State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

DOVER MUNICIPAL EMPLOYEES' ASSOCIATION Complainant v. CITY OF DOVER Respondent	CASE NO. M-0608:2 DECISION NO. 93-01

APPEARANCES

Representing Association:

Donald E. Mitchell, Esq.

Representing City of Dover:

Mark T. Broth, Esq.

Also appearing:

Cynthia L. Gillispee, DMEA
Rudy Lundy, DMEA
William R. Wardwell
Scott E. Woodman
H. Williams
Paul Beecher
Andrew D. Russell, Fosters
Sandra Erdman, DMEA
James F. O'Neil

BACKGROUND

The Dover Municipal Employees Association (Association) filed unfair labor practice (ULP) charges on September 25, 1992 against the City of Dover (City) alleging violations of RSA 273-A:5 I (a), (e), (g), (h) and (i) for the City's failure to pay merit increases under the collective bargaining agreement. The City filed its

answer on October 7, 1992 after which this matter was heard by the PELRB on December 8 and 10, 1992.

FINDINGS OF FACT

1. The City of Dover is a "public employer" of municipal employees as defined by RSA 273-A:1 X.

2. The Dover Municipal Employees Association is the duly certified bargaining agent for certain personnel employed by the City of Dover.

3. The City and the Association are parties to a CBA dated October 26, 1989, with an effective date of July 1, 1989. Article XXVI, Section 1 of the CBA provided that it shall be effective "through June 30, 1992" and that it "shall continue to govern the working relations between the City and the Association until such time as a new agreement is ratified by both parties." Article XX, Section 4 provides that "no member shall be penalized, disciplined, suspended or discharged without just cause."

4. Article VI, Section 3 of the CBA provides for annual written evaluations of employees' job performances. "Failure to receive a satisfactory annual rating two (2) years in succession may, at the discretion of the department head, result in termination." On the other hand, employees are eligible for graduated merit pay raises or increases depending on their weighted annual evaluation scores, namely 1% added to wage base for scores of 70-74%, 2% added to wage base for scores of 75-79, 3% added to wage base for scores of 80-85, and 3% added to wage base plus an additional week of pay, at the discretion of the department head, for scores of 85 or better.

5. On July 13, 1992 Acting City Manager Scott E. Woodman directed a memorandum to department heads saying, "Given the current status of the collective bargaining agreements between the City and the DPFOA, DMEA [the "Association" in this case], IAFF and DPA, you are hereby directed to refrain from paying any merit step or other increases in pay over and above those pay rates received by each employee of these units prior to the expiration of their agreements." (City Exhibit No. 2) The foregoing directive has not

stopped the annual evaluation process referenced in the CBA; only the entitlements under that process have ceased.

6. The legislative body of the public employer has not appropriated monies to fund merit-based wage increases after June 30, 1992 nor has it paid them, notwithstanding that some employees may have qualified for such increases based on their annual evaluation scores. Longevity pay increases under Article XIX due after June 30, 1992, likewise, have not been paid. Conversely, educational incentive reimbursements (Article XXIV) and increased vacation accruals (Article XIII) have been recognized and paid.

7. Minutes of the City Council Workshop meeting of October 4, 1989 show that the City Manager passed out the CBA (the same document referenced in Item 3, above) at that time. (Association Exhibit No. 6).

8. Minutes of the Dover City Council Regular Meeting of October 11, 1989 show that the City Manager asked the Council members if they had any questions concerning the proposed CBA. (Association Exhibit No. 7).

9. Minutes of the Dover City Council Regular Meeting of October 25, 1989 show that the CBA was adopted by a roll call vote of 6 to 0. (Association Exhibit No. 8 and City Exhibit No. 1.)

10. Attachments A, B and C to the CBA provide enough self-contained information to permit the calculation of the City's maximum exposure to merit pay obligations under the contract, according to Mayor Williams. Traditionally, this had been calculated at three (3%) percent for budget purposes according to testimony from the City's junior accountant.

DECISION AND ORDER

This case involves a contract (CBA), a duration clause which continues that contract "until such time as a new agreement is ratified by both parties," and a contractual merit pay plan which grants employees an annual incremental pay increase if they meet certain standards. Notwithstanding the duration clause of the CBA, the public employer unilaterally discontinued the merit pay entitlements by its declaration of July 13, 1992. Finding No. 5,

above. This is a ULP in violation of RSA 273-A:5 I (h) and (i).

This Board has previously spoken to merit pay plans, also in Dover (Decision No. 92-120, August 31, 1992), albeit in a different context. In that case, involving the Dover Police Association and a different CBA, we said that the City did not have "unilateral authority to modify or eliminate merit-based compensation under the contract." The same is true here, but for different reasons. Basically, a unilateral change in working conditions--merit pay is a working condition--is an unfair labor practice under RSA 273-A:5 I (e). This is further compounded in this case by the public employer's picking and choosing which part(s) of the CBA it wants to honor and those it elects to ignore. Finding No. 6, above. Where incentives (e.g., merit pay) have a specific purpose in the scheme of a CBA (i.e., to encourage meritorious performance), the furtherance of that purpose "does not contemplate that one party may pick and choose which elements of the [contractually provided] incentives it will fund or encourage." Alton Teachers Association, Decision No. 92-195, December 22, 1992.

Merit pay increases were discussed in AFSCME, Local 3657 v. Town of Litchfield, Decision No. 92-155, November 5, 1992, and distinguished from "simple step increases based on longevity." They involve a quid pro quo, a benefit for a stated level of performance, i.e., meritorious performance. "They involve incentive-driven increases for which employees are to be rewarded for meritorious performance. It would make little sense, indeed, to say that the employer is free to eliminate the incentive during the course of negotiations and that the employees are free to respond by eliminating their efforts to perform meritoriously." Litchfield, supra.

Not unlike our analysis in East Kingston Teachers Association, Decision No. 92-159, October 21, 1992, "this is not the typical 'step' case." Employees are being paid for something (meritorious performance), not just another year of longevity or service. The particular terms of the merit pay plan permit the public employer to terminate employees who do not achieve a merit pay standing or score "two years in succession." Thus, the plan is a proverbial "double-edged sword." To permit the City to eliminate the merit pay compensation on one edge of that sword but to adhere to its right to discharge for failure to achieve merit status on the other edge would not only be contrary to the stated and negotiated intent of the parties but would also be contrary to the "level playing fields" doctrine of State Employees' Association of N.H. SEIU Local 1984, Decision No. 92-186, December 10, 1992, and Appeal of Franklin Education Association, ____N.H.____ (No. 90-478, November 10, 1992).

For the foregoing reasons we find that the City's actions constituted unfair labor practices and were violative of RSA 273-A:5 I (e), (h) and (i). The City is directed to reinstate the

merit pay plan forthwith, to make retroactive payments to those employees who have qualified for pay entitlements under that plan since it was unilaterally suspended or stopped on or about July 13, 1992, and to CEASE and DESIST from making any further modifications to the contractually guaranteed benefits under the merit pay plan until and unless those benefits have been modified through the negotiations process.

So Ordered.

Signed this 7TH day of January, 1993.

Jack Buckley

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Alternate Chairman Jack Buckley presiding. Members Seymour Osman and Arthur Blanchette present and voting.