NH Supreme Court reversed this decision on June 20, 2001, Slip Opinion No. 1999-670.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 402 Complainant v. CITY OF PORTSMOUTH, BOARD OF POLICE COMMISSIONERS Respondent	CASE NO. P-0709:19 DECISION NO. 1999-087

APPEARANCES

Representing IBPO, Local 402:

Peter Phillips, Esq., Counsel

Representing City of Portsmouth Police Commissioners:

Thomas J. Flygare, Esq., Counsel

Also appearing:

William T. Burke, City of Portsmouth
Michael Magnant, City of Portsmouth
Theo Mahoney, City of Portsmouth
Al Kane, IBPO Local 402
John Centola, IBPO Local 402

BACKGROUND

The International Brotherhood of Police Officers, Local 402 (Union) filed unfair labor practice (ULP) charges on March 22, 1999 against the City of Portsmouth, Board of Police Commissioners (City) alleging violations of RSA 273-A:5 I (a), (e), (g), (h) and (i) resulting from the Commission's failure to implement a binding arbitration award, identified as "Attachment C" to the ULP and as Joint Ex. No. 3. The Board of Police Commissioners filed its answer on April 5, 1999 after which the parties participated in a

pre-hearing conference on May 11, 1999, as reflected in Decision No. 1999-042 dated May 21, 1999. In the pre-hearing conference the parties, each represented by counsel, stipulated the following issues for consideration by the PELRB:

> Whether the City has breached the CBA between the parties thereby violating RSA 273-A:5 I (a), (e), (g), (h) and (i) when it failed to implement the arbitration award dated January 20, 1999 in case #P-0709:19.
>
> Whether an arbitrator can bind the City based on the facts of this case considering City of Portsmouth v. Association of Portsmouth Teachers, 134 NH 642 (1991).

The pre-hearing conference order set this matter for hearing by the PELRB during its June calendar, said hearing having occurred on June 22, 1999. Thereafter, the parties agreed to submit post-hearing briefs on or before July 23, 1999, upon receipt of which the record was closed.

FINDINGS OF FACT

1. The City of Portsmouth, by and through the Portsmouth Board of Police Commissioners, is a "public employer" of police officers and other personnel in the operation of its police department within the meaning of RSA 273-A:1 X.

2. The International Brotherhood of Police Officers, Local 402, is the duly certified bargaining agent for all permanent members of the Portsmouth Police Department not above the rank of patrolman.

3. The Commission and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 1995 through June 30, 1998 and remaining "in effect after that date unless either party notifies the other…of it's [sic] desire to terminate said contract." (Joint Ex. No. 1.) That agreement provides, in pertinent part:

   Article 23 - Outside Work Details:

   > Outside Work Details apply to those jobs where officers are paid by persons and/or firms needing police coverage, either as required under State law or City ordinance, or for the safety and protection of the general public. These include construction companies working on or near roadways, public dances, rallies, private parties, athletic events, political events, etc. Voluntary overtime details shall be considered, "Outside Work."
   >
   > Policies and procedures along with the recording of and the number of police personnel assigned to all Outside Work Details shall be the responsibility of the Chief of Police and

the Portsmouth Police COMMISSION.

If any officer, signed up for an Outside Work Detail, cancels that job within a twenty-four (24) hour period of the job starting time, that officer is subject to a one week work penalty. This means that the officer will be subject to being bumped by any officer from any job regardless of money earned and days off. If an officer does cancel on such a job, it is the officer's responsibility to make an explanation to the Chief of Police or his designee. If the explanation is not satisfactory the officer is subject to one week work penalty. This work penalty is subject to the grievance procedure for all full time officers.

Outside or private work details shall be paid at the overtime rate for maximum patrolman with a guaranteed minimum of four (4) hours. Overtime and/or "Budgets" will be subject to Section 21 "Overtime" Pay. Overtime jobs carry a three (3) hour minimum.

* * * * *

Article 45 - Grievance Procedure:

The term "Grievance Procedure" shall include any dispute concerning the application or interpretation of any of the provisions of this Agreement.

(A) Any employee having a grievance shall bring it to the attention of the Commander, Administrative Services Bureau within five (5) working days of the occurrence of the event giving rise to the grievance or of the employees knowledge of said event. If the grievance is resolved at this informal level the settlement shall not be used as precedent for future cases.

(B) Should the employee not be satisfied with the responses at this grievance step, which response may be oral, the employee shall bring the grievance to the attention of the Board of Directors in writing within forty-eight (48) hours of having brought it to the attention of the Commander in Step 1 above. The Board of Directors shall determine the justification of said grievance.

(C) If the Board of Directors feel that the grievance exists, it will arrange for a meeting within five (5) days of the receipt of the grievance with the Chief of Police or his designee, in an attempt to adjust the grievance. Upon the Union's request, the Chief's answer will be reduced to writing within five (5) working days.

(D) In the event that the grievance cannot be satisfactorily settled between the Chief of Police and the representatives of the Union, the matter will be referred to the Commission within ten (10) days after the Chief's answer. The Commission shall meet with the Union for a hearing on the grievance within fifteen (15) days of their request for said hearing.

(E) (Section 1) - If the grievance has not been resolved to the satisfaction of the aggrieved employee, the UNION may, by giving notice to the COMMISSION within ten (10) working days after the conclusion of the meeting referred to in Section (D) submit the grievance to Arbitration. Such notice shall be addressed in writing to the COMMISSION.

(Section 2) - In the event that the UNION elects to

proceed to Arbitration the COMMISSION, or it's designee, and the UNION will endeavor to agree upon a mutually acceptable Arbitrator and obtain a commitment from said Arbitrator to serve. If the parties are unable to agree upon an Arbitrator or to obtain a commitment to serve, the grievance shall be referred to the American Arbitration Association by the UNION no later than twenty (20) days after the receipt of the notice of submission to Arbitration, Section 1. In such event, the Arbitrator shall be selected in accordance with the rules of the American Arbitration Association, then applicable to voluntary labor Arbitration.

(Section 3) - The COMMISSION and the UNION agree that they will individually be responsible for their own costs, preparation and presentation. The COMMISSION and the UNION further agree that they shall equally share in the compensation and the expense of the Arbitrator.

(Section 4) - The function of the Arbitrator is to determine the interpretation of specific provisions of this Agreement. There shall be no right in Arbitration to obtain and no Arbitrator shall have any power or authority to award or determine any change in, modification or alteration of, addition to, or detraction from any other provision of this Agreement. The Arbitrator may or may not, make his/her award retroactive to the initial filing date of the grievance as the equities of the case may require.

(Section 5) - Each grievance shall be separately processed at any Arbitration proceeding hereunder, unless the parties otherwise agree.

(Section 6) - The Arbitrator shall furnish a written opinion specifying the reasons for his decision. The decision of the Arbitrator, if within the scope of his authority and power within this Agreement, shall be final and binding upon the UNION and the COMMISSION and the aggrieved employee who initiated the grievance.

(Section 7) - The arbitration provisions of this Section shall be subject to RSA:542 Arbitration of disputes.

4. In anticipation of the fixed termination date of the 1995-98 CBA on June 30, 1998, the parties commenced negotiations for a successor agreement. When they did not reach an agreement, they proceeded to fact finding (RSA 273-A:12) with Fact Finder Garry Wooters who issued his report on January 5, 1998. It included a recommendation of three (3) retroactive "general wage" increases, namely 2% for 1995-96, 2% for 1996-97 and 3% for 1997-98. By letter of February 3, 1998, Theodore Mahoney, Chair of the Board of Police Commissioners, forwarded the fact finder's report to the Mayor and City Council for their approval, after announcing that the police commission had voted unanimously to approve the fact finder's report on January 28, 1998. (City Ex. No. 7.) That letter also indicated that the commissioners had the necessary money in the budget to fund this retroactive settlement if it were to be approved by the City Council. The Council approved the fact finder's report on February

28, 1998 by a vote of 6 to 3. (City Ex. No. 8, Item No. 24.)

5. The parties signed a successor agreement on or about March 4, 1998. Police officers received retroactive wage increases from July 1, 1995 for all items of the wage rate except outside "private work" or "extra detail" pay. Retroactive pay was paid, for instance, for such items as overtime, sick leave, personal days and holiday pay. (See Joint Ex. No. 3, p.2.) The fact finding process neither considered nor addressed the issue of extra detail pay; therefore, it was not a projected cost utilized by the employer in estimating the CBA settlement costs. (Magnant memo to Chief Burke, part of City Ex. No. 5.)

6. By memo of April 1, 1998 from Rodney McQuate, Vice President of Local 402, to the Executive Board, the Union initiated a grievance over retroactivity as it applied or should be applied, to "outside work," to wit:

> This grievance is filed on behalf of LOCAL 402 and it's membership pursuant to the Collective Bargaining Agreement between the Portsmouth Police Commission and IBPO Local 402.
>
> On March 19th, 1998 members of this bargaining unit were issued retroactive wages based on the Collective Bargaining Agreement.
>
> It has come to the attention of IBPO LOCAL 402 that not all retroactive wages were paid. Retroactive wages for "Outside Work" was not paid.
>
> As a result the LOCAL contends that Section 19, "SALARIES" and Section 48 "PRESENT BENEFITS" were violated.

The grievance proceeded through the various steps of of the grievance procedure as described in Finding No. 3 without resolution satisfactory to the Union. On May 12, 1998, Union steward John Centola sent a memo to Theodore Mahoney, Chair of the Police Commission, that the Union was proceeding to final and binding arbitration as provided under Article 45(E) of the CBA. On May 29, 1998, Union counsel Peter Phillips forwarded a demand for arbitration to the American Arbitration Association. (Joint Ex. No. 2.)

7. Arbitrator Allan McCausland was subsequently appointed by the American Arbitration Association and held an arbitration hearing on November 12, 1998, rendering

his decision on January 20, 1998 (Joint Ex. No. 3, also identified as AAA Case No. 1139-0011-0998). In those proceedings *the parties agreed* to the following issue:

> Are the Bargaining Unit Members entitled to retroactive pay under the Collective Bargaining Agreement (Joint Exhibit 1) for outside or private work details for Fiscal Years 1995-96, 1996-97 and 1997-98? If so, what shall the remedy be?

The arbitrator's decision indicates there were no challenges to arbitrability in that proceeding. The award sustained the grievance and directed that bargaining unit members be paid retroactive pay increases for outside or private work detail pay for Fiscal Years 1995-96, 1996-97 and 1997-98.

8. After the arbitrator's award was issued, the Portsmouth City Council, meeting on May 3, 1999 voted to approve the "working agreement" between the Commission and the Union from 7/1/98 to 6/30/03 and, in a separate vote, voted "to deny appropriation to apply general wage increases to outside work details retroactive to July 1, 1995." (City Ex. No. 9, Items 16 and 17.) Neither the implementation of the arbitrator's award nor the payment of retroactive increases as directed therein has been accomplished as of the date of the closing of the record in this case.

DECISION AND ORDER

There are two questions posed by the parties above, for our consideration in this case. The first may be determined by reference to the contract language found at Article 23 and recited in Finding No. 3. Critical to that language is the provision that "outside or private work details shall be paid at the overtime rate for maximum patrolman with a guaranteed minimum of four (4) hours." When the Commission and the City Council approved the fact finder's recommendations in 1998, it approved a retroactive wage rate for 1995-96, 1996-97 and 1997-98, as explained in Finding No. 4.

The underlying general wage increases found in the fact finder's report and approved by the City formed the basis for increases in all other areas of compensation which were wage rate sensitive or dependent. Thus, rates for such compensated benefits as retroactive holiday pay, sick leave pay, overtime pay and personal days pay, were adjusted accordingly to conform with the general wage rate increase. Yet, the rate for outside or private duty pay was not adjusted. This is inconsistent with that part of

Article 21 of the CBA which provides that, "It is expressly understood that time spent on outside or private work details will be counted in determining the number of hours worked for overtime purposes." All details are at an overtime rate set in Article 23; that overtime rate is controlled by the hourly rate assigned to the maximum patrolman's rating; the maximum patrolman's rate is general wage rate sensitive; thus, the maximum patrolman's rate for outside or private work details should have been/must be adjusted upward to compensate those details, just as it was for holiday, sick leave, personal days and overtime pay. Failure to make that adjustment became a bona fide grievance as defined by Article 45 and a breach of contract within the meaning of RSA 273-A:5 I (h).

In discharging his duties as arbitrator, Dr. McCausland sustained the grievance, not only consistently with our assessment here but for other reasons, substantiated and explained in his award, which need not be reiterated further for purposes of this ULP. The arbitrator's award, however, did not reach the issue of whether management's failure to implement was a breach of contract in violation of RSA 273-A:5 I (a), (e), (g), (h) and (i). We find that failure to implement to have been violative of RSA 273-A:5 I (e) as a refusal to negotiate because it unilaterally altered a term and condition of employment, payment for outside work or extra details, and of RSA 273-A:5 I (h) as a breach of contract. In this instance the breach extends not only to Article 23 which set the compensation rate for outside or private work details but also to Article 45 (E) as it describes the parties' promise to each other to engage in final and binding arbitration as the last step of the contract grievance procedure.

The bifurcation between the City and the Police Commission cannot be used to create an immunity from the breach of contract, merely because one body forms and administers policy while the other, the City, is responsible for funding the expenditures mandated by the CBA. Both the Commission and then the City Council approved the CBA in 1998. (Finding No. 4.) "RSA Chapter 273-A recognizes the city council's right to review the financial terms of a CBA in detail before approving or disapproving them.....If the city council approves a CBA, it has no choice but to fund whatever benefits the [employees] decide to enjoy pursuant to its terms." Appeal of City of Franklin, 137 NH 723, 730 (1993). Practically speaking, this result is essential if one is to make any sense of the obligation to bargain in good faith under RSA 273-A:3 or the sanctity of collective bargaining agreements under RSA 273-A:4. Both would become meaningless if a public employer were to be permitted to reject, "unappropriate" or "de-fund" certain provisions of a previously approved agreement, after the fact, once it learned those certain provisions were unfavorable or unacceptable to it. The parties did promise themselves a final and

binding grievance procedure for the duration of the CBA. They should be held to that promise.

This brings us to an appropriate segue to the second issue, that of the implications of City of Portsmouth v. Association of Portsmouth Teachers, 134 NH 642 (1991) on this case. We think the City and the Commission have placed undue reliance on City of Portsmouth in their post-hearing brief, at page 6, and elsewhere. The City of Portsmouth case, as noted in both the Union's post hearing brief (page 3) and in the arbitrator's award (Joint Ex. No. 3, page 9), involved an *interest arbitration*, not a grievance arbitration, scheme whereby, "if the parties to collective bargaining are unable to reach agreement, disputed terms are submitted to and decided by a neutral arbitrator," in accordance with a contractual agreement to do so. 134 NH 642, 644 (1991). That must be contrasted to the present case where the parties already have a CBA, have a dispute as to one of its provisions, and have called upon a *grievance* arbitrator, pursuant to their CBA, to resolve that issue for them.

The City's and the Commission's arguments are flawed for two very conspicuous public policy reasons. First, it is the City, through its employees and agents, which costs the expenses associated with a contract settlement. See, for example, the costing memo from Magnant to Chief Burke included a part of City Ex. No. 5. The Union can neither be held responsible for the process followed in the City's costing the contract settlement nor be the victim of errors in that assessment, whether by omission or commission. This simply is not its responsibility. Likewise, on February 23, 1998, the Portsmouth City Council unequivocally intended, as a legislative body, to approve the parties' CBA for July 1, 1995 to June 30, 1998 "in accordance with the Fact Finding Report." (City Ex. No. 8, Agenda Item 24.) The contract was duly approved. "The Commission and the City must be held to having read the contract and understood its terms." (Union post-hearing brief, p. 4) Any contrary assessment of the parties' responsibilities would jeopardize the "level playing field" of the collective bargaining arena by allowing one side to cancel or modify already agreed-upon contract provisions merely by costing the package to omit those key provisions.

Second, the City places reliance on the fact that the "cost item" relating to the expense of retroactive pay increases for extra details was "never presented to or approved by either the Police Commission or the City Council." (City post-hearing brief, p.13) But, for that matter, none of the other wage rate sensitive benefits were approved individually either. They were approved, as part of the "package" presented by City employees or agents to City policy makers, whether on the Commission or on the Council. This

is exactly as it should have been. Extrapolating from Appeal of Derry Educ. Assn., 138 NH 69, 71 (1993), the police commission, "not legislative bodies, [had] the authority to negotiate and enter into collective bargaining agreements." "We were to interpret RSA 273-A:1 IV otherwise, legislative bodies would determine in the first instance some of the most significant terms" of the CBA. Appeal of Alton Sch. Dist., 140 NH 303, 311 (1995). In approving the CBA in 1998, the City Council was acting in its capacity as "legislative body" for the City of Portsmouth, discharging one of the two processes reserved to it in the collective bargaining process, namely, accepting or rejecting a fact finder's report. Alton, *i.d.* By accepting the fact finder's report, the Council then breathed the breath of financial life into the CBA.

The City's conduct in not implementing the arbitrator's award is an unfair labor practice in violation of RSA 273-A:5 I (e) and (h), as stated above. By way of remedy we direct that it forthwith pay the amounts due under the arbitrator's award (Joint Ex. No. 4) with interest, at the statutorily permissible rate, to attach on any sums remaining due and owing more than thirty-one, (31) days after the date of this decision.

So ordered.

Signed this 3rd day of SEPTEMBER, 1999.

JACK BUCKLEY
Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members E. Vincent Hall and Richard W. Roulx present and voting.