



**State of New Hampshire**  
**PUBLIC EMPLOYEE LABOR RELATIONS BOARD**

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DOVER PROFESSIONAL FIREFIGHTERS ASSOCIATION  
LOCAL 1312  
  
Complainant  
  
v.  
  
FIRE CHIEF, CITY OF DOVER  
  
Respondent  
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CASE NO. F-0102:4  
  
DECISION NO. 85-46

APPEARANCES

Representing the Dover Professional Firefighters Association, Local 1312

Teresa DeNafio, Counsel

Representing the Fire Chief, City of Dover

Scott E. Woodman, Esq., Counsel

Also in Attendance

David Gilland, Local 1312  
David Duquette, Local 1312  
Douglas Conway, President, Local 1312  
David Bibber, Fire Chief, City of Dover  
Lon A. Cheney, City of Dover  
Robert Steele, City Manager, City of Dover

BACKGROUND

On January 25, 1985, the Dover Professional Firefighters Association, Local 1312, IAFF filed improper practice charges against the City of Dover, specifically the Fire Chief of the City of Dover, claiming violations of RSA 273-A in the following situations:

- 1) The City of Dover violated RSA 273-A:5, I (e), (g), (i) in that the Fire Chief instituted a series of individual contracts (for six new employees) in which the employees agreed not to smoke and to a certain weight limit during the entire time of their employment with the City of Dover. These contracts were not negotiated and therefore constituted a refusal to negotiate in good faith with the exclusive representative of the bargaining unit;
- 2) The City of Dover unilaterally changed the conditions of employment for members of the bargaining unit by substantially changing the field examination for pump and ladder operators, thereby violating RSA 273-A:5, I (i);

- 3) The City of Dover, through its agent, Chief Bibber have refused to recognize the President of Local 1312 while on duty, constituting a violation of RSA 273-A:5, I (a), (b).

The City of Dover responds with respect to allegation #1, that it is within the prerogative of managerial policy to require certain conditions of employment and that the subject of smoking and weight control are within the City's exclusive power to set and are not therefore subject to collective bargaining under the statute; with respect to #2, the City argues that it is within the managerial policy of the rights of the City to establish testing examination procedure and that indeed the parties have agreed to this in their contract, Article 10, Section 3; with respect to the third allegation, the City denies any breach of RSA 273-A with respect to their recognition of the Union President. Indeed, the City points out that in complaint #3, the Union petition does not allege any particular instance where the Union President has been treated either unfairly or in a discriminatory manner.

A hearing was held at the Public Employee Labor Relations Board's office in Concord, New Hampshire on May 9, 1985, with all parties represented.

#### FINDINGS OF FACT

During the initial stage of the hearing, it was determined that item #3 in the Union's petition for unfair labor practices on the part of the City was without sufficient foundation and item #3, the charge about the ignoring of the Union President, was dismissed.

The hearing clearly established that in fact the City did institute individual contracts with certain new members of the department and that those contracts required the individual not to smoke either off or on the job and also to maintain a certain weight while working for the City of Dover, according to a physical fitness height and weight control chart, which the City adopted. The individual contracts were a condition of becoming employed by the City of Dover and the individuals who signed these contracts are in a probationary status and therefore are not covered by the collective bargaining agreement at this point. The individual contracts which are called "Employment Agreements" extend the agreement with the individual throughout the employment of the individual by the City.

At the hearing it was also ascertained that there were no provisions in the current contract for either weight control or smoking, even though at some point in the past there have been discussions about smoking but nothing has been agreed to.

At the hearing the Fire Chief testified that after certain rulings by this Board (in 1979), the Dover Fire Department continued it's physical fitness program and seeks now to have certain requirements imposed upon new employees which have not been imposed upon the older employees. These new requirements are also characteristics of physical capacity, some of which are recommended by the National Fire Protection Association, a group of fire officials in the country who recommend certain standards for fire departments. The City fire department wishes to reduce the possibility of heart attacks in the department and as such has required new employees to pledge not to smoke while they're employed by the City.

The Chief further argued that the ability to set physical requirements for the job is a management prerogative and not subject to negotiating.

With respect to charge #2, the Union alleges that the City failed to negotiate changes in the "field examination for pump and ladder operators". The following circumstances were revealed: the existing contract, Article 10, Section 3, contains a clause providing an incentive of \$10.00 a week for those permanent pump and ladder operators who can successfully pass a field examination. The language also includes the following with respect to field examinations: "...as may be established by the department". The City argues that this means the changes that were recently made in the field examination are entirely up to the City and are not mandatory subjects of bargaining and that the contract clearly recognizes such. The Union argues that since the language is contained in the contract they are relying upon that language, and any changes should be negotiated with them.

There is no dispute that the City in fact did change some of the details of the field test by including a written test, an eye examination and a reaction-timed test. The Union argues that past practice controls, in this case, and that changes in the actual field examination should be negotiated with the Union and not simply determined unilaterally by the management of the fire department.

Testimony and discussion at the hearing clearly established that in the past a written portion of the field examination was used at some time and in this case is being reintroduced as a part of the so-called field examination.

#### RULINGS OF LAW

With respect to the first charge, failure to negotiate the individual contracts limiting weight and smoking: the PELRB finds that the individual contracts are clearly in operation for the probationary period only, that the collective bargaining agreement comes into force when the individuals are no longer probationary employees but permanent employees of the department and are represented by the exclusive representative of the firefighters in the City of Dover, Local 1312. We also find that the establishment of physical and other specifications for the job of firefighter with the City of Dover is a clear prerogative of the management of the department. However, the management is limited to establishing physical and other requirements which relate in a reasonable manner to the job of firefighter and cannot extend their purview into other areas such as certain opinions, religion, church attendance, the playing of certain types of sports, sexual activity, etc. In other words, the City of Dover, in establishing its criteria for the employment of firefighters, must establish that criteria with the job performance of firefighters in mind only. As such, it is our belief that the lack of demonstrated, job-related characteristics with respect to individual smoking means that the City cannot restrict an individual's freedom to smoke unless and until it can demonstrate that not smoking or smoking is in fact directly related to the job of firefighter in the City of Dover.

As a consequence of our understanding, the City of Dover is well within its rights in establishing physical fitness criteria for the performance of the job of firefighter but cannot restrict individuals from smoking. When the individual contracts expire at the end of the probationary period, the

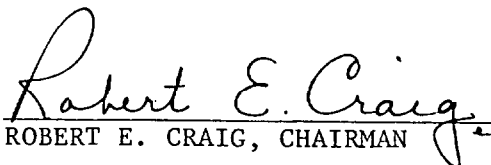
collective bargaining agreement comes into force for those individuals who then become the permanent members of the City fire department; the provisions of the probationary employment agreement no longer apply and all conditions of employment of those individuals must be negotiated with the Union representative. Since it is management's right to establish the criteria for employment, criteria which are job related, the question of negotiability can only be applied to the impact of those management decisions on the other conditions of employment of the individuals.

With respect to the second charge, the failure to negotiate a change in the department's test, called the field examination: the PELRB finds that indeed past practice would include a written component even though this is termed "field examination" and finds no problem with the inclusion of such in the recent changes made by the Chief. The contract also clearly establishes that the management of the department has broad latitude in "establishing" an examination and indeed we concur. Management rights must include the ability of the management to test individuals within a department for their job competency and technical skills. Insofar as the department is in fact carrying out this duty, they are within their clearly established management rights under RSA 273-A. Insofar as the changes made in the field examination by the management of the department, impacts on other conditions of employment of the workers, those other conditions of employment must be negotiated with the exclusive representatives of the employees of the fire department. Indeed we believe that the parties to the contract are correct in that they have already agreed on a certain incentive pay in connection with successfully passing these field examinations. This is an excellent illustration of the potential impact of a managerial decision to introduce a certain procedure or requirement on the job, and therefore a proper subject for negotiation.

#### DECISION AND ORDER

It is the decision of the Public Employee Labor Relations Board that:

- 1) The City of Dover has included, in its individual employment agreements, the prohibition of smoking as a criterion for employment in the fire department in the City of Dover and that when these individuals become permanent members of the department, that prohibition cannot be imposed unilaterally by the City under its claim of management rights to establish reasonable job-related criterion.
- 2) With respect to certain changes in the field examination administered by the department, we do not find an unfair labor practice, but rather affirm management's rights to determine the testing of its employees.

  
ROBERT E. CRAIG, CHAIRMAN

Signed this 26th day of June, 1985.

By unanimous vote. Chairman Robert E. Craig presiding. Members Seymour Osman, Russell Verney and Richard Roulx present and voting. Also present, Evelyn C. LeBrun, Executive Director.