State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, INC., SEIU, LOCAL 1984 Complainant v. TOWN OF EXETER Respondent	CASE NO. S-0370:4 DECISION NO. 92-131

APPEARANCES

Representing State Employees Association:

Christopher Henchey, Chief Negotiator

Representing Town of Exeter:

Mark S. Gearreald, Esq, Counsel

Also appearing:

Robert A. Stilson, SEA
George Olson, Town of Exeter
Hubert Moyer, Town of Exeter
Keith Noyes, Town of Exeter
Jay Perkins, Town of Exeter
Scott Lebeau, Town of Exeter
Walter Dow, Town of Exeter
Robert Tucker, Town of Exeter
Ronald Roy, Town of Exeter
Helen Dix, Town of Exeter
Paul Binette, Town of Exeter

BACKGROUND

The State Employees Association of New Hampshire, Inc., Local 1984 (Union) filed unfair labor practice (ULP) charges on behalf of certain employees of the Town of Exeter (Town) on February 19, 1992

alleging violations of RSA 273-A:5 I (a), (g) and (h). The Town filed an Answer and Counter-Complaint on March 5, 1992. This matter was then scheduled for and heard by the Board on May 7, 1992 and May 22, 1992.

FINDINGS OF FACT

1. The Town of Exeter is a public employer of municipal employees as defined by RSA 273-A:1 X.

2. The State Employees' Association of New Hampshire, Inc., Local 1984, is the duly certified bargaining agent for certain municipal employees of the Town.

3. The Town and the Union were parties to a collective bargaining agreement (CBA) which expired on December 31, 1990 ("or until replaced by a successor agreement") and have continued to operate under that CBA since then. The CBA has a provision (Article 17.1) which provides that it "shall not discharge or take other disciplinary action without just causes" and a provision (Article 18.7 and 18.8) calling for advisory arbitration which is thereafter subject to approval, modification or rejection by the Board of Selectmen.

4. By letter of June 27, 1991, from Paul Binette, Chairman of the Board of Selectmen, Robert Stilson was discharged from employment with the Town for "serious infractions of the personnel plan," notably Section 17.2, subsections (b) (disobedience of departmental regulation, rule order, instruction, or memorandum), (c) (insubordination), (e) (neglect of duty), (g) (inefficiency), (i) (arrogance...of duty), (m) (loafing while on duty), and (v) (leaving work stations for lunch prior to scheduled lunch starting time or exceeding time allowed). A specific instance of alleged "sleeping in a truck on town time" on June 25, 1991 was referenced in Binette's letter along with an assertion that two town employees (not then identified by name) confirmed the sleeping on June 27, 1991. During the arbitration proceedings which followed, these two employees (subsequently identified as Dow and Lebeau) testified that the statements which were prepared by management and presented to them for signature contained inaccuracies.

5. The Union initiated a grievance concerning Stilson's discharge by letter from Chris Henchey to Keith Noyes, Director of the Public Works Department, on June 28, 1991.

6. After receiving a denial of the grievance by a letter from Noyes to Henchey dated July 10, 1991, the Union appealed to the Town Manager, by letter of July 11, 1991. After the Union received no satisfaction at the Town Manager's step, the grievance was processed to arbitration with a hearing held before Arbitrator Allan S. McCausland on September 26, 1991.

7. Witnesses were sequestered at the arbitration hearing. One of the stipulations prior to the hearing was that Stilson "was asleep in a town truck while on duty on June 25, 1991."

8. For reasons stated in his Award of October 15, 1991, Arbitrator McCausland concluded that "discharge is too severe a punishment for....[the] proven offense of sleeping" and modified the discharge to a thirty (30) calendar day suspension after which the grievant was to have been made whole.

9. By letter of October 30, 1991, the Union requested of Binette that the Exeter Selectmen accept the arbitration award.

10. By letter also of October 30, 1991, Binette advised Henchey that the selectmen had voted to reject the arbitrator's award and that the action was final under Section 18.8 of the CBA. The Union requested that the Selectmen reconsider this decision by letter of November 19, 1991. By letter of December 6, 1991, Town Manager George Olson informed Henchey that the Selectmen did not wish to reconsider their decision. Arbitrator McCausland's decision has not been accepted or implemented by the Selectmen between the date of that correspondence and these proceedings.

11. At no time during which the Selectmen decided to terminate Stilson or to reject the arbitrator's award was Stilson or his representative afforded a hearing before the Selectmen.

DECISION AND ORDER

Upon thorough review of the case documents in general and the arbitrator's award in particular, this Board unanimously agrees with the conclusions of the arbitrator, namely, the testimony and evidence will not sustain the allegation that [the grievant] lied to Mr. Noyes; the grievant's normal supervisor would have investigated, and, if verified, issued a "stern warning;" and "discharge is too severe...for...sleeping in a town truck for a few minutes before quitting." The grievant had good (next to the

highest) performance evaluations and a commendation as recently as February 7, 1991. There was no evidence of first infractions of sleeping violations being enforced by the employer with the penalty of termination in the past or that the employee's sleeping in any way endangered the security of the public employer, the employee's safety or that of his fellow workers.

In speaking to our unanimous concurrence with the arbitrator's opinion, this Board cannot ignore the many concerns voiced by the arbitrator in his opinion of October 15, 1991. In particular, we share the arbitrator's concerns with the employee's right to a fair and impartial investigation and hearing, inclusive of his due process rights during that process. Noyes, who conducted the investigation after the grievant was accused of sleeping in the town truck while on the payroll, testified before the arbitrator that he would not have felt justified in recommending the grievant's discharge if he had not had witnesses willing to make statements that they had seen the grievant sleeping in the truck. Then, the arbitrator notes, these same two witnesses testified that they signed the statements in question "but that they were not true or accurate....The testimonies of Mr. Perkins, Mr. Dow and Mr. Lebeau indicate no one saw Mr. Stilson sleeping in a truck at any time. The testimonies of all four raise serious questions about how Mr. Dow's and Mr. Lebeau's statements came to be, as well as indicating that the statements are not accurate." (Arbitration Award, p.13).

In addition to the implicit issues about the "fairness and objectivity of the investigation" cited by the arbitrator (Award, pp. 8-17), i appears that there are additional issues of the same nature which are raised by the manner by which the Selectmen decided not to adhere to the arbitrator's decision and to reaffirm their prior decision (prior to arbitration) to discharge. In particular, it appears that: (1) the Selectmen did not attempt to resolve inconsistencies in the testimony reviewed by the arbitrator before they affirmed their decision to discharge, (2) there is no evidence that the Selectmen considered or applied the principles of progressive discipline which, incidentally, are listed in detail in the Town's Personnel Plan (Town Ex. No. 1), to the extent that document should be determined to be applicable, (3) the deliberations by the Selectmen after the receipt of the arbitrator's award were done internally, and (4) without affording the grievant and/or his representative an opportunity to address the Selectmen prior to the time they affirmed their decision to terminate. In fact, the union representative's letter to Paul Binnette, Chair of the Selectmen, on November 19, 1991, summarized the matter effectively; the Board [of Selectmen's] decision misrepresents the factual findings of the arbitrator. Finally, by letter of December 6, 1991, Town Manager Olson informed the union that the Selectmen "will not honor your request to address the Board in open forum."

Notwithstanding our unanimous conclusions relating to the arbitrator's decision and concerns for the due process rights of the employee, a majority of this Board is not willing to enforce either the arbitrator's award or the employee's due process rights by way of this decision. We are unanimous in our conclusion that the employee has due process rights guaranteed by the Constitution; a majority of this Board is of the opinion that the enforcement of those rights in a case such as this belongs in a forum other than the PELRB. Likewise, a majority of this Board is not inclined to disturb the action of the Selectmen taken on October 31,1991, whereby they rejected the arbitrator's decision in accordance with rights confirmed under Article 18.8 of the collective bargaining agreement. Article 18.8 requires the Board of Selectmen to meet within fifteen working days of the receipt of the arbitrator's report "to approve, modify or reject it...Said decision shall be final." This is the grievance procedure which the parties themselves have agreed to utilize as manifested by the contract. We will not disturb that agreement.

The charge of unfair labor practice is DISMISSED.

So ordered.

Signed this 29th day of DECEMBER, 1992

EDWARD J. HASELTINE
Chairman

By unanimous vote as to the conclusions of the arbitrator, the "too severe" characterization of the discipline imposed, and the employee's due process rights. Chairman Edward J. Haseltine presiding, Members Osman and Hall present and voting. By majority vote as to the dismissal of unfair labor practice charges, Chairman Haseltine and Member Osman voting in the majority; Member Hall voting in the minority.

Member Hall's dissenting opinion as to the finding of no unfair labor practice is as follows:

While I commend the majority's findings with respect to the integrity of the arbitrator's findings and the employee's due process rights, which I feel have been seriously abridged by the conduct of the Selectmen, I am of the opinion that justice in the workplace demands the reinstatement of the grievant/employee involved. This is a sincere conclusion which is affirmed by various means of analysis.

First, the Selectmen did not adhere to the progressive discipline scheme of the Town's Personnel Plan. In a "worst case"

scenario, assuming arguendo that the employee had prior warnings about extended breaks (Binette letter to grievant, June 27, 1991) and/or sleeping and assuming, again arguendo, that these warnings extended through warnings, counseling and training, official reprimand (of which there is no evidence) and professional assistance, there is no evidence that the steps of disciplinary probation, demotion, or suspension, were applied prior to implementing dismissal. If, on the other hand, the employer were to claim that the Personnel Plan did not apply because of the contract, then there is a severe deficiency in the requirement for a "workable grievance procedure" under RSA 273-A;4.

Second, this Board has consistently, in my opinion, held that a grievance procedure, in order to be "workable" as required by the statute, must have some kind of "final and binding" grievance process. To be sure, the decision of the Selectmen was "final" under the contract language, but that does not make the process a "workable" one. In Bedford Police Assn., Decision 85-51, June 26, 1985, the PELRB held that a "grievance process involving as the final step, the decision maker who made the initial decision, cannot be viewed as 'workable' under the act." The PELRB followed this decision in 1991 with Association of Campton Educators, Decision No. 91-66, November 27, 1991, where it said of advisory arbitration that "[W]e find that the procedure is not workable as required under RSA 273-A as the School Board [employer] who is involved in the process is also the body who has the ultimate power to veto any arbitrator's decision." In State Employees Association, Decision No. 92-186, December 10, 1992, the PELRB said "A 'workable' grievance procedure must be both functional and fair. An essential ingredient of this fairness is the assurance that the ultimate decision maker(s) at the end of the grievance chain are independent from the parties and can approach the decision making process without pre-conceived notions or commitments." In this case, the process was neither functional nor fair; the Selectmen were actively involved throughout and exhibited precommitment to their first decision without inclination or effort to resolve discrepancies in testimony.

Third and finally, I am concerned about the "fundamental fairness" of the case (Henchey letter to Binette, November 19, 1991 and elsewhere). In addition to egregious deprivations of the employee's due process rights ranging from refusal to consider the facts, resolve discrepancies in testimony, encouraging testimony in the form of soliciting statements which the makers later disclaimed as inaccurate or untrue, and closed-door sessions which denied the employee and/or his representative an opportunity to address the Selectmen, the "level playing fields" of Timberlane School District, 114 N.H. 245 (1974) and Franklin Education Association, ___ N.H. _____ (No. 90-478, November 10, 1992) were non-existent given the manner in which the Selectmen decided to handle this case. In 1984, the New Hampshire Supreme Court told us that "there must be a mechanism for resolving the dispute or else the agreement

is meaningless" in Appeal of the Town of Pelham, 124 N.H. 131 at 136 (1984). Five years later, the State Supreme Court handed down its decision in Centronics Corp. v. Genicom Corp., 132 N.H. 133 (1989) in which it announced the "common rule: under an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith...." Centronics Corp., supra, at 143. The "implied covenants of good faith" were utilized by this Board when it decided Association of Campton Educators, Decision No. 91-66, November 27, 1991, and found "failure of a party to comport itself in good faith" when it refused to comply with an arbitrator's decision relating to the non-renewal of a non-probationary teacher in advisory arbitration proceedings which had been negotiated under the collective bargaining agreement. I feel there is no justification to deviate from the relief granted in Campton. As was the case in Campton, supra, I would not only reinstate the employee but also direct and compel the parties to negotiate a "workable" grievance procedure within the scope of the relief granted in Campton and the caveats of what constitutes a "workable" grievance procedure as referenced in the cases cited above.