State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CITY OF CONCORD Complainant v. CONCORD FIREFIGHTERS, LOCAL 1045, IAFF, AFL-CIO Respondent	CASE NO. F-0101:23 DECISION NO. 92-58

APPEARANCES

Representing City of Concord:

Mark Broth, Esq., Counsel

Representing Concord Firefighters Local 1045:

Glenn R. Milner, Esq., Counsel

Also appearing:

Brian Braley, City of Concord
Julia Griffin, City of Concord
John M. Dionne, City of Concord
Robert Marcus, City of Concord
Andrea Johnstone, Esq.
Harold Richardson, Local 1045
William Stetson, Local 1045
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BACKGROUND

On March 20,1991, the City of Concord (City) filed unfair labor practice (ULP) charges against Concord Firefighters, International Association of Firefighters, Local 1045 (Union) alleging violations of the obligation to bargain, RSA 273-A:5 II (d), and attempting to bargain prohibited subjects of bargaining with the assistance or utilization of mediation and fact finding

contrary to RSA 273-A:5 II (g). The Union answered by filing of April 4, 1991 which also contained a cross-complaint alleging violations of the City's duty to bargain, RSA 273-A:5 I (e), resulting from the City's refusal to bargain certain issues. The matter was set for hearing and heard by the Board on June 25, 1991.

At issue in this case is the identification of certain issues over which the parties had (or did not have) an obligation to bargain under RSA 273-A:3 and RSA 273-A:5 I (e) and II (d). The City claims that the Union proposed contract language pertaining to prohibited subjects of bargaining, namely, employee selection, examination and advancement, employee discipline, compensation, safety, direction of the work force, and the relationship between legislative and executive branches of city government. The City claims the Union's proposals were inappropriate and, therefore, barred by (1) the definition of "managerial policy within the exclusive prerogative of the public employer" as defined in RSA 273-A:1 XI, (2) being within the exclusive prerogative of the City Manager, and (3) being protected subjects under RSA 273-A:3 III.

FINDINGS OF FACT

1. The City of Concord is a public employer of employees in the firefighters' bargaining unit, as defined by RSA 273-A:1 X.

2. The International Association of Firefighters, Local 1045, is the duly certified bargaining agent of firefighters employed the City.

3. The City and the Union were parties to a collective bargaining agreement (CBA) which expired February 28, 1991. They commenced bargaining for a successor agreement in October of 1990.

4. RSA 273-A:3 III provides:

> III. Matters regarding the policies and practice of any merit system established by statute, charter or ordinance relating to recruitment, examination, appointment and advancement under conditions of political neutrality and based upon principles of merit and competence shall not be subjects of bargaining under the provisions of this chapter. Nothing herein shall be construed to diminish the authority of the state personnel commission or

any board or agency established by statute, charter or ordinance to conduct and grade merit examinations from which appointments or promotions may be made.

5. RSA 273-A:1 XI provides:

> XI. "Terms and conditions of employment" means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

6. The Charter of the City of Concord, enacted by the Legislature in (1949) (Ch.418 P.L. 1949) expressly provides for the establishment of a merit system of personnel administration under the direction of the City Manager. The Charter mandates that merit be the basis for employee selection, promotion, discipline, compensation and other terms of employment.

7. Article 36 of the City's Charter provides that "appointments and promotions...shall be made solely on the basis of merit and only after examination of the applicants' fitness." Article 37 thereof provides that Rules and Regulations under the Merit Plan "shall include provisions with regard to classification, compensation, selection, training, promotion, discipline, vacations, and any other matters necessary to the maintenance of efficient service and the improvement of working conditions."

8. The Union proposal relative to "Acting Promotions" objected to by the City, provided:

> Employees failing to receive a permanent appointment to any rank above their existing rank

> after serving a probationary period shall be ineligible to take the promotional examination for the same position for one (1) year and will not be eligible to be named in any acting promotional capacity for that position.

This language was included in the former (now expired) CBA. The City's objection claims that the promotional examination procedure has been established according to the City Charter; therefore, promotional policies based on the merit system are not negotiable.

9. The Union proposed a contract article involving just cause and discipline to which the City objected. The Union proposal included (1) just cause for discipline, (2) a progressive discipline plan involving verbal warning, written warning, suspension without pay, and discharge (3) provisions requiring written warnings, suspensions and discharge notices to be in writing and to be signed by the employee acknowledging receipt, (4) exclusion of written records of oral warnings from the employees personnel file, (5) exclusion of written communications in the employee's personnel file without his consent, and (6) grievance arbitration enforcement of the contract article. Items 1, 2, 3, 4 and 6 were included in the former (now expired) CBA. The City's objections included no authority for the City Manager to delegate the disciplinary process to the collective bargaining process, the reservation of discipline under the management rights provision (Article IV) of the CBA, and the inherent managerial function of keeping and maintaining personnel files.

10. The Union proposed a contract article involving seniority to which the City objected. The Union proposal reiterated provisions relating to computation of seniority, placement on the eligibility roster and loss of seniority (with the exception of extending the recall period from 3 to 5 days) as were found in the former (now expired) CBA. It also proposed new language relating to "seniority rights," to wit:

    (a) Any employee not wishing to fill a vacancy for temporary acting promotion may do so without finding an alternate to fill the vacancy.

(b) All suppression members of the bargaining unit will be allowed to choose their duty assignment based on seniority within the Battalion. Employees will be polled every six (6) months and new duty assignments awarded if desired.

The City's objections claimed that the selection of an employee to receive a temporary promotion and duty assignments are "inherent management rights" and not negotiable, with duty assignments also being protected under Article IV of the CBA.

11. The Union proposed a contract article pertaining to wages which included (1) across-the-board increases, (2) movement of employees by classification (not by name) from one labor grade to another labor grade, (3) step increases for some employees, (4) addition of new steps to existing labor grades, and (5) placement of certain employees by name (not by classification) from their current labor grades to new labor grades and steps. Two new sections were proposed which do not appear in the expired CBA, to wit:

2. All steps other than those awarded above are annual and shall be granted on the employee's anniversary date.

3. The employer agrees that no reclassification will be implemented without first negotiating the impact with the union. (Including changes in job description and assigned duties.)

The City contends that "the labor grade assigned to any employee of the City under the Personnel Rules and Regulations is not subject to negotiation, [h]owever, the City will negotiate in good faith on any proposals to adjust wages." Since the City Manager has no authority to "abandon merit based compensation" the City has taken the position it "will not negotiate any proposals which eliminate merit as a criteria for advancement in step within a wage scale." As for the Section 3 proposal (above), the City claims that "reclassification of employees is an inherent right of the public employer, a matter of managerial prerogative, and a management right under Article IV" of the now expired CBA.

12. The Union proposed additions to the "Health and Safety"

article (Art. XXVIII) which involved: (1) the creation of a departmental safety committee with two members from Local 1045, two from Local 3195, and two appointed by the Chief, the committee to meet monthly, (2) a formula determining the total number and type of employees on duty at a given time determined by apparatus designated as being in service, (3) limiting labor required in extremely hot or cold conditions (with the exception of emergency calls or responses) and postponing [summer] training and other activities which cannot be performed in air conditioned areas, (4) clothing to be provided by the employer, e.g. work uniforms, winter coats, windbreakers, safety shoes, safety glasses and insignia, and (5) sleeping (sheets, pillowcases) and bathing (towels, face cloths, soap) facilities to be provided by the employer, including the frequency of providing clean clothes, sheets and towels.

The City objected to the Safety Committee because of its obligation to provide a safe workplace under state and federal law; however, it is willing to "afford the Union the opportunity to consult and make recommendations." As for manning requirements, they are a right of the employer and a "matter of managerial prerogatives," thus non negotiable. Addressing hot and cold weather or working conditions, the City claims that the direction of the workforce "is an exclusive matter of managerial prerogative and a management right under Article IV....and not negotiable."

13. The Union proposed changes to the Employee Rights article (Art. XXX) of the new expired CBA. Added to Section 2 is the following language:

> The Employer agrees that normal, routine interior and exterior housekeeping and maintenance will be contracted out to service providers of the employer's choice.

This would cause the deletion of the following language:

> The UNION agrees that normal, routine housekeeping and maintenance currently practiced is exempt under this section.
>
> The UNION agrees to perform certain construction and maintenance activities pertaining to the Fire Department facilities such as: carpentry, electrical, plumbing and masonry to the level of

of existing skills.

The City claims that the assignment and direction of the work force, including job descriptions, is a managerial prerogative and a management right under CBA Article IV and, therefore, is not negotiable. The City also argued that the "manner or method" by which it "chooses to have interior and exterior housekeeping and maintenance performed" is an "exclusive managerial prerogative."

14. The Union proposed changes to the "Vacancies" article (Art. XXXI). The underlined portions of Sections 2 and 4 show language which is new in the current proposal. Sections 3 and 5 are new proposals in their entirety.

> 2. Promotional eligibility lists shall remain in effect for a period of two (2) years from the date of its establishment. All promotions shall be made according to City Personnel Rules and Regulations. For purposes of making acting appointments, the roster shall continue until replaced unless a person on that roster has requested to be removed from consideration for promotion. The examination process to establish a replacement roster shall commence within thirty (30) calendar days of the expiration date of the roster.
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> 3. Promotional eligibility shall be mutually agreed upon by the UNION and the EMPLOYER.
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> 4. At least thirty (30) days prior to any promotional examination for positions above the rank of fire fighter, notice of such examination shall be posted on the Official Bulletin Board of each station. Such notice shall contain, among other information, the source of all materials from which the written examination will be taken and where this material may be found.
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> 5. For purposes of this section anyone receiving incentives under the Incentive Program Section 4 (Appendix A) must meet eligibility and pass promotional examinations in effect prior to the Incentive Program.

Notwithstanding language appearing in the expired agreement, the City asserted (1) that when and if a vacancy is filled is an exclusive prerogative of management, (2) that the initiation and content of examinations and the content and duration of promotional rosters is not negotiable under RSA 273-A:3 III, and (3) that the determination of eligibility for promotions is an exclusive prerogative of management.

15. The Union proposed a new article entitled "Promotion to the Governing Body" which provided, "The Management of the City of Concord....agrees to present this agreement to the City Council, along with all information required for adoption, pursuant to the New Hampshire Supreme Court decision involving the Sanborn Teachers Contract." The City has responded by saying that "the relationship between the City's executive and legislative branches of government are [sic] not negotiable."

DECISION AND ORDER

We address each of the negotiating issues in the same order they appear above. This brings us first to "acting promotions." The language of this proposal has appeared in former contracts and is not inconsistent with the City's merit system, i.e., this contract language promotes merit system principles rather than detracts from them. It encourages appointments based on competence and eliminates eligibility for demonstrated lack of competence. Because the contract language limits, rather than expands on, merit system principles, we find it to be negotiable. We believe this result to be consistent with Appeal of Town of Pelham, 124 N.H. 131 at 136 (1983) where the Supreme Court noted, "The legislative history of RSA chapter 273-A indicates that the hiring, firing, demotion and promotion of an employee is within the scope of bargaining under the grievance clause."

We have already addressed the negotiability of language relative to just cause for discipline relative to the City's charter provisions in I.B.P.O., Local 435 V. City of Concord (Decision No. 92-51, March 26, 1992) which we incorporate herein by reference. The former (now expired) and proposed contract language regarding just cause, progressive discipline, written warning and notices, and grievance arbitration does not involve recruitment, appointment, advancement under conditions of political neutrality the grading of examinations, or the functions, programs and methods of the public employer, the use of technology, organizational structure or the selection, direction and numbers of personnel under either RSA 273-A:3 III or RSA 273-A:1, XI. Discipline,

including the firing or demotion of employees, was addressed in Pelham (supra, pp. 136-137) and found to be subject to the negotiated grievance procedure to the exclusion of statutory provisions where the employer and its representatives were both "prosecutor and judge," e.g., the Personnel Appeals Board. Therefore, we conclude that these topics are negotiable, with two exceptions: (1) the keeping of records-what is included in the employee's personnel file and (2) the reinstatement of employees terminated for political, racial or religious reasons, appeals of which are directed to the appeals board established by the charter. As for personnel files, it is an inherent responsibility of the employer to keep such files. It would be inappropriate for this Board or the negotiations process to attempt to control the contents of those files. Conversely, the contents of such files must be reasonably accessible to employees and should not contain information unknown to or secreted from employees.

The current contract language pertaining to "seniority" is negotiable because it does not transgress on any of the prohibited areas found in RSA 273-A:3 III and RSA 273-A:1,II, as recited in the paragraph preceding. Likewise, changing the time in which to respond to a recall from layoff from three (3) to five (5) days is negotiable. The "not wishing to fill vacancy" proposal is not negotiable because of its potential impact on the employer's ability to fill shifts and direct the work force as protected by RSA 273-A:1, XI. The "choice of duty assignment" proposal is a permissive subject of bargaining over which the parties may negotiate and reach agreement; it is not a mandatory subject of bargaining which either side may take to impasse or over which they may demand fact finding. In its best light, this proposal is merely amendatory to the merit system principles; it cannot be mandatorily negotiated to the extent it would impair rights under RSA 273-A:1 XI or under State Negotiating Committee v. State Employees Assn. (Decision No. 77-08, February 24, 1977) and 118 N.H. 885 at 890 (1978).

Across-the-board pay increases, cost-of-living adjustments and proposed modifications to the wage scale, as each of these applies to all unit employees, are negotiable as wages and are defined as "terms and conditions of employment" under RSA 273-A:1, XI. Likewise, movement of a group of employees, by classification and not individually or by name, is negotiable as a "wage". As such, it is not an individual benefit and does not offend the merit principle that one progresses in compensation as measured by competent work performance. Conversely, step increases proposed from some employees or enhanced placement on the pay scale, if by name and not by classification, does contravene the merit principle of pay increases predicated on satisfactory job performance. As such they would be protected by RSA 273-A:3, III and not negotiable. The frequency with which steps are awarded on the pay

scale to unit employees or a class thereof (i.e., not individually or by name) is a matter of "wages" and a "term and condition of employment" which is negotiable under RSA 273-A:1, XI. The "no reclassification without negotiating impact" proposal is a permissive subject of bargaining with the same caveats and rationale applying to it as to the "choice of duty" proposal in the immediately preceding paragraph. Any implicit duty relating to "impact bargaining" remains unchanged whether contained in the CBA or not.

Those portions of the health and safety article which apply to clothing provided by the employer and to sleeping and bathing facilities relate to "terms and conditions of employment" under RSA 273-A:1 XI and are negotiable. Likewise, the creation of a department safety committee is negotiable as a "term and condition of employment" under normal circumstances. That portion of the proposal which involves negotiating for a local (Local 3195) which is not a party to these negotiations is merely permissive. The parties may negotiate and agree on it but, failing that, may not take it to impasse or fact finding. The proposal relative to the total number and type of employees on duty is protected under RSA 273-A:1 XI and our definition of "governmental direction" in State Negotiating Committee, above. It is not negotiable. Finally, the proposal relative to hot and cold working or training conditions is negotiable as a "term and condition of employment" so long as the essence of the proposal does not impair "managerial policy within the exclusive prerogative of the public employer" as found and described in RSA 273-A:1, XI. It cannot be proposed or worded in such a way to deprive the public employer of its control over "governmental functions."

Notwithstanding City claims that its right to assign and direct the work force protects it from negotiating the "interior and exterior housekeeping" proposal of the union under RSA 273-A:1, XI, we disagree. A proposal that the employer will contract out housekeeping and maintenance services, freeing unit members from their current obligations under Article XXX of the contract, is more akin to negotiating "terms and conditions of employment" than it is an infringement on the City's methodology for accomplishing these functions. We cannot credit the City's argument that it is protected from negotiating this proposal under Article IV of the CBA. To do so would ignore the incompatible existence of what was formerly Article XXX, Section 2 of the CBA. The union's proposal involves functions which are not central to the purposes for which the unit members were hired nor does it infringe on "governmental direction." The proposal is a mandatory subject of bargaining.

Changes proposed to the internal wording of Section 2 and 4 of the "Vacancies" article (XXXI) do not violate the merit system. One merely permits an employee to remove himself from consideration

for promotion (merit principles do not require mandatory or involuntary promotion) while the other would require the employer to identify where certain study materials might be found (it does not even obligate the employer to obtain those materials). Promotional eligibility (such as time in grade or educational requirements) may be "agreed upon" through negotiations without impairing the merit principle of promotion based on competence and ability. The proposal would merely set forth what the standards of competence or of achievement should be. Likewise, the "incentives" proposal requires eligibility standards and passing promotional examinations. This proposal supports the merit system; it doesn't detract from it. Because these proposals involve none of the exclusionary standards set forth in either RSA 273-A:1 XI or RSA 273-A:3 III, they are negotiable.

The "presentation to the governing body" article is negotiable as it applies to the manner in which the parties may agree to support and/or present an agreed upon agreement. We noted in Salem Police Relief Assn. (Decision No. 92-08, January 22, 1992) that "there is one thing which the public employee apparently did not contract for, namely, the submission of their multi-year agreement for one-time and complete approval at the 1990 town meeting." To the extent the proposal attempts to control the manner of presentation of an agreement and without a convincing showing (lacking in this case) that such a procedure interferes with the employer's ability to deal with its executive and legislative branchs of government, we find it to be negotiable.

We find that the City violated its obligation to bargain under RSA 273-A:3 I and RSA 273-A:1 XI, and thus committed an unfair labor practice under RSA 273-A:5 (e), when it refused to bargain those subjects or topics identified herein as negotiable.

The City is directed to CEASE and DESIST from refusing to bargain those subjects identified herein as negotiable.

The parties are directed to recommence negotiations on those subjects identified herein as being negotiable forthwith as soon as one party demands of the other to reopen those negotiations.

Signed this 6th day of May, 1992.

EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members Seymour Osman and E. Vincent Hall present and voting.