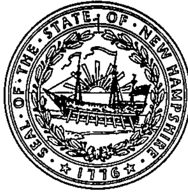

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

PROFESSIONAL FIREFIGHTERS OF GOFFSTOWN, LOCAL 3420, IAFF Complainant v. TOWN OF GOFFSTOWN Respondent	CASE NO. F-0143:6 DECISION NO. 1998-108

APPEARANCES

Representing the Professional Firefighters of Goffstown:

John Krupski, Esq., Counsel

Representing the Town of Goffstown:

Paul Fitzgerald, Esq., Counsel

Also appearing:

John Scruton, Town of Goffstown
Linda Moody, Town of Goffstown
John DeSilva, Town of Goffstown
Steve Roberts, Local 3420
Steve Tower, Local 3420
John Van Gelder, witness

BACKGROUND

The Professional Firefighters of Goffstown, Local 3420, IAFF, AFL-CIO (Union) filed unfair labor practice (ULP) charges against the Town of Goffstown (Town) on September 28, 1998 alleging violations of RSA 273-A:5 I (a), (e), (g), (h) and (i) for breach of contract resulting from the manner in which the Town was calculating longevity pay as provided for in Article 15.3 of the collective bargaining agreement (CBA). The Town filed an answer and a motion to dismiss on October 13, 1998. This matter was then heard by the PELRB on November 10, 1998 and December 16, 1998.

FINDINGS OF FACT

1. The Town of Goffstown is a "public employer" of firefighters in its Fire Department within the meaning of RSA 273-A:1 X.

2. The Professional Firefighters of Goffstown, Local 3420, I.A.F.F. is the duly certified bargaining agent for firefighters, up to and including the rank of lieutenant, employed by the Town.

3. During the times pertinent to the conduct complained of in this complaint, the Union and the Town were parties to a CBA for the period March 20, 1995 (date signed) to December 31, 1997. (Joint Ex. No. 1.) That document contains a negotiated grievance procedure which defines a grievance (Article 14.1), provides Step I review at the department head level (Article 14.2), provides Step II review by a Personnel Advisory Board (Article 14.3) and concludes with a final "and not subject to further appeal or redetermination" decision by the Board of Selectmen (Article 14.4). The subject matter of the dispute involves "longevity pay" as referenced in Article 15.3, to wit:

LONGEVITY

15.3 Upon the 8th year of service, and every two years thereafter, through the 20th year, employees will accumulate longevity pay at the rate of $5.00 per week, to be paid in a lump sum (less taxes) in the first week of December. Longevity pay will accumulate therefore, as follows:

YEAR	RATE/WEEK	ANNUAL PAYMENT
8	$ 5.00	$ 260.00
10	$10.00	$ 520.00
12	$15.00	$ 780.00
14	$20.00	$1,040.00
16	$25.00	$1,300.00
18	$30.00	$1,560.00
20 and thereafter	$35.00	$1,820.00

This benefit will be calculated on a twelve month period from the first week of November to the last week of October. Employees who separate prior to November in any given year shall be paid on a pro rata basis for the year.

4. On or about December 11, 1997, Firefighters Steve Roberts and Jesse Koch filed a grievance with Chief Ed Hunter, pursuant to Article 14.1 and 14.2, claiming that they were eligible for longevity pay under Article 15.3 of the CBA but that they did not receive their respective longevity checks when they were distributed on December 3, 1997. Roberts cited his date of hire as May 28, 1990 while Koch cited his date of hire as June 6, 1990. (Attachment C to ULP and Joint Ex. No. 2.)

5. On December 17, 1997, Chief Hunter wrote to Koch and Roberts to tell them he was denying their grievance because "the use of this longevity pay has never been for anything other than a full year of service and only commencing after the completion of the eighth year" and "this is the Town wide interpretation of Section 15.3 of the fire union contract." (Attachment D to ULP and Joint Ex. No. 2, p.2.)

6. On December 26, 1997, both Roberts and Koch sent letters to Chief Hunter appealing his decision. (Joint Ex. No. 2, pp. 3-4.) This required the grievance to proceed to a Personnel Advisory Board under Article 14.3 of the CBA. That board consisted of John Van Gelder union member, Maurice Allard, town member and Dr. Phil Mansour, Chair and public member. The PAB convened and heard the grievance on March 6, 1998 after which it issued a 3 to 0 decision in favor of the union. (Attachment E to ULP and Joint Ex. No. 2, p.5.)

7. On March 10, 1998, Chief Hunter wrote to Koch and Roberts, telling them that he was exercising his option of appealing the PAB decision and that the selectmen "wish to hear the grievance on Monday, 3/16/98 at 7:30 p.m. at the Goffstown Town Hall." (Attachment F to ULP and Joint Ex. No. 2, p.6.) The Union claims that the rules used in the hearing, which were unilaterally adopted by the selectmen on January 30, 1995 (Union Ex. No. 1) after the tentative agreement on the 1994-97 CBA was reached on November 10, 1994 (Union Ex. No. 2), were not negotiated and that the selectmen were prejudicial in their conduct of the hearing because they declined to hear a witness offered by the Union (John Van Gelder, Joint Ex. No. 3, page 8.) and because they utilized matter not in evidence in making their decision, thus violating RSA 273-

A:4 relative to a workable grievance procedure. The parties have since negotiated a successor CBA to the 1994-97 agreement. There is no evidence that there was dissatisfaction with or that they went to impasse over the selectmen's role in step 3 (Article 14.4) of the grievance procedure. (Union Ex. No. 1). Conversely, there is unrefuted testimony form Fire Captain John DeSilva, corroborated by Scruton, that he was given a copy of Union Ex. No. 1 by Town Administrator Scruton in 1995 shortly after it was promulgated, that DeSilva provided a copy to Union counsel and that it prompted no objection at the time.

8. On March 30, 1998, the selectmen voted unanimously to reverse the decision of the Personnel Advisory Board. This was conveyed by a memo from Scruton to Koch, Roberts, Steve Tower and Chief Hunter on March 31, 1998. (Joint Ex. No. 2, p.7 and Attachment H to ULP.)

9. Unrefuted testimony from DeSilva, Roberts and Scruton established that the language of Article 15.3 providing for longevity pay was taken from the Town's personnel plan and put into the CBA. Scruton testified that this transfer was verbatim. (See Town Ex. No. 3.) Hunter, a 22 year employee of the Town, testified that longevity pay has been calculated in the same manner since it was initiated under the personnel plan, *i.e.,* in a manner consistent with the Town's interpretation of Article 15.3 of the CBA.

10. Linda Moody has been a town bookkeeper for 11 1/2 years. She is responsible for the calculation of longevity pay, both under the personnel plan and under various collective bargaining agreements, and has made those calculations consistently the past eleven years. She explained that Koch and Roberts, both hired in 1990, did not *start* to accrue longevity until they had been employed over eight (8) November firsts, namely on November 1, 1997. Then on November 1, 1998, they both qualified to *receive* their first longevity checks for time worked over the prior twelve months. (See Union Ex. No. 4, p.3.) Under the contract, those checks were due to have been distributed in December of 1998. Five firefighters were hired in 1987 through 1989, inclusive. Town documents verify that their longevity pay was

calculated and paid consistent with the testimony offered by Moody, *e.g.,* personnel hired before November 1, 1987 first *received* longevity pay in 1995; personnel hired before November 1, 1988 first *received* longevity pay in 1996 and personnel hired before November 1, 1989 first *received* longevity pay in 1997. (Town Ex. No. 2)

DECISION AND ORDER

The Town's original filing of an answer in this matter was accompanied by a motion to dismiss which was predicated, in large part, on the language of Article 14.4 of the contract which gives final decision-making authority to the board of selectmen. (Finding No. 3, above.) We reject that motion to dismiss as being dispositive of this case because the language conferring final decision-making authority on the selectmen in Article 14.4 pertains only to disputes which have arisen under the grievance procedure of the CBA, *i.e.,* it is the final step of that process. In this case, the Union has plead a number of violations of RSA 273-A:5 I, not just a breach of contract. The bilateral contractual provision in Article 14.4 does not and cannot remove the authority of the PELRB to hear the alleged statutory violations arising under RSA 273-A:5 I.

This brings us to the facts in this case. The language in question, Article 15.3, provides, in pertinent part, that "upon the 8th year of service...employees will accumulate longevity pay at the rate of $5.00 per week..." The term "upon the 8th year of service" is in contention here, with the Union claiming that it is triggered upon starting the eighth year of service while the Town claims that "upon" means upon the *completion* of eight years of service and that it has been consistently interpreted in that manner since this provision became part of the personnel plan, later to become part of this CBA.

When disputes such as this arise, it is customary to look at how the terminology has been treated historically by the parties. First, the language in question has been in Town documents for at least the eleven (11) years of Moody's tenure. Second, it was transferred without modification to the CBA. Third, there is no evidence of an attempt to modify the way the language reads in the CBA from how it appears in the personnel plan, as is evident from comparing Article 15.3 of Joint Ex. No. 1 with Town Ex. No. 3. The benchmarks and methodology remain the same, notwithstanding some stylistic changes in typing. Fourth, it is uncontroverted that this language, whether in the CBA or in the personnel plan, had been consistently applied and calculated since it was implemented. Fifth and finally, the manner of calculating and paying longevity pay under the contractual entitlement language has been applied consistently and without challenge for *bargaining unit* members through December of 1996. (Town Ex. No. 2.)

1997, Shawn Murray, hired on May 8, 1989, received his first annual longevity payment of $260.00. Roberts and Koch (and DeSilva), all hired in 1990, did not receive the benefit in 1997, consistent with the distinction for 1989 dates of hire versus 1990 dates of hire. The Union is without standing to complain successfully that the provisions of Article 15.3 of the CBA have not been appropriately applied to Roberts and Koch.

This case represents, essentially, a past practice, with the unusual twist that it is being asserted as a defense by the Town, rather than by a union which is more commonly the case. The manner of eligibility for, calculation of and payment of longevity pay meets the standards for a past practice because all have been "(1) unequivocal, (2) clearly enunciated and acted upon and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." [AFSCME, Local 3438 v. Sullivan County Nursing Home, PELRB Decision No. 1998-084, p.6 (October 20, 1998) and Elkouri and Elkouri, How Arbitration Works 632 (5th ed. 1997).] The Union cannot now achieve a modification in the historical application of this contract benefit without first having obtained that modification through the bargaining process. [City of Keene v. Keene Police Officers, SEA Local 1984, PELRB Decision No. 1998-048, p.6 (May 29, 1998).] Any perceived need on the part of the Union to change the wording or application of Article 15.3 of the CBA must be negotiated, not claimed through arbitration or a ULP, because the facts, the practice and the duration of that practice all do not substantiate their claim.

The ULP is DISMISSED.

So ordered.

Signed this 31st day of DECEMBER , 1998.

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Alternate Chairman Jack Buckley presiding. Members Seymour Osman and Daniel Brady present and voting.