

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

DOVER PUBLIC ADMINISTRATORS ASSOCIATION :

Petitioner :

v. :

RICHARD E. LAK, CITY MANAGER :

Respondent :

CASE NO. M-0574:3

DECISION NO. 89-55

APPEARANCES

Representing the Dover Administrators Association:

Donald E. Mitchell, Esq., Counsel

Representing City Manager Richard E. Lak:

Scott E. Woodman, Esq.

Also Appearing:

Charles D. Reynolds, Police Chief
David F. Bibber, Fire Chief
Pierre R. Bouchard, Public Works Director
Richard E. Lak, City Manager
James F.O'Neil, Jr., Mayor
Thomas E. Scharff, Councilman
Paul A. Bruyere, Jr., Councilman
Jesse A. Galt, Councilman
James H. McAdam, Councilman
William P. McQuade, Councilman
Reynold Perry, Former City Manager

BACKGROUND

On February 16, 1989, the Dover Public Administrators Association (DPAA) through its counsel filed an unfair labor charge against the City of Dover, (City), specifically City Manager Richard E. Lak alleging that the City by and through acts committed by its City Council had violated provisions of RSA 273-A:5 by refusing to abide by the executed collective bargaining agreement by and between the City and DPAA, ratified in 1985 and effective until June 30, 1989. Said agreement contained a mutually agreed "Grievance Procedure" which permitted the resolution of grievances by the City Manager.

The City Manager, acting within the agreement, City Charter, Administrative Code, and Laws of N.H. resolved a grievance awarding certain salary increases to all members of the DPAA.

Subsequent to the resolution of that grievance, (filed by Fire Chief David Bibber through DPAA Counsel, Donald Mitchell) the City Council refused to implement the awarded increases authorized by the then City Manager Reynold Perry.

DPAA sought an order preventing the City from withholding wages due DPAA members as of July 1, 1989 in accordance with the award, "Memorandum of Agreement" between the City of Dover, N.H. and the Dover Public Administrators' Association signed August 3, 1988 in accordance with Article V, Section D, of the memorandum of Understanding by and between the parties dated November 14, 1985, salaries to become effective July 1, 1989, as follows:

"The memorandum of Understanding between the City of Dover and the Dover Public Administrators Association salary ranges in effect 7/1/86 as outlined in attachment #1 of the agreement shall be increased by ten percent (10%) effective 1/1/88, becoming Attachment #2; by nine percent (9%) effective 7/1/88, becoming Attachment #3; and by nine percent (9%) effective 7/1/89, becoming Attachment #4. These are adjustments to the salary ranges, not the individual salaries."

Settlement also provided that should actual salary received by any member be less than the minimum salary amount provided in Attachment #3, said salary would be adjusted to the minimum amount provided; any member denied subsequent to 1/1/88 a merit pay adjustment because the amount would have caused the member's salary to exceed the range minimum, would be eligible for a retro merit increase to the extent provided in the applicable Attachment; effective 1/1/89 members salaries would be increased by five percent (5%); and effective 7/1/89 salaries would be adjusted by nine percent (9%).

The Agreement was not intended to, nor was it to be considered precedent setting and rendered without prejudice to either party.

A hearing on this matter was held on May 9, 1989 and continued on June 5, 1989 in the Council Chambers, City Hall, in Dover.

In opening statements, DPAA Counsel Mitchell stated that the City, acting through its City Manager Reynold Perry addressed a grievance. Grievance settlement was complied with except for the nine percent (9%) agreed upon raise for all DPAA members effective July 1, 1989.

In his opening statements, City Counsel Woodman stated that, in his opinion the basic issues were:

- (1) whether the City Council, who has authority to set the compensation for the department heads, had the authority to rescind or terminate the contract in accordance with the "Memorandum of Understanding" and,
- (2) had the authority to invalidate the nine percent (9%) raise effective July 1, 1989.

Further, the City felt that the former City Manager had exceeded his authority in settling a grievance resulting in pay increases for all members of DPAA.

FINDINGS OF FACT

1. On November 13, 1985, the City council authorized the City Manager to enter into a Memorandum of Understanding (agreement-contract) with the Dover Public Administrators' Association (DPAA). The bargaining unit consisted of various municipal department heads.

Section of the agreement pertinent to the issue at hand are "Section V.D." dealing with salaries and Section IX-A setting the procedures for future negotiations.

Section "V.D. Provided further that effective December 1, 1986, members salaries and salary ranges shall be adjusted by five percent (5%) and annually thereafter members salaries and salary ranges shall be adjusted at a minimum by a Cost of Living amount consistent with the maximum awarded other City employees, exclusive of the Dover School Department."

Section IX. A. "This Memorandum of Understanding shall be in full force and effect commencing July 1, 1985, unless provided specifically in any Article hereof, and shall continue then from year to year unless otherwise provided in any sections hereof or written notice of desire to cancel, modify, or terminate the Memorandum of Understanding is served by either party on the other at least one hundred and twenty (120) days prior to budget adoption date set forth in Section VI: 5 of the City Charter, City of Dover, New Hampshire or any amendments thereto."

Salary adjustment made under this agreement as follows: 5% adjustment to salaries effective July 1, 1986; 5% effective July 1, 1987; 4% effective July 1, 1988 and ending June 30, 1989. To these salary adjustments, a certain percentage in the form of cost of living adjustment was made.

2. In July of '88, the City entered into a contract with the Dover Professional Fire Officers' Association. This contract awarded salary adjustments of 6% effective January 3, 1988 plus a cost of living adjustment of 4% was added for a total of 10% effective January, 1989. The Fire Officers were awarded a salary adjustment of 6% and a cost of living adjustment of 3% for a total of 9% effective July 1, 1989.

The Firefighters Local 1312 were awarded certain salary increases effective on July 1, 1989.

For the purpose of this case, the Board is considering the Fire Officers' contract because of its compatability with the Administrators' Association.

3. On July 19, 1988, DPAA filed a grievance with the City Manager requesting the same salary increase awarded the Dover Fire Officers' Association.

4. City Manager Reynold Perry, on August 3, 1988, rendered his grievance decision stating that salaries of DPAA would be increased by a 5% increase to be effective January 1, 1989 and also a 9% effective July 1, 1989.

5. The above 5% and 9% awards were not included in the municipal budget adopted by the Council for fiscal year, July 1, 1988 through June 30, 1989. Action on Perry's awards have not been taken by the City Council to date.

6. City Manager Perry did not notify the City Council officially of his decision in the grievance case. Testimony offered at the hearing indicated that City Council first became aware of the grievance decision through a telephone call between Mayor O'Neil and one Richard Mazslowski an applicant for the City Manager position which had been vacated by Manager Perry in late November of 1988. Further testimony indicated the Council did not become knowledgeable of the grievance settlement until January of 1989. Several meetings of the City Council took place in January and at its meeting on January 25, 1989, the Council voted to terminate the agreement with DPAA in accordance with IX. A. of Memorandum of Understanding (agreement) voted not to pay DPAA members the 9% salary adjustment awarded in Perry's grievance decision of August 3, 1985.

7. The notice of termination was served on DPAA 134 days prior to budget adoption date, the date negotiated by the parties, not the budget submission date which is customarily used in most contracts.

"Budget submission date" means the date by which, under law or practice, the public employer's proposed budget is to be submitted to the legislative or other similar body of the government, or to the city council in the case of a city, for final action. In the case of a town or school district, or supervisory union, it means February 1 of each year, except in the case of a city school or city school administrative unit which has a separate budget submission date applied to it by the city."

8. Authority of the City Council, the City Manager, governing provisions of New Hampshire Laws, the Dover City Charter, and the City's Administration Code, RSA 47.2, provides the City Council with authority to fix compensation of its employees.

9. The Administrative Code on the City of Dover provides that compensation of all department heads shall be fixed by the City Council. (Paragraph 3-3)

10. The City Manager was authorized to conduct negotiations with the City employees and in all prior instances had kept the Council advised of his actions except in the case of the settlement of the affecting salaries of DPAA members effective July 1, 1989.

11. The grievance was filed subsequent to the signing of the contract with the Fire Supervisors and Section 5D of the agreement provides that raises provided to all other City employees will also be paid to the department heads.

12. Subsequent to the signing of the contract with the Fire Officers, DPAA Chairman Chief Bibber spoke to the City Manager about increases that had been made to the Fire Officers and the DPAA members' entitlement to the same increases.

13. Following this discussion with the City Manager, a decision was made to proceed with the grievance by Chief Bibber.

14. Efforts to secure an answer as to the applicability and comparability of the raises given the fire officers were futile. The grievance was filed and decision rendered by then City Manager Perry. The DPAA members accepted the decision and felt it was in accordance with the grievance filed and the agreement and a 5% increase was received on January 1, 1989.

15. The DPAA Memorandum of Understanding language referring to annual increases states that the cost of living shall be consistent as that awarded other City employees exclusive of the School Department.

16. Only issue in dispute before PELRB was the 9% increase effective January 1, 1989 awarded by City Manager Perry.

17. The City Council was aware of this Memorandum of Agreement and had approved it in 1985, and the contract was available to all members of the City Council.

18. Former City Manager Perry had resolved many grievances with employees under the authority granted by the City Charter among which were grievances on overtime pay. He had also discussed with the Council various contracts and, in detail, the impact of the Fire Officers' contract.

19. As a witness former City Manager testified in detail about the language of the firefighters' contract and the fire officers' contract, particularly with respect to the cost of living increase plus another amount as a salary increase; his treatment of other City employees and the process of resolution of disputes and the method of appropriating funds by the Council. Also, that his last day was in mid-August and he had not informed the City Council as a group of the settlement of the particular grievance in this case.

20. Although Counsel Woodman for the City alleged that the former City Manager had exceeded his authority and that he might have settled the grievance differently had he not in the process of resigning as City Manager of the City of Dover, the accusation is neither accepted nor denied.

21. Grievances frequently involve many individuals and consists of various subject matter, however, this seemed to be the only one that granted increases to a whole group of City employees in a specific bargaining unit without across the table negotiations.

22. Manager Perry's operational understanding with members of the City Council was that it would be his responsibility to secure better labor relations and to settle problems prior to the filing of grievances. He understood that he had authority to manage the contract, implement it and that authority existed to grant the group wage settlement in response to the grievance filed by the members of DPAA.

23. The contract was to continue each year unless either party notified the other of intent to terminate.

24. The Council members felt it was important that they terminate the agreement as of July 1st in accordance with the provisions of the negotiated Memorandum of Understanding and that the issue should go to negotiations.

DECISION AND ORDER

After reviewing all the exhibits, testimony and all evidence in this matter, the Board finds:

A. The City Council has the responsibility of setting the pay of department heads in accordance with the Dover Code in paragraph 3-3, subparagraph B which states as follows: "the compensation of all department heads shall be fixed by the City Council:"


B. Former City Manager did exceed his authority in this case. Even though through past practice he had negotiated wages for all city employees (except for school department employees), he had in the past notified the Council of all specifics and received Council approval, he neglected to advise them of the results of his settlement of this particular grievance.

C. The notice of termination was filed in accordance with the negotiated Memorandum of Understanding.

D. PELRB declines to find unfair labor practices against the City of Dover with respect to its disposition of wages authorized by the former City Manager's decision in resolution of the grievance for DPAA.

E. The parties are ordered to negotiate all issues presented in this case.

F. Compliance and updated reports to be submitted, in writing, to PELRB by both parties within 30 days of this ORDER and every 15 days thereafter if no agreement is reached.


EDWARD J. HASELTINE, Chairman

Chairman Edward J. Haseltine and Seymour Osman voting majority. Member Richard E. Molan dissenting. Also present, Executive Director Evelyn C. LeBrun.

DISSENTING OPINION

In reviewing the Dover Public Administrator's Association and the City of Dover I find that I am of the opinion that as long as this is an appropriately certified bargaining unit under RSA 273-A, that I must find that the City of Dover has committed an unfair labor practice in this matter.

I would find it so, for the following reasons:

1. The parties entered into a collective bargaining agreement which did in fact set forth the compensation for the employees who are covered by the agreement.

2. Pursuant to Article V Section D, the City Council as well as the employees committed themselves to a standard by which future pay increases would be granted.

3. That the subject of this particular action is based on the resolution of a grievance by the City Manager in August of 1988. It is uncontradicted that the City Manager was and is fully authorized under the City's charter and the Merit System Ordinance to adjudicate such grievances. There is nothing in the charter or other controlling documents that would indicate that such a decision in any way requires the imprimatur, approval or even knowledge of the City Council. As a pragmatic affair, it would seem likely that City Manager would inform the Board of any important matter so resolved by whether or not he or she does is of no matter to the Public Employee Labor Relations Board since the charter and ordinance speaks to the manager's authority.

4. Whether or not the City Manager made a correct decision is not for the Board to decide but whether or not he or she had the authority to make that decision. Based on the documents produced at the hearing I conclude that Mr. Perry did. Whether or not it was a correct decision on his part was a matter between Mr. Perry and the council but certainly the employees cannot be held accountable by the City Council for the acts of their agent.

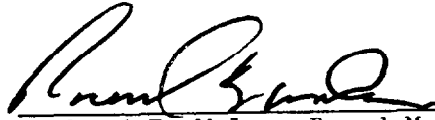
5. I agree with the Board's conclusion that the commission of the Unfair Labor Practice turns on whether or not the City of Dover exercised its ability to cancel the Collective Bargaining Agreement and enter into new negotiations. If it is a fact that the parties were free to establish a benchmark period of time in which to notify and engage in negotiations such as they did in the duration clause, then I would agree with the Board's finding that the City Manager and/or the City for that matter was without authority to make agreements that would impact a fiscal year not within the confines of the agreement. However, this is where I part company with the Board.

6. It is very clear that RSA 273-A:3 Obligation to Bargain sets forth the time period in which a party must serve notice of its intention to bargain. That section is set forth in II (a) and states "Any party desiring to bargain shall serve written notice of its intention on the other party at least one hundred and twenty days (120) before the budget submission date;" (emphasis supplied) Section IV provides also that each public employer shall record its budget submission date with the Board. It is my understanding that the City of Dover has registered February 15, with the Board as its budget submission date. Since the statute utilizes the mandatory "shall", and unlike other provisions of the act which permits the parties to agree to alternatives that were otherwise legal, e.g., RSA 273-A:12 V, I would find that the notice period is mandatory and any notice given outside of the mandatory period is without any effect.

7. Regardless of the City Counsel's opinion of the relationship of statutes and charters, the New Hampshire Supreme Court has long held that the Cities and Towns are but subdivisions of the State and have only those powers granted to them by the state and that conflicts must be resolved in favor of the statutory scheme. See, Piper v. Meredith, 110 N.H. 291 (1970); Gerard v. Town of Allenstown, 121 N.H. 268 (1981).

8. While a claim may be made that the notice period contained in this contract and appropriately met by the City should be enforced, it is axiomatic in law that two parties, regardless of their good or bad faith or their intentions otherwise, cannot agree to contract for an act that is barred by law. Since RSA 273:3 II sets forth a mandatory notice period for collective bargaining, the parties' provision is null and void.

Therefore, on that basis, I do not find that timely notice was given and that the previous grievance decision must stand and that the City is guilty of an unfair labor practice. Further the City must make the payment pursuant to the grievance as settled by the City Manager.

A handwritten signature in black ink, appearing to read "Richard E. Molan", written over a horizontal line.

Richard E. Molan, Board Member