State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

TOWN OF HOOKSETT Complainant	:	
v.	:	CASE NO. F-0136:13
HOOKSETT PERMANENT FIREFIGHTERS ASSOCIATION, IAFF LOCAL 3264 Respondent	:	DECISION NO. 1998-035

APPEARANCES

Representing Town of Hooksett:

Renny Perry, Consultant

Representing Hooksett Permanent Firefighters Association, IAFF Local 3264:

John Krupski, Esq.

Also appearing:

Thomas Flygare, Esq.
Steve LaDuke, Chief, Hooksett Fire Department
Gary Lambert, Deputy Chief, Hooksett Fire Department
Dean Jore, President, Hooksett, Local 3264
Gerald Covey, Hooksett, Local 3264
Jim Anderson, Hooksett, Local 3264
Richard Molan, Esq., Hooksett, Local 3264
Richard Mooney, Hooksett, Local 3264
Stephen Dillman, Hooksett, Local 3264
Michael Farrell, Town of Hooksett

BACKGROUND

The Town of Hooksett Fire Department (Town) filed unfair labor practice (ULP) charges against the Hooksett Permanent Firefighters Association, Local 3264, IAFF (Union) on December 3, 1997 alleging violations of RSA 273-A: II (b) and (f), a breach of contract, resulting from the Union's attempting to arbitrate a non-arbitrable and untimely grievance. On December 5, 1997, the Town filed a motion to stay arbitration in these proceedings. The Union filed an objection to the Town's motion to stay arbitration on December 15, 1997 and its answer to the ULP on December 18, 1997. This matter was then scheduled for hearing on January 6, 1998, continued at the request of the parties and then heard by the PELRB on April 7, 1998. At the conclusion of the hearing, the parties requested and were given until April 30, 1998 to file post-hearing memoranda.

FINDINGS OF FACT

1. The Town of Hooksett employs regular full time firefighters, fire lieutenants and fire inspectors and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Hooksett Permanent Firefighters Association, Local 3264, I.A.F.F., is the duly certified bargaining agent for regular full time firefighters, fire lieutenants and other personnel employed by the Town of Hooksett Fire Department.

3. The Town and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 1995 through June 30, 1998. (Joint Exhibit No. 2.) That document contains three sections which are germane to these proceedings:

   Article II - Management Clause:

   "Except as specifically limited or abridged by the terms of this Agreement, the management of the Hooksett Fire Department in all its phases and details shall remain exclusively in the Employer and its designated agents. The Employer and its agents shall have jurisdiction over all matters concerning the management of the Hooksett Fire Department, including, but not limited to,...the right to hire, supervise, discipline or discharge, relieving employee from duty for lack of work or funds....It is further specifically agreed that this Article and the exercise of any management rights herein shall not be subject to any grievance proceeding as hereinafter set forth."

Article IX - Discipline and Discharge:

"The Town agrees it shall only discipline or discharge Union members for just cause. For purposes of this Agreement, 'just cause' for discipline or discharge shall be deemed to be unsatisfactory performance or misconduct as determined by the Fire Chief..."

Article XVI - Grievance Procedure:

"For the purpose of this contract a grievance is defined as a written dispute, claim or complaint which is filed and signed by an Employee in the Bargaining Unit who alleges an actual instance of aggrievement and which arises under and during the term of this Agreement. Grievances are limited to matters of interpretation or application of specific provisions of this Agreement and must specify the Article and Section of this Agreement which has allegedly been violated, the date of the alleged violation, all witnesses to same and the relief requested..."

* * * * * *

If the Employer or the Union is not satisfied with the decision of the Town Administrator, or if the Town Administrator has not issued a decision within the appropriate timeframe, the Union may file, within twenty (20) days following the expiration of the timeframe or receipt of the decision...a request to the New Hampshire Public Employee Labor Relations Board that a neutral arbitrator be appointed to resolve the dispute. The arbitrator shall not have the power to add to, ignore or modify any of the terms or conditions of this Agreement....The arbitrator's decision shall not go beyond what is necessary for the interpretation and application of express provisions of this Agreement. The arbitrator's judgement[sic] shall not substitute for that of the parties in the exercise of rights granted or retained by this Agreement. The decision of the arbitrator shall be final and binding on the parties.

4. Firefighter Stephen Dillman, a member of the bargaining unit, was discharged on September 6, 1997 by the Town. There is a dispute in the pleadings whether this was for misconduct. Thereafter, Dillman was terminated again by a letter of discharge from Chief Steve LaDuke dated September 18, 1997 for an incident on September 5, 1997. This letter said, in pertinent part, "Disobeying a direct order, this incident along with others in your file leave me no choice

but to terminate you from Employment with the Hooksett Fire Department effective immediately." (Attachment 2 to Answer.) On September 21, 1997, the Union grieved Dillman's discharge saying it violated the just cause provisions of Article IX, that it was excessive discipline and that it was inconsistent with discipline imposed in other cases of insubordination. (Attachment 1 to ULP.) By letter of October 14, 1997, LaDuke denied Dillman's grievance, saying "Based on a hearing held on October 18, 1997[sic], your grievance of September 21, 1997 is denied. Article IX of the CBA states just cause, and I have determined just cause." No issue of arbitrability was raised. (Attachment 2 to ULP.)

5. On October 16, 1997, the union appealed the grievance to Mike Farrell, Town Administrator. Farrell conducted a hearing on this appeal on October 23, 1997 in which he addressed two issues, whether the termination violated the just cause provisions of Article IX and whether there was adequate notice of the termination hearing in order to comply with union representation rights under Article IX, Section 3. Farrell issued a decision denying the grievance on both grounds on October 27, 1997. (Attachment 4 to ULP.) In it, he said, *iter alia*, "three firefighters witnessed Fire fighter Dillman act in an insubordinate manner toward Lt. Carignan on September 21, 1997" and "in the incident on September 21, 1997 Chief LaDuke, based on reports of the four other firefighters who were witness to the incident, determined Firefighter Dillman was guilty of misconduct in the form of insubordination toward an officer." The Union then requested a list of arbitrators from the PELRB by a request dated November 4, 1997 (Attachment 5 to ULP) consistent with Article XVI of the CBA, as shown in Finding No. 3, above.

6. When it filed the ULP, the Town claimed, in item 11 of its pleadings, that the Union committed an unfair labor practice "in violation of RSA 273-A:5 II (b) and (f) by attempting to raise issues that were not timely raised at Steps One [Chief's level] and Two [Administrator's level] of the Grievance Procedure."

7. The Town also claimed, in item 12 of its pleadings, that the parties "clearly intended" that issues of just cause" would not be submitted to arbitration as the result of the wording chosen and utilized in Article

IX, more particularly set forth in Finding No. 3, above.

8. Town negotiator and labor counsel, Thomas Flygare, testified that he worked on the first CBA between the parties in 1991 and that, post fact finding, the Town Council rejected putting both just cause and binding arbitration in the first contract. Thus, the grievance procedure language in the original (Joint Exhibit No. 1) and successor (Joint Exhibit No. 2) CBAs concludes with "This Article shall be subject to the provisions of N.H. RSA 542." Flygare said he proposed the discipline and discharge language with the intent to remove it from the arbitration provisions of the CBA. Notwithstanding this intent, the Town has arbitrated discipline and discharge cases for this bargaining unit at least two times during the past five years, e.g., a stipulated arbitration award on September 14, 1995 (Union Exhibit No. 1) and a full decision and award on January 28, 1997 (Town Exhibit No. 3). The issue of arbitrability was not raised in Union Exhibit No. 1. It was raised and litigated in Town Exhibit No. 3 with the result that the Town lost on that issue.[1] Attorney Flygare acknowledged that the parties have traditionally allowed discipline cases to proceed to the first two steps (Chief and Town Administrator) of the grievance procedure.

9. Former firefighter, member of the first negotiations team and now Deputy Chief Gary Lambert said the first CBA represented a trade where just cause was given up for binding arbitration. He said he believed the first CBA made discharge and discipline non-arbitrable. Conversely, James Anderson, currently a firefighter and also a member of the first negotiating team, said he understood everything in the first CBA was subject to the grievance and arbitration language unless it was specifically excluded. He supported his recollection of this matter by saying that given the former chief, the union would not have left such serious matters to his sole discretion. Union president Jore, in his testimony, supported Anderson's interpretation because of the provisional language in the Management Clause, "Except as specifically limited or abridged..." Jore referenced Article XIX, Section 3 of the CBA where

[1] This series of events and the results of the arbitration proceedings cited were also confirmed in testimony of Dean Jore, unit member and current local president, appearing as a Union witness.

the parties conspicuously and specifically excluded certain items from the grievance procedure, e.g., "Issues and complaints related to the administration or modification of rules, regulations or SOPs shall not be subject to the Grievance Procedure."

10. Chief LaDuke, called as a Union witness, confirmed Attorney Flygare's testimony, namely, that discipline and discharge matters have traditionally been subject to the grievance procedure but that he, personally, did not believe that they should go on to arbitration. Union Exhibit Nos. 2 and 3 show where a former chief's decisions were reviewed by a former town administrator and affirmed or modified, as appropriate, as part of that review process in 1995 and 1996, respectively. There is nothing in the CBA which directs or suggests that discipline and discharge disputes are limited to only the first two steps of the grievance procedure as found in Article XVI.

DECISION AND ORDER

It is axiomatic that an arbitrator's authority is controlled by the extent of the parties' agreement to arbitrate. Nashua School District v. Murray, 128 NH 417 at 420 (1986) citing to Steelworkers v. Warrior and Gulf Nav. Co., 363 U.S. 374, 582 (1960). Our assessment of this case is predicated on that agreement as measured by the "clear meaning" of the words of the CBA, the parties' practices and their history of dealing with discipline and discharge cases under the contract. All three of these elements lead us to the conclusion that this matter is arbitrable.

"While custom and past practice are used very frequently to establish the intent of contract provisions that are so ambiguous or so general as to be capable of different interpretations, they ordinarily will not be used to give meaning to a provision that is clear and unambiguous." Elkouri, How Arbitration Works, Fifth Edition, p. 651. (Bureau of National Affairs, 1997). But for the testimony of Town witnesses as to what they thought the contract meant relative to discipline and discharge grievances or thought they were accomplishing when that language was crafted prior to 1993, the practice of the parties since then and the language of the contract appear to be in harmony.

The "clear meaning" test shows us that Article II recites certain management rights, inclusive of the right to discipline or discharge employees, and says the exercise of those rights shall not be the subject of grievances. That clause also says that it shall apply "except as specifically limited or abridged" by terms of the contract.

When we turn to Article IX we find such a limitation inasmuch as the parties have agreed that the Town will not discipline or discharge members except "for just cause." Thereafter, Article XVI defines a grievance as "an actual instance of aggrievement" and limits them "to matters of interpretation or application of specific provisions" of the contract. The Union's grievance in this matter concerns an issue of just cause. (Attachment 1 to ULP.)

At this point, the Town says it is protected by the wording of Article II from proceeding to grievance arbitration. The "clear meaning" provision is not as clear as the Town would have us believe because of the provisions of Article IX and XVI, cited above. Thus, we turn our attention to the practice and history of the parties in dealing with discipline cases and grievances.

The operative CBA during the acts complained of is the 1995-98 contract (Joint Exhibit No. 2) which became effective July 1, 1995. There is evidence that disciplinary matters were being grieved as early as November of 1994 and being adjusted at the Town Administrator's level in January of 1995 (Union Exhibit No. 2). This occurred before the current 1995-98 CBA went into effect. There is no evidence about dissatisfaction with the handling or processing of disciplinary grievances, at least through Level II, prior to the implementation of the 1995-98 agreement or that the parties changed those procedures during negotiations for that agreement.

Next, in looking at history, we note that two cases, both involving matters of discipline, have been processed to and including arbitration under the current CBA. Finding No. 8. The parties have openly continued the practice of permitting discipline disputes to be processed through the grievance procedure. It is not until the instant case that the Town has been heard to complain, after losing its arbitrability argument in Town Exhibit No. 3.

Finally, in addition to these practices and the history of the parties, we note that there is evidence that the parties were able to identify and specifically exclude certain matters from grievance arbitration. Finding No. 9. Such was not the case with just cause; there is no exclusionary language excepting just cause claims from the grievance procedure. In conjunction with this observation, there also is no language limiting discipline and discharge grievances to the first two steps of the grievance procedure. Processing of grievances under the CBA cannot be or become a "pick and choose so long as we are winning" procedure. The parties have bound themselves by contract, by practice and by how they have conducted their business in the past. This has continued over the duration of two CBAs. The stability of labor management relations cannot now be disturbed or diluted by a unilateral interpretation to the contrary.

The Town must have persuaded us that there was "positive assurance" that the parties did not intend to process alleged violations of the just cause clause, Article IX, through the contract grievance procedure. Appeal of Westmoreland School Board, 132 N.H. 103, 105 (1989). They have failed to do so, either in their reading of the contract language or in how they have handled similar disciplinary complaints involving the current and former CBAs. Both of those contracts are, indeed, "susceptible of an interpretation that covers the asserted dispute." *Id.* The ULP is DISMISSED and the Motion to Stay Arbitration is DENIED.

So ordered.

Signed this 13TH day of May, 1998.

JACK BUCKLEY
Alternate Chairman

By unanimous decision. Alternate Chairman Jack Buckley presiding. Members E. Vincent Hall and Seymour Osman president and voting.