the imposition of

12

There is no evidence to suggest that the Selectmen on April 7, 1987 were different from the Selectmen who signed the agreement on November 10, 1986.

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We note that the record contains no evidence which would suggest that any individual Selectman opposed the funding request. Even if there were such evidence, however, we note that courts have recognized certain acceptable limitations on the constitutional rights of public officials and employees. E.g., in the

(continued)



Town of Rockland and Rockland Town Employees Association, H.L.P.E.,
16 MLC 1001

affirmative communication requirements upon employers pursuant to collective bargaining laws has long been sanctioned by the Supreme Court. See Hudson Education Association, 15 MLC 1126 (1988), citing, NLRB v. Express Publishing Co., 312 U.S. 426 (1941) (approval of notice posting requirements).

The Selectmen's failure to Seek
Alternative Sources of Funding

The Town contends that the hearing officer erred in finding that the Town violated its obligation to support the Agreement when it failed to fund the salary upgrades from existing sources other than an appropriation from Town Meeting. The Town contends that it was prohibited from funding the "disapproved cost item" from other budgetary sources by the Law's requirement that "cost items shall be returned to the parties for further bargaining" if an appropriation request is rejected by the legislative body. G.L. c.150E, §7(b). The Town argues that after the defeat of the funding article at Town Meeting, its only option was to return to the bargaining table.

As a preliminary matter, it is unclear from the record in this case whether the initial vote to "pass over" the funding article was a vote not to fund the salary upgrades of the library employees, or merely a vote not to consider the substance of the article. Assuming, arguendo, that the vote was a vote not to fund, however, the Selectmen were not relieved of their obligation to use unexpended, but previously appropriated, money to fund the incremental costs of the Agreement. The library Trustees had determined following the April 7, 1987 Town Meeting that there was sufficient money in the current library budget to fund the upgrades.

The Law does not restrict the parties to funding their agreements by the appropriation mechanisms described in Section 7. An employer must explore alternative sources of funding to fulfill its statutory obligations. County of Suffolk, 8 MLC 1573, 1577 (1981) (if a public employer determines that there are insufficient funds available to implement an agreement, it must seek an appropriation from the appropriate legislative body within thirty days after executing the contract; if it determines in good faith that there are sufficient funds on hand to finance the cost items of the agreement, no such request need be made), vacated on other grounds, County of Suffolk v. Labor Relations Commission, 15 Mass. App. Ct. 127 (1983). See also, City of Medford, 9 MLC at 1795-96; Worcester School Committee, 5 MLC at 1085.

The Town's reliance on Section 7 of the Law to support its argument that it

13 (continued)

Matter of Bonin, 375 Mass. 680, 709 (1978) (judges and other public servants must suffer limits on constitutional rights of speech and association as are appropriate to the exercise of their official duties or sanctions).



Town of Rockland and Rockland Town Employees Association, H.L.P.E.,
16 MLC 1001

was precluded from funding the upgrades through any means other than a Town Meeting appropriation is misplaced. Section 7 contains no prohibition against funding incremental collective bargaining costs from existing appropriations. Although a contract provision may be nullified if the legislative body rejects an appropriation request necessary to fund that clause, see, e.g., Saugus v. Newbury, 15 Mass. App. Ct. 611, 615-16 (1983), it does not follow that such rejection nullifies an agreement which can be funded through existing appropriations. The legislative body may reject the funding request because an additional appropriation is not necessary. See Worcester School Committee, 5 MLC at 1084-85.

The Town had latitude in selecting the method by which it would comply with its obligation to support and secure funding for the Agreement. City of Chelsea, 13 MLC at 1154. Its refusal to seek alternative sources when one method failed violated its duty to bargain in good faith and constituted a repudiation of the Agreement. Id.; Worcester School Committee, 5MLC at 1085.

The Appropriate Remedy

The Town objects to the hearing officer's remedial order, which required the Town to make whole the employees for the loss of earnings they suffered as a result of the Selectmen's conduct. the Town argues that no agreement comes into existence until its funding is approved by the Town Meeting as the local legislative body, and the Commission has no authority to divest the local legislative body of its statutory prerogative to approve cost items. In the absence of such legislative appropriation approval, argues the Town, the agreement cannot bind the Town. Therefore, the Town claims, the only appropriate remedy is an order to resubmit the funding article to the Town Meeting.

The Town correctly notes that the Commission may not order payment of cost items in the absence of available appropriated funds. County of Suffolk v. Labor Relations Commission, 15 Mass. App. Ct.127, 132-33 (1983) (a cost item in a collective bargaining agreement cannot be implemented until the legislative body appropriates funds sufficient to pay the item). In this case, however, there existed a "relevant appropriation" from which the salary upgrades for the library employees could have been paid. Therefore, an order requiring such payment, with interest, is appropriate. Furthermore, we note that the hearing officer's order properly included the directive that the Town take all appropriate steps to comply with the Agreement, including, if necessary, seeking supplemental appropriations. See also City of Chelsea, 13 MLC at 1155.

Therefore, we affirm the hearing officer's decision that the Board of Selectmen's failure to support funding of the November 10, 1986 agreement at Town Meeting, and its subsequent failure to seek alternative methods of funding the agreement, constitute a repudiation of the Agreement in violation of Sections 10(a)(5) and (1) of the Law. Moreover, the appropriate remedy shall include an order to make whole the employees affected by the Town's unlawful conduct, including payment of interest.



Town of Rockland and Rockland Town Employees Association, H.L.P.E.,
16 MLC 1001

Order

Wherefore, based upon the foregoing,

IT IS HEREBY ORDERED, pursuant to Section 11 of the Law that the Town of Rockland shall:

1. Cease and desist from:
 - a) Refusing to bargain in good faith by failing to implement the salary increases for the three library employees contained in the November 10, 1986 agreement negotiated with the Rockland Town Employees Association, H.L.P.E. and approved by the Board of Selectmen.
 - b) Failing and refusing to take all necessary and appropriate steps to fund the above-stated salary increase commitment.
 - c) In any like or similar manner, interfering with, restraining or coercing its employees in the exercise of their rights under the Law.

2. Take the following affirmative action which will effectuate the purposes of the Law:
 - a) Take all appropriate steps to implement the salary upgradings required by the agreement with Rockland Town Employees Association, H.L.P.E., dated November 10, 1986, including, if necessary, promptly seeking a supplemental appropriation.
 - b) Make whole the employees for the loss of earnings they suffered as a result of the Town's failure to pay the salary increases negotiated pursuant to the November 10, 1986 agreement, including interest on the earnings at the rate specified in M.G.L. c.231, Section 6B, to be computed quarterly.
 - c) Immediately sign and post in all conspicuous places where bargaining unit members usually congregate, or where notices are usually posted, and maintain for a period of thirty (30) consecutive days thereafter, copies of the attached Notice to Employees.



Town of Rockland and Rockland Town Employees Association, H.L.P.E.,
16 MLC 1001

- d) Notify the Commission, in writing, within thirty (30) days of service of this Order of the steps taken to comply herewith.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PAUL T. EDGAR, CHAIRMAN
MARIA C. WALSH, COMMISSIONER
ELIZABETH K. BOYER, COMMISSIONER

NOTICE TO EMPLOYEES
POSTED BY ORDER OF
THE MASSACHUSETTS LABOR RELATIONS COMMISSION
AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

After a hearing at which all parties had the opportunity to present evidence, the Massachusetts Labor Relations Commission has decided that the Town of Rockland violated Sections 10(a)(5) and (1) of Massachusetts General Laws Chapter 150E by repudiating the November 10, 1986 agreement with the Rockland Town Employees Association, H.L.P.E. In compliance with the Commission's order:

WE WILL NOT refuse to bargain in good faith by failing to implement the salary increase for the three library employees contained in the November 10, 1986 agreement negotiated with the Rockland Town Employees Association, H.L.P.E. and approved by the Board of Selectmen.

WE WILL take all appropriate steps to implement the salary upgradings provided for in the agreement with the Rockland Town Employees Association, H.L.P.E., dated November 10, 1986, including, if necessary, seeking a supplemental appropriation.

WE WILL make whole Janice Josselyn, Gertrude Batts and Marjorie Kelly for the loss of earnings they suffered as a result of the Town's failure to pay the salary increases negotiated pursuant to the November 10, 1986 agreement, including interest on the earnings at the rate specified in M.G.L. c.231, Section 6B, to be computed quarterly.

For the Town of Rockland

