STATE OF NEW HAMPSHIRE

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

LOCAL 1088, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, BERLIN, N.H. Complainant and CITY OF BERLIN, NEW HAMPSHIRE	ADDENDA TO DECISION NO. 81-42 Date: October 2, 1981 CASE NO. F-0109:1

OPINION

Although I concur with my colleague's opinion discussing the various petitions concerning bad faith bargaining and the arbitration awards, I cannot do so with respect to the status of Manning in terms of negotiability.

The Board is faced here with a dilemma created by the language of Chapter 273-A. While it is clear that "the selection, direction, and number of its personnel" is a management prerogative, it is equally clear that organized employees are entitled to bargain over the terms and conditions of their employment, including safety.

Extreme hypothetical cases can always be posited which would demonstrate the dilemma; a request for far too many personnel, or a condition of far too little safety, lead to an easy resolution. However, to paraphrase Justice Holmes, easy cases, like great cases, make bad law. We deal here with the hard case.

Evidence presented at the hearing demonstrated that, when we are in the range of 5 to 6 men on a platoon, we are on the cutting age of safety for the firefighters. Such being the case, the terms and conditions of employment overlap with management prerogatives on number of personnel.

I am persuaded, on balance, that Manning becomes a mandatory subject of negotiation in such circumstances. By way of observation, however, I am not persuaded by the argument of the Union that negotiations for many years by a municipality over a permissive subject converts it to a mandatory one by estoppel or otherwise. Such a result would plainly discourage a public employer from ever discussing anything but mandatory subjects. Also, to the extent the Union relies on Manning to create planned overtime, this position flies in the face of a long line of decisions of this Board.

Thus, in conclusion, I will rule that the subject of Manning, given the evidence presented at the hearing, constitutes a mandatory subject of negotiation insofar as it affects the terms and conditions of employment.

Russell F. Hilliard
Board Member

Signed this 20th day of October, 1981

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LOCAL 1088, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, BERLIN, N. H. Complainant and CITY OF BERLIN, NEW HAMPSHIRE Respondent	CASE NO. F-0109:1 DECISION NO. 81-42

APPEARANCES

Representing the Fire Fighters' Local 1088:

Earl F. Gage, Esq., Counsel

Representing the City of Berlin:

Bradley F. Kidder, Esq., Counsel

Witnesses for Local 1088:

Roger Villeneuve, President of Local 1088
George Fortier, Firefighter
Barry Bush, Chief of Fire Services Training, State of N. H.
Paul Fortier, Firefighter
Robert K. Darling, Firefighter
Larry Laflamme, Firefighter
Larry Labbe, Electrician

Witness for the City:

Michael L. Donovan, City Manager

BACKGROUND

On August 4, 1981, the International Association of Fire Fighters, Local 1088 of Berlin, N. H. petitioned the Board (PELRB) for a restraining order against the City stating as its reason for the request, the following brief excerpts:

1) On August 22, 1979, the parties executed a working agreement covering working conditions, rights, duties and responsibilities of the parties for the period September 1, 1979 thru August 31, 1981.

2) Negotiations between the parties were presently going on.

3) Impasse had been declared by the Local and request for the appointment of a mediator/factfinder had been filed with the Board.

4) The City by notice to Local 1088 on March 24, 1981 stated their intention to terminate the contract in accordance with Article 33, Section 1 of the existing contract which stated:

> "This agreement shall be retroactive to September 1, 1979 and it shall remain in full force and effect until August 31, 1981, and thereafter from year to year until terminated. It may be terminated at the end of the contractual year by one party served thirty (30) days prior thereto upon the other party."

5) The City had indicated its intention, as of midnite August 31, 1981, to unilaterally change working conditions presently guaranteed under the existing contract; more specifically, to change "platoon size" by reducing shift level below that guaranteed by contract.

6) The City's termination, if effective August 31, 1981, would terminate every benefit, right, duty and obligation which the Union had gained over the twenty-five years of collective bargaining.

7) The City by its act of termination would tend to destroy the union by its failure to negotiate and also destroy the grievance procedure.

8) Local 1088 has taken all steps permitted by law to protect its membership; i.e., by petition to the Board, to the Superior Court of Coos County, and by requesting assistance of a mediator/factfinder, which they felt had not been acted upon in spite of the seriousness of the situation.

Local 1088 sought the following relief:

a) That the City be immediately, ex parte, temporarily enjoined from terminating the existing work agreement between the parties until a hearing can be held permitting the Plaintiff to document by evidence to the Board, its need for a permanent court injunction.

b) That following such hearing, that the Defendant be permanently enjoined from terminating the parties' contract on August 31, 1981 until such time as an agreement is reached covering the period from September 1, 1981 to August 31, 1982.

That the Defendant be enjoined temporarily and permanently from further harrassment of the Plaintiff union by way of

threats or actions which impede the possibility of good faith bargaining in the negotiation of a new contract.

The matter came on for hearing before the Board on September 3, 1981 in the Council Chambers, City Hall, Berlin, N. H.

Local 1088 presented evidence that on March 24, 1981, the City forwarded to the Union a notice of intent to terminate the contract and alleged that such notice did not meet rigorous standard of termination procedure as they interpreced this to mean and that the only time such notice could be served, in accordance with the contract language, was 30 days and only 30 days prior to termination of the agreement.

Local 1088 further contends that the termination letter left the membership without contract and men would be laid off or locked out come August 31, 1981 and it was the City's intention, as stated in negotiations, to reduce the size of the platoon, matter which had been negotiated at the table for years.

The platoon size is addressed in Article 21, Section 3 of the present agreement which states:

> "Upon the initiation of a 42-hour weekly work schedule, the City may at its sole discretion reduce platoon size to not less than five firefighters exclusive of the Fire Chief or Deputy Fire Chiefs."

The Local argued that the platoon size had been the subject of negotiations between the parties since 1088, an AFL-CIO affiliate, had been recognized as the exclusive representative and contended that the City could not now make any changes in platoon size without first negotiating the subject at the bargaining table.

Local 1088's principal attack on the manning subject came in the form of the safety aspect of the platoon size. They presented evidence on the safety of hose handling under pressure, house entry upon arrival at a fire scene, evidence which was largely hypothetical as no factual cases were presented. They did, however, produce an expert witness to testify as to the nature of building construction in the Berlin area and the potential of mutual aid from the surrounding communities.

The Union contended that the City entered into bad faith bargaining since they had issued the termination letter five months prior to termination and by posting and removing the vacation list and attempting to unilaterally making a change in the platoon size. As a result of a hearing date of the Public Employee Labor Relations Board, the City was ordered to continue to adhere to the contract which had been negotiated in all of its aspects during the life of the contract.

The parties attempted early in March to sit down and enter into negotiations and it was at this point that the Union indicated that the City would not negotiate the subject of staffing of the platoon and subsequently declared impasse.

The Board (PELRB) in response to a request from Local 1088 did in fact appoint a mediator/factfinder, James Cooper, Esq., to the case.

Testimony was presented that certain cases had been processed through the grievance procedure to the final step, arbitration, and that the arbitrator's award was unsatisfactory to Local 1088; consequently, the Local felt this was another unfair labor practice by the City. The Local argued strongly and with some merit ~~that the fact~~ that the staffing had been a subject of negotiations over many years of contract relationship, and could see no reason at this time why the City refused to discuss the matter and held firm to their position of managerial rights under RSA 273-A:1, XII which states:

> "....The phrase 'managerial policy within the exclusive prerogative of the public employer' shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions." (emphasis added)

The City testified that it complied with the contractual agreement in existence on March 24, 1981 by sending a letter to the Local indicating their intent to terminate the contract at its expiration date, August 31, 1981. They pointed out that this was a procedure used frequently and one available to both parties signatory to the agreement, Article 33, Section 1, which stated:

> "....It may be terminated at the end of the contractual year by notice in writing by one party served thirty (30) days prior thereto upon the other party."

The City Manager testified that the reason the notice was filed with the Local on March 24, 1981 was to provide them with adequate advanced notice rather than to file it as a complete surprise on August 1, 1981 and that similar action had been taken by the City with respect to the Police Department in the same situation. The City further stated that the notice of intent to terminate the agreement did not constitute "layoff or lockout" as alleged by the Union, but merely to state a position which the City was to take at the bargaining table.

The City further testified that it was their intention to continue the wage and fringe benefits in effect in the event a new agreement was not reached by September 1. This position dispelled to a certain degree the Union's position that the City was conducting a lockout of its employees by declaring the contract terminated. The City contended that the manning clause negotiated in prior years did not constitute a waiver of the management's right to invoke its right to set the size of staff for its various operations.

Survey was offered through testimony by the City that there are eleven (11) comparable fire stations in the State of New Hampshire that have platoons of fewer than six (6) men. This argument must of necessity be tempered with consideration of the types and locations of the units referred to. Certain testimony of the experts all on behalf of the Union indicated that the majority of fire departments in the State of New Hampshire were in fact operating in unsafe conditions according to the standards established by the representative.

The City rebutted the argument of bad faith bargaining by citing the number of negotiation sessions held and that both parties had made offers and counter-offers, some of which had been acceptable to both parties. They agreed that they had notified the Union in March of their intent to terminate the agreement at expiration and also notified them on August 20, 1981, just prior to expiration, that they would continue with the wages and fringe benefits; they felt this position was not an attempt to influence negotiations but merely to let the employees know that they would be receiving their daily living commitments even though the contract had expired.

The matter of grievances was raised by the Union and discussed at length. A number of them were heard by the Board pertaining to individuals within the Local relative to overtime and call backs, all of which had been addressed in accordance with the grievance procedure in the contract. When all arguments had been presented the issue focussed on the subject of platoon size change and all other aspects of the discussions appeared to fade away.

FINDING OF FACTS

-- Local #1088, IAFF, has represented the firefighters in the City of Berlin for a good many years. At many negotiating sessions, the parties voluntarily discussed the subject of platoon size and for years reached a mutual agreement on the matter.

-- In 1975, the New Hampshire Legislature enacted RSA 273-A conferring the right to municipal employees and all other public employees throughout the state, the right to organize and be represented for the purpose of collective bargaining.

-- Some organizations in the State of New Hampshire were grandfathered under RSA 273-A by virtue of their labor/management relationships prior to the enactment of the law. The firefighters in the City of Berlin were granted recognition under the grandfather clause.

-- RSA 273-A refers specificatlly to the selection of staff and the right to deterimanation of these factors to management.

-- It is possible that the subject of staffing might be a subject for discussion, it appears that this right finally accrues to and only to, management. The fact that the unit was grandfathered and the subject of manning had been negotiated over a long period of time seems to disappear in view of the act creating 273-A, the right to organize and the legislature saw fit to deal specifically with this particular subject in Section XII under "managerial policy".

-- The parties are still in negotiations although not progressing very far or very fast at the present time. The Board (PELRB) urged the parties to continue negotiations but feel that no resolution will be reached until the subject of manning is resolved.

DECISION AND ORDER

After careful review of all the evidence and testimony presented at two hearings and post hearing briefs filed by both counsels, the Board finds as follows:

> The subject of manning of the platoons in the City of Berlin, N. H., Fire Department, is a management prerogative.
>
> The subject may be discusses at the table but is not a mandatory subject of negotiations.
>
> Board issues no finding or ruling on the arbitrator's awards as Article 16, Section 1, Grievance Procedure, contains "final and binding" arbitration.

EDWARD J. HASELTINE, Chairman
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed this 2nd day of October, 1981.

The vote on the arbitrator's award was unanimous. Chairman Haseltine presiding, members Hilliard, Mayhew and Osman present and voting; however, Member Hilliard did not join in the opinion on the manning clause and will issue a separate opinion at a later date.

Also present, Executive Director, Evelyn LeBrun.

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