State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

DOVER POLICE ASSOCIATION Complainant v. CITY OF DOVER Respondent	CASE NO. P-0714:5 DECISION NO. 92-120

APPEARANCES

Representing Dover Police Association:

J. Joseph McKittrick, Esq., Counsel

Representing City of Dover:

Mark Broth, Esq., Counsel

Also appearing:

Gail McGlone, Association
Brenda Blonigen, Association
Thomas Powers, Association
Bill Fenniman, City
Bill Wardwell, City

BACKGROUND

The Dover Police Association (Union) filed unfair labor practice (ULP) charges against the City of Dover (City) on March 9, 1992 alleging violations of RSA 273-A:5 I (a), (b), (c), (e), (g), (h) and (i) caused by alleged unilateral changes in merit pay components and the scoring of certain examinations which control the awarding of merit pay. The City, relying on intervening Federal legislation, denied the commission of a ULP when it filed its answer on March 20, 1992. This matter was heard by the Board on June 2, 1992.

FINDINGS OF FACT

1. The City of Dover is a public employer as defined by RSA 273-A:1 X and employs sworn police officers and other employees in its police department.

2. The Dover Police Association is the duly certified bargaining agent of sworn police officers and other employees of the Dover Police Department.

3. For all times pertinent to these proceedings, the City and the Union were parties to a collective bargaining agreement (CBA) for the period July 1, 1989 through June 30, 1992. Article V of the CBA addressed the subject of "Salaries" with Section 3 thereof providing for merit-based compensation. Merit increases under the CBA were determined based on three variables: (1) supervisory evaluations, (40%), (2) physical standards (40%), and (3) test results relating to professional knowledge (20%). The foregoing physical fitness examination established a minimum standard of fitness in order for employees to perform their duties. In addition to the foregoing minimum physical fitness standard, employees capable of exceeding that standard could achieve physical fitness scores over and above the minimum standard, thus qualifying for higher merit pay increases. Under these circumstances, the physical fitness examination (consisting of bicycle pulse monitor, dynamic strength tests, flexibility and body fat composition measurements) had the potential to and did reward employees who had overall physical fitness capabilities in excess of the standard when those excess capabilities were not necessarily related to job performance.

4. The Americans with Disabilities Act of 1990 (ADA) found at 42 U.S.C. Section 12131 through 12134 became effective for public sector employees on January 26, 1992. Section 12112 (b), (6) of the ADA (effective July 26, 1992), defines as "discrimination" "using qualifications standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria...is shown to be job related for the position in question and is consistent with business necessity." Section 12131 of the ADA defines as a "public entity" "any State or local government" or "any department,

agency, special purpose district, or other instrumentality of a State of States or local government" and was effective January 26, 1992.

5. On and after January 26, 1992, the City ceased administering the physical fitness (physical standard) portion of the annual merit raise review system for purposes of adjusting compensation under the CBA, relying on the effective date of the ADA and its belief that its present form under the CBA inappropriately tested non-job related physical abilities. This change resulted the non-awarding of any merit raises due to have been considered on employees' anniversary dates after January 26, 1992. Notwithstanding the ADA, the City has not been willing to agree to eliminate the physical standards (a 70% score) as a condition of employment or continued employment.

DECISION AND ORDER

For all times pertinent to these proceedings the parties had and operated under a collective bargaining agreement. That agreement provided an incentive scheme by which unit members could enhance their compensation by excelling in three areas (evaluations, physical standards and professional knowledge) which were measured annually under provisions calling for merit-based compensation in the CBA.

The employer has argued that the application of the ADA on municipalities as of January 26, 1992, has voided the physical fitness standards as they apply to merit-based compensation and, therefore, contract provisions calling for merit based compensation are now void and unenforceable. We disagree. Assuming, for sake of argument, that the City is correct in asserting that it, under the ADA, should not be rewarding employees for non-job related proficiencies over and above what is required for satisfactory job accomplishment, this does not equate to unilateral authority to modify or eliminate merit-based compensation under the contract. Even if the implementation of the ADA as it applies to municipalities limits a public employer's ability to reward "excess capacity" as it applies to physical standards, it does not abrogate the responsibilities of the parties under the CBA.

Our reading of the CBA indicates that the employer is obligated to measure for and pay merit increases annually, based on the employee's anniversary date, notwithstanding the ADA. While the PELRB is not the agency charged with the enforcement of the ADA, it appears to us that the employer, assuming it is correct in its interpretation of the ADA, may be estopped from "bonusing"

excess physical capability but should, nevertheless, complete the annual merit evaluations in a manner which does not deprive unit employees of annual merit pay review as contemplated under the contract. It also appears that this may be accomplished without conflicting with the ADA by scoring the physical standards portion on a "pass-fail" basis, a minimum standard or some other means which is mutually agreeable but which maintains the employees' ability to have an annual review and qualify for merit increases. Because the contract responsibilities for merit pay review never disappeared, benefits should be retroactive for employees to the date they normally would have been received had the implementation of the ADA not caused the City to stop its annual merit-based compensation evaluation procedures. We leave it to the parties to negotiate merit pay compensation procedures for their successor contract which they believe to be in compliance with the ADA.

We find:

1. That the City's stopping of annual testing to qualify employees for merit-based compensation on and after January 26, 1992 violated the CBA and, thus was an unfair labor practice under RSA 273-A:5 I (h).

2. That the City must reinstitute merit-based compensation testing consistent with the terms of the CBA and in a manner not inconsistent with the ADA.

3. That employees entitled to and qualifying for merit-based compensation benefits on or after January 26, 1992 be paid those benefits retroactively.

So Ordered.

Signed this 31st day of August, 1992.

EDWARD J. HASELTINE
Chairman

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