State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

TEAMSTERS LOCAL 633 for SALEM POLICE RELIEF ASSOCIATION Complainant	:	CASE NO. P-0715:28
v.	:	DECISION NO. 2000-040
TOWN OF SALEM Respondent	:	

APPEARANCES

Representing Teamsters Local 633/Salem Police Relief:

Thomas Noonan, Business Agent

Representing Town of Salem:

Robert Leslie, Esq.

Also appearing:

Stephen MacKinnon, Salem Police Department
Teresa E. Padvaishas, Salem Police Relief
Fred Rheault, Salem Police Relief

BACKGROUND

Teamsters Local 633 of New Hampshire (Union) filed unfair labor practice (ULP) charges on behalf of the Salem Police Relief Association on February 2, 2000 against the Town of Salem (Town) alleging violations of RSA 273-A:5 I (e), (g), (h) and (i) resulting from breach of contract and refusal to bargain when the Town unilaterally issued a general order implementing a physical fitness

testing program, after all reference thereto was removed from the bargaining table when the parties agreed to settle the overall successor contract from April 1, 2000 to March 31, 2000 solely on the basis of certain financial adjustments. The Town filed its answer and cross-petition for declaratory judgment on February 17, 2000 after which this matter was heard by the PELRB on March 30, 2000. The record was closed after receipt of posting hearing briefs from both parties on April 17, 2000.

FINDINGS OF FACT

1. The Town of Salem operates its own police department, and, in the course of so doing, is a "public employer:" within the meaning of RSA 273-A:1 X.

2. Teamsters Local 633 of New Hampshire/Salem Police Relief Association is the duly certified bargaining agent for all full-time patrol officers, sergeants, dispatchers and dispatch supervisor of the Salem Police Department and has been so since October 19, 1993.

3. The Town and the Union were parties to a collective bargaining agreement (CBA) for the period April 1, 1998 to March 31, 2000. (Joint Exhibit No. 1.) That agreement contains no specific language pertaining to physical fitness standards and testing. Such standards formerly appeared in CBA's (e.g., the 1990-1992 CBA, Joint Exhibit No. 2) but were negotiated out of the CBA for the period ending in 1996, according to testimony from Fred Rheault, and have not appeared in the contract since then. Likewise, they do not appear in the April 1, 1998 - March 31, 2000 successor CBA.

4. Issues pertaining to physical fitness standards and testing have, however, arisen since 1996. On or about July 16, 1998, the Salem Police Department issued Training Bulletin #98-05 (Joint Exhibit No. 4) which was entitled "Preparing for the Physical Fitness Program, described a six event test battery and established a "standard" for each event. The issuance of this training bulletin prompted the filing of an unfair labor practice by the Union on or about September 11, 1998. (Joint Exhibit No. 5.) The Town responded to the charges on or about October 8, 1998,

stating, *inter alia,* that no implementing general order had been issued. The matter was thereafter scheduled for hearing before the PELRB on November 12, 1998 (Joint Exhibit No. 6). At that hearing the parties joined in a stipulated order which caused the Union to withdraw the ULP (Joint Exhibit No. 7) under certain conditions, as reflected in Decision No. 1998-099 (November 19, 1998), to wit:

> The Physical Fitness Program which is the subject of the instant charge shall not be incorporated into any employees' performance evaluation and will carry no weight in the performance evaluation until after a successor agreement to the April 1, 1998 to March 31, 2000 collective bargaining agreement is signed.
>
> The Union by agreeing to withdraw the instant charge does not waive its right to negotiate over the issue of the Town's Physical Fitness Program without prejudice to either parties' position herein, including but not limited to the Town's position that the Physical Fitness Program is not a mandatory subject of bargaining.

5. In the course of negotiations for the 2000-2002 CBA, the Union made a bargaining proposal on May 18, 1999 which contained a physical fitness program, inclusive of standards, which was voluntary and provided incentives based on attaining one of three levels of proficiency. (Joint Exhibit No. 8.) According to testimony from Union witness and negotiator Fred Rheault and from Chief MacKinnon, the Town did not respond to the Union's physical fitness program proposal with MacKinnon adding that it was the Town's position that "we didn't have to negotiate" it. Negotiations concluded with a tentative agreement on October 28, 1999 (Joint Exhibit No. 9). All previously tentatively agreed items remained tentativly agreed, the parties agreed on salary increases in April of 2000 and 2001, and agreed that "all other proposals on both sides are dropped." Sometime thereafter, but before appearing at the PELRB hearing on March 30, 2000, the parties caused their duly authorized representatives to sign the 2000-2002 CBA. As was the case with the 1998-2000 CBA, the successor agreement did not make reference to a physical fitness training program or incentives therefor.

6. On January 28, 2000, the Salem Police Department issued General Order No. 25-7 entitled "Physical Agility Testing," which, over the course of several years, would ultimately evaluate all sworn personnel on an annual basis. (Joint Exhibit No. 11.) It contained physical fitness standards in six categories, each of which is to be tested. Rheault testified that, while negotiations for the 2000-2002 CBA were on-going, he queried MacKinnon about the impact of a physical fitness program on officers who did not meet standards and whether a failure to meet standards could have adverse financial implications on them. Both Rheault and MacKinnon said that MacKinnon answered the "financial implications" inquiry in the negative. Article 13, Section 4 of both the 1998-2000 and the 2000-2002 CBA's provides that the "Town...will only demote a Union employee for the following reasons ...unsatisfactory performance". Notwithstanding this, MacKinnon testified that the physical fitness program was not intended to create a situation where physical testing results "could have an impact on wages." He added, "I can see no scenario where poor performance on that [test] will result in a drop in pay." Conversely, MacKinnon, on cross examination, testified that it had "always been the intent to include officers' performance on the physical fitness test" as part of his or her annual evaluation.

7. Section VII of the physical agility testing general order (Joint Exhibit No. 11) addresses "Evaluation" and provides in part:

> Any officer who is unable to meet Department standards (or show the 50% improvement) after the third test will be referred to the Chief of Police. A medical review of the circumstances will focus on the officer's general physical condition and potential health dangers that may exist. The medical opinion and conclusions following this review will determine what administrative actions, if any, will be taken.

MacKinnon was unable to say what "administrative actions" would be taken pursuant to Section VII but did offer that he would rely on a "doctor's guidance," notwithstanding that the referred employer may still be subject to discharge.

DECISION AND ORDER

This Board considers it an unfair labor practice in violation of RSA 273-A:5 I (e) for parties to engage in collective negotiations over a battery of topics, both mandatory and permissive, decide to settle all their outstanding differences predicated on a salary settlement alone, drop all issues other than the salary package as inducement to attain both the salary enhancement and an overall settlement and then have one of the parties unilaterally implement provisions which had been put on the table, which remained unresolved and which were dropped as part of the accord to reach overall settlement. Given the bilateral inducements of a salary increase and an overall settlement, the parties' actions voluntarily removing all other topics raised by both sides from the bargaining table meant that those "removed topics" were no longer the subject of negotiations. Once proposed topics were relegated to the status of having been dropped, the proposed versions died and the subject matter reverted to the *status quo* of what it was under the expired agreement. The expired agreement was silent on the issue of fitness exams but did permit the Town to set qualifications for personnel. The parties negotiated fitness standards out of their 1996 CBA and that topic has not been mentioned contractually since then.

Considered in a light most favorable to the Town, the *status quo*, under the parties' stipulation of November 12, 1998, provides that "fitness program results shall not be incorporated into any employee's performance evaluations and will carry no weight....until after a successor agreement to the...1998 to...2000 collective bargaining agreement is signed." Joint Ex. No. 7. That time has now come and the condition precedent has occurred, e.g., Joint Ex. No. 3. Conversely, as referenced on page 8 of the Union's post-hearing brief, the Town, in its answer and cross-petition in Case No. P-0715:26 in October of 1998, "conceded," to use the Union's terminology, that the implementation of the fitness program "may affect employees' earnings and rank during the term of the next CBA" and, because of this, the Union would be "at liberty to make proposals during the next round of bargaining concerning the impact of the Town's action on a successor agreement." We agree with this assessment, both as a position advanced by the Town and as being consistent with case law. We also find this language to have been an inducement to achieve the stipulation referenced in Decision No. 1998-099.

In Appeal of the State of New Hampshire 138 NH 716, 722 (1994), decided after the cases cited in the Town's brief, (page 10), the Court said that, in order to be negotiable, the proposal in question "must primarily affect the terms and conditions of employment, rather, than matters of broad managerial policy...For example... whether or not to offer extracurricular programs is part of broad managerial policy [but] staff wages, hours and other specifics of staff obligations and remuneration primarily affect the terms and conditions of employment." Translated to this case, the Town's decision to conduct fitness testing was a policy decision. To the extent the implementation of this policy decision has or might have an impact on wages and other terms and conditions of employment of bargaining unit members, that impact is bargainable because it is more akin to terms and conditions of employment than to broad managerial policy. The inclusion of fitness results on the annual evaluation report has implications as to pay, promotions, demotions or other administrative procedures, such as are listed in Section VII of Joint Ex. No. 11, and have individual impact and consequences directly bearing on wages and other terms of employment of unit members.

We consider the unilateral adoption of the fitness program by the Town after the conclusion of negotiations to fall within the confines of Appeal of Pittsfield School Dist., __ NH __, 744 A.2d 594 (1999) to the extent that the managerial policy exception asserted by the Town (brief, pp. 2, 11-13) does not apply to new or modified evaluation procedures and, given the prior conduct of the parties, either was, or was agreed to be, permissively negotiated. Were the Town to incorporate the results of the fitness program into the current methodology for evaluations as is its stated intent in Finding No. 6, above, it will have changed the overall complexion of the assessment process and is liable for implementing a unilateral change in a negotiable working condition because of the potential impact on terms and conditions of employment. This impact is negotiable. Our reading of the Union's brief (page 7) suggests that this is the relief sought, not the invalidation of the fitness program itself.

Turning again to Appeal of Pittsfield School District and coming full circle to our assessment of the consequences of both sides dropping all pending and not-tentatively-agreed-to proposals in favor of a salary enhancement, we see that the Court has opined that "once parties to a CBA have chosen to bargain over matters not otherwise prohibited from negotiation, the parties must abide by the agreement entered into during the term of the CBA." Here, the parties bargained on the fitness program and other issues, reached

no agreement, and, from all that was presented to us, apparently dropped a number of proposals from both sides, with the expectation that they became closed issues not subject to further negotiations for the pending 2000-2002 CBA. This is a reasonable expectation and may be equated to a proposal to modify a contract grievance procedure. With no agreement to modify reached, the proposal is dropped and the grievance language remains the same as in the former CBA; the grievance procedure is neither eradicated or thereafter subject to unilateral alteration by one of the parties. The same result pertains here, except there is no language on-going about the fitness program. The void continues and the *status quo* is the past practice as it was under the now expired 1998-2000 CBA, because both sides withdrew their unresolved proposals. With this in mind, there is no evidence that the strategy employed by the Union was a waiver, express or implied. (Union brief p. 19-20)

The Town's conduct in refusing to entertain any bargaining about the fitness program (Finding No. 5) was, for the reasons given, violative of RSA 273-A:5 I (e). By way of remedy, we direct the Town to CEASE and DESIST from refusing to bargain the impact of the fitness program. In the meantime, the fitness program, as a program only, may continue as promulgated under the SOP (Joint Ex. No. 11); however, the Town is directed not to incorporate or include any of the results therefrom, in whole or in part, into annual evaluations or any other programs or files which could lead, contribute to or cause the wages and/or terms and conditions of employment of bargaining unit members to be adversely impacted by such incorporation or inclusion.

So ordered.

Signed this 25th day of May, 2000.

BRUCE K. JOHNSON
Alternate Chairman

By unanimous vote. Alternate Chairman Bruce K. Johnson presiding. Members Richard W. Roulx and Richard E. Molan, Esq., present and voting.