State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

RYE FIRE AND POLICE ASSOCIATION Complainant	:	
v.	:	CASE NO. M-0604:3
TOWN OF RYE Respondent	:	DECISION NO. 94-29

APPEARANCES

Representing Rye Fire and Police Association:

Thomas D. Noonan, Business Agent/Teamsters

Representing Town of Rye:

Michael Donovan, Esq.
Bradley Kidder, Esq.

Also appearing:

Mark N. Zartarian, Rye Fire & Police Association
Peter Colbeth, Rye Fire & Police Association
A. H. Huhlm, Town of Rye
Brad Loomis, Town of Rye
Jeffrey T. Peirce, Teamsters

BACKGROUND

The Rye Fire and Police Association (Association) filed unfair labor practice (ULP) charges against the Town of Rye (Town) on January 10, 1994 alleging violations of RSA 273-A:5 I (e), (h) and (i) relative to breach of contract and a unilateral change in working conditions due to changes in permanent shifts. The Town filed its answer on January 25, 1994 after which this case was heard by the PELRB on March 10, 1994.

FINDINGS OF FACT

1. The Town of Rye is a "public employer" with the meaning of RSA 273-A:1 X.

2. The Rye Fire and Police Association is the duly certified bargaining agent for police and fire department personnel employed by the Town.

3. On or about August 17, 1993, the parties executed a CBA for calendar year 1993, through December 31st of that year. Article XXV, Section 1 of the CBA provides that it "shall continue in full force and effect from year to year thereafter unless written notice by certified mail of desire to terminate is served by either party upon the other at least ninety (90) days prior to date of expiration." Article XXV, Section 3 of the CBA provides "if negotiations are in progress at the expiration date of this Agreement, the Agreement shall continue in effect by mutual consent of both parties until conclusion of the negotiations."

4. Article X, Section 3 of the CBA provides "whenever permanent change from the present schedule of 2-12 hour days and 2-12 hour nights in contemplated, then the impact is negotiable before change takes place."

5. On September 28, 1993, two of the three selectmen (Quirk and Herlihy) wrote to the Association, telling them "effective this date, the Board of Selectmen... hereby gives you notice that this Board is terminating the Collective Bargaining Agreement between the Town of Rye and the Rye Fire and Police Association as provided in Article XXV of said Agreement, effective December 31, 1993."

6. On December 22, 1993, Selectman Herlihy wrote to the Association conveying the Town's "final offer." Prior to the date of this letter, the parties had held nine negotiating sessions and had tentatively agreed on all elements of the 1994 CBA, with the sole exception of an agreement of the wage proposal. There have been two additional negotiating sessions after the December 22nd letter, namely, on December 31, 1993 and February 1, 1994. Neither of these resulted in settlement. The parties are scheduled for mediation on April 11, 1994.

7. When Herlihy wrote the Association on December 22, 1993, that correspondence was accompanied by a "final offer" draft of the 1994-96 CBA, as perceived by the Town.

(Town Exhibit No. 4) Article X of that draft, entitled "Hours of Work," reflects that the former provisions of Article X, Section 3 (Finding No. 4, above) have been negotiated away. Annotations indicate that Article X was "TAed" on 12/3/93, as modified." It now provides:

> Section 1:
>
> On a yearly average, 42 hours per week beginning and ending on consecutive Sunday nights shall constitute one work week.
>
> The 42 hour work week shall be effective for Fire Department employees. The 40 hours work week shall be effective for the Police Department employees. The hourly pay scales for 42 and 40 hour work weeks are made a part of this Agreement as Appendix A and B.
>
> Those employees converting from a 42 hour work week to a 40 hour work week shall maintain the same step and level in Appendix A and B. There shall be no increase in annual base salary due to this change in hours.
>
> Section 2:
>
> Scheduling and length of shifts is reserved solely to the Fire and Police Chiefs as required for the efficient operation of their individual departments.
>
> When any shift becomes open due to any reason, except the Detective shift, the shift will be covered by a member of this Association by seniority, if available to work. If no member of the Association is available to work, call Firefighters or Special Police Officers may be utilized.
>
> In the Police Department, should a second Police Officer be required by the Police Chief to man a patrol shift on Saturday or Sunday day shift, part-time, Special Police Officers may be utilized.

8. On January 3, 1994, the Town implemented the forty hour schedule and pay formula of Finding No. 7. This occurred before settlement on the total contract since the wage package had not been agreed. Notwithstanding this lack of agreement, officers were paid for forty-two hours while working the new forty hour schedule. Simultaneously, part-time police officers were used

for the Saturday and Sunday day shifts. Officer Peter Colbeth testified that these shifts had formerly been available as bargaining unit work and that the changeover reduced overtime opportunities, a fact which was known to unit members when the TA on the new Article X was agreed to on December 3, 1993.

DECISION AND ORDER

Under the facts of this case, we find no evidence of an unfair labor practice. The change in the "permanent shift" from 42 hours per week to 40 hours per week was part of the parties' tentative agreement. It has been "paid for" by maintaining the same wage steps and levels as had been paid under the 42 hour rate of compensation. Finding No. 7, above. Moreover, the contractual requirement to bargain impact before implementing a work schedule other then 2-12 hour days and 2-12 hour nights (Finding No. 4, above) had been bargaining away under the tentative agreement for the CBA to become effective on January 1, 1994. That tentative agreement had been finalized except for the general wage proposal. Finding No. 6, above. Thus, we cannot accept that the change to the eight hour shifts was unknown to or unexpected by the Association. Given the parties' knowledge of the impending change in shifts and the fact that that change was "paid for" by maintaining the 42 hour rate of compensation, we do not find that implementation violated the need to maintain status quo pending negotiations.

As for the Association's complaint that the implementation of the eight hour shifts improperly altered working conditions by reducing overtime opportunities, we disagree. RSA 273-A:1 XI defines as "managerial policy" the ability of the public employer to set its organizational structure, including "the selection, direction and number of its personnel." Thus, it is within the Town's discretion whether to use or staff overtime shifts. Conversely, "once management has decided to utilize overtime, then the manner in which it is assigned is a mandatory subject of bargaining." See Teamsters Local 633 v. Town of North Hampton, Decision No. 92-135 (August 31, 1992) and Professional Firefighters of North Hampton, Local 3211 v. Town of North Hampton, Decision 93-06 (February 10, 1993). This case, unlike the two North Hampton cases, shows no evidence of a refusal to bargain over changes in the assignment or availability of overtime. To the contrary, the parties have had a negotiating session after the changes were filed and after these changes were made. Association members knew part-time personnel would be used to cover Saturday and Sunday day shifts as part of the process of coming to a tentative agreement on the language now found as the last paragraph of new Article X, Section 2 reflected in Finding No. 7, above. We find no violation relative to overtime.

The pending ULP is hereby DISMISSED.

So ordered.

Signed this 29th day of MARCH, 1994.

Jack Buckley

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Alternate Chairman Jack Buckley presiding. Members E. Vincent Hall and Seymour Osman present and voting.