State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, LOCAL 298

Complainant

v.

CITY OF MANCHESTER

Respondent

MANCHESTER EDUCATION ASSOCIATION and MANCHESTER EDUCATIONAL SUPPORT PERSONNEL ASSN., NEA-NEW HAMPSHIRE

Complainants

v.

CITY OF MANCHESTER

Respondent

UNITED STEELWORKERS OF AMERICA, LOCAL 8938

Complainant

v.

CITY OF MANCHESTER

Respondent

CASE NO'S A-0544:43
T-0242:12
M-0607:13
M-0545:13

DECISION NO. 95-43

APPEARANCES

Representing AFSCME, Local 298:

James Anderson, Staff Representative

Representing Manchester Education Assoc. and Manchester Education Support Personnel Assn:

James Allmendinger, Esq.

Representing United Steelworkers of America Local 8938:

Vincent Wenners, Esq.

Representing City of Manchester:

David Hodgen, Chief Negotiator

Also appearing:

Thomas I. Arnold, II, City of Manchester
Brian Mitchell, AFSCME Local 298
Michael D. Roche, USWA Local 8938
Wilbur Jenkins, Witness
Joseph Morris, Manchester Education Assoc.
Elizabeth Tygert, Manchester Education Assoc.
Thomas L. Adams, MESPA/MEA
Michael Olmstead, USWA Local 8938
Ronald A. Philbert
Robert Beaurnage, Manchester Water Works
Jim Schaufenbil, Union Leader

BACKGROUND

The American Federation of State County and Municipal Employees Local 298 (AFSCME) filed unfair labor practice (ULP) charges against the City of Manchester (City) on November 16, 1994 alleging violations of RSA 273-A:5 I (a), (c), (e), (g) and (i) relating to unilateral changes to supplemental pay which enhanced workers' compensation benefits. The City filed an answer and Motion to Dismiss on these charges on November 18, 1994. On December 19, 1994, the Manchester Education Association, NHEA/NEA (MEA) and the Manchester Educational Support Personnel Association, NHEA/NEA (MESPA) filed similar charges alleging violations of RSA 273-A:5 I (a), (e), (g), (h) and (i) due to unilateral changes in working conditions because of the elimination of supplemental workers' compensation benefits. The City filed an answer and Motion to Dismiss these charges on January 3, 1995. Meanwhile, the United Steelworkers of America, Local 8938 (USWA) filed an unfair labor practice complaint on December 15, 1994 alleging violations of RSA 273-A:5 I (a), (c), (e), (g) and (i) due to unilateral changes to the Workers' Compensation ordinance which unilaterally altered terms and conditions of employment. The City filed an answer and Motion to Dismiss these charges on December 29, 1994. The USWA filed an objection to the City's motion to dismiss on January 9, 1995.

On January 13, 1995, the MEA and MESPA filed a motion to consolidate its complaints with the AFSCME complaint for purposes of hearing. The City filed objections thereto on January 18, 1995. On January 17, 1995, the USWA filed a similar motion to consolidate its ULP complaint with the other complaints for purposes of hearing. Likewise, on January 17, 1995, AFSCME filed a statement agreeing to the consolidation of the MEA, MESPA, and USWA cases with its pending complaint set for hearing on January 24, 1995. On January 19, 1995, the PELRB issued Decision No. 95-06 granting the motion to consolidate the foregoing cases for hearing. On January 20, 1995, the City filed an objection to consolidation of the USWA complaint with the other cases after the PELRB had issued Decision No. 95-06 on January 19, 1995. The City then filed a Motion for Reconsideration on the procedural issue of the consolidations for hearing on February 8, 1995. Objections thereto were filed by MEA and MESPA on February 21, 1995. The PELRB then denied the City's Motion for Reconsideration and affirmed the consolidation on February 28, 1995 in Decision No. 95-17. The USWA filed an objection to the City's Motion for Reconsideration on March 2, 1995, after Decision No. 95-17 had issued. The case proceeded to hearing before the PELRB on March 9, 1995 and April 4, 1995. Post-hearing briefs were due and filed on or before May 17, 1995.

FINDINGS OF FACT

1. The City of Manchester is a "public employer" within the meaning of RSA 273-A:1 X.

2. AFSCME, Local 298 is the duly certified bargaining agent for certain personnel employed by the City of Manchester in its cemetery, highway, health, public building services, traffic, and parks and recreational departments and for educational assistants.

3. The MEA and the MESPA are the duly certified bargaining agents for teachers and educational support staff employed by the Manchester School Department.

4. USWA, Local 8938 is the duly certified bargaining agent for certain personnel employed by the City of Manchester in its Water Works Department.

5. Each of the four complaining certified bargaining agents in this case (AFSCME, MEA, MESPA and USWA) has a current or expired collective bargaining agreement with the City. Those contracts address the issue of "supplemental pay" differently. For example, the AFSCME Master Agreement and their Public Building Services agreement contain no specific

reference to supplemental pay. The same is true for the MEA and MESPA contracts. The USWA contract language dating to 1982, makes specific reference to workers' compensation benefits at Article 33.2 which says, "The Board and the Administration agree to pay the amount of Workers' Compensation the employee is entitled to under the applicable State Statutes and City Ordinance, as amended from time to time." The applicable ordinance is 18-47.

6. For purposes of this case, the term "supplemental pay" means that amount of money paid by the City to an employee, injured on duty, to make up the difference between that employee's regular compensation and amounts the employee is receiving/ has received as worker's compensation benefits. As a benefit, the provision dates to the City Ordinance of March 17, 1964. (Union Exhibit No. 1). As originally defined, these provisions resulted in some employees actually receiving more in total compensation from these benefits, as the result of an on-the-job injury, than they received from working. This prompted the language of Ordinance 18-47 to be re-discussed, re-negotiated, and re-codified by the parties so that it included the following definitions: "Regular salary for purposes of this section is defined as regular gross salary less the federal income tax withholding on regular gross salary based on the number of dependents claimed as of the date of the injury and less social security withholding based on regular gross salary." This change was implemented by the Ordinance of July 6, 1982, (Employer Exhibit E), following discussions and/or negotiations where the sides were represented by professional negotiators or counsel and actually exchanged proposals. (Union Exhibit Nos. 2, 3, 4, and City Exhibit Nos. 1, 12, 13, 14, 15 16, 17, 18, 19, 20, 21, and 23 relating to AFSCME proposal of October 8, 1981, on this issue and its being mediated, fact found and handled as part of negotiations.)

7. Wilbur Jenkins, former City Personnel Director from 1969 to 1990, testified that the provisions of City Exhibit No. 12 were discussed, agreed upon and re-codified outside the CBA as a means to avoid disputes related thereto being grieved. Notwithstanding this, the record shows that the AFSCME and the City did grieve, through arbitration and an award, a just cause/Ordinance 18-47 grievance with Arbitrator Bruce Fraser in 1989. City Exhibit No. 8.

8. The supplemental pay benefits, as constituted from

1982 to the present time, existed more than sufficiently long enough to be considered "past practices" between the parties and protected by the doctrine that they should not be unilaterally disturbed or changed without being negotiated.

9. Ordinance 18-47 was revisited by the City and its various unions in 1987 after Wilbur Jenkins sent a memo to Tom Adams on August 11, 1987, seeking to discuss further modifications to its language. In that document, Jenkins told Adams that the Aldermanic Insurance Committee had endorsed a proposal to permit employees to use accrued sick leave to supplement workers compensation. (Union Exhibit No. 5). Adams responded on October 7, 1987, said the proposed changes affected conditions of employment and must be bargained. (Union Exhibit No. 6) Adams wrote a letter reiterating similar sentiments to members of COPE (Coalition of Public Employees) on October 13, 1987 (Union Exhibit No. 7). By June 9, 1988, COPE had a proposal on language changes. (Union Exhibit No. 8) On June 10, 1988, Adams wrote counsel for COPE unions, telling them that progress was being made in these negotiations and that a declaratory judgment petition could be avoided. (Union Exhibit No. 9) By October 19, 1988, Jenkins wrote a memo to the City's risk manager, Robert Badolati, about a proposal that both labor and management representatives could support. (Union Exhibit No. 11) Proposed ordinance changes in Section 18-47 were presented to the COPE membership on January 25, 1989 and new language, with a 12 month benefit limitation, was passed on July 5, 1989, after two years of negotiations or "cooperative efforts" as described in a letter from Jenkins to Adams on July 7, 1989. (Union Exhibit No. 15)

10. On November 7, 1990 a further amendment to Ordinance 18-47 (g) was passed limiting the duration of supplemental pay to 52 weeks. (Employer Exhibit H) This occurred after discussions with some, but not all, of the City's unions. By April 11, 1991, the City had proposed to MEA negotiators that "notwithstanding any practices which have existed in the past, effective July, 1991, teachers shall not be entitled to any rights and privileges contained in the City's Personnel Ordinance unless such rights or privileges are specifically referenced in this Agreement." Union Exhibit No. 17). There is no

evidence this proposal was ever accepted by the MEA. Likewise, on July 7, 1992, the City proposed to MESPA negotiators that, "It is expressly understood that Section 18-47 may be amended to entirely eliminate the payment of supplemental pay benefits." (Union Exhibit No. 18) There is no evidence this proposal was ever accepted by the MSEPA. We find this conduct to be de facto, if not actual, negotiating.

11. In 1994, the state legislature amended RSA 281-A:28 by passing HB 1579-FN-A-Local which reduced the workers' compensation percentage from 66 2/3% to 60% effective February 8, 1994. The City claims this increased its costs of supplemental pay by 6 2/3%. (Hearing brief, p. 6).

12. Thereafter, the City considered amending Ordinance 18-47 in response to the foregoing legislative charge. By June 7, 1994, the proposed change was in second reading and being discussed by the aldermen. During the June 7, 1994 meeting, City Negotiator Hodgen advised the Board of Mayor and Aldermen that they cannot take the benefit away from the unions without negotiating first, either as an item in the contract or as a past practice. (Union Exhibit No. 19). Notwithstanding this advice, the Board of Mayor and Aldermen passed a new Ordinance 18-47 to replace the former version, on June 28, 1994 and July 5, 1994 (Employer Exhibits J and K). This change, in the form of an alleged unilateral implementation, prompted the filing of the ULP charges now under consideration in this case.

13. There is no evidence that the City ever contested the negotiability or the applicability of grievance procedures to workers' compensation supplemental pay prior to enacting the changes complained of on June 28 and July 5, 1994, respectively. The City's prior conduct with respect to this issue evidences either actual or de facto negotiations on supplemental pay. (Union Exhibit Nos. 17 and 19.)

DECISION AND ORDER

Our examination of the evidence offered in this case brings us to a unanimous finding and conclusion that the past conduct of the parties has been tantamount to, if not actual, bargaining over the matter of supplemental pay. Findings No. 6, 9 and 10. In addition to this conduct, which included the exchange of "proposals" between the parties' respective negotiators, the parties have actually grieved, through arbitration, the dismissal of an employee under

ordinance 18-47 in 1985. City Exhibit No. 8.

In addition to bargaining and grieving matters concerning supplemental pay and Ordinance 18-47, benefits under the current and prior versions of Ordinance 18-47 have been conferred upon certain of the City's employees for more than ten years and over the duration of several CBA's. Thus, there has been a past practice with regard to these benefits. There shall be no unilateral changes to past practices without those changes first being negotiated.

Finally, testimony before this Board concerning recipients of supplemental pay revealed that those recipients had their supplemental pay reported as income and withheld for tax and statutory deduction purposes just as though the supplemental pay had been regular salary. This causes us not only to reaffirm our conclusion that there was a past practice but also that that past practice involved a "term and condition of employment, as defined by RSA 273-A:1 XI," i.e., a wage contingent on a condition precedent, namely, an occupational injury compensable under the various Workers' Compensation laws then in effect, as modified from time to time and as acknowledged by our Finding No. 11, above. This conclusion is consistent with testimony offered by former Personnel Director Jenkins who said he felt supplemental pay was pay, versus a benefit, because of FICA, withholding and other deductions which were taken from it before it was received by the injured employee.

Chief Negotiator Hodgen testified that he had advised City officials that the subject of supplemental pay was a mandatory subject of bargaining prior to the Appeal of State, 138 NH 716, decision last summer. Finding No. 12. We think it still is. Applying the three step test of Appeal of State, supplemental pay passes muster as a mandatory subject of bargaining. First, the subject of supplemental pay is not reserved to the exclusive managerial authority of the public employer by constitution, statute or regulation. For that matter, history shows it had been negotiated in the past. Second, supplemental pay primarily affects terms and conditions of employment versus broad managerial policy. Third, if and as supplemental pay is, was or has been incorporated into CBA's, by negotiations or by practice, its application as a pre-conditioned payment of wages has not and will not interfere with public control of governmental functions any more than does the payment of an hourly wage provided for elsewhere in the agreement.

Likewise, the City's enactment of the new ordinance (City Exhibit J) in June of 1994 is not protected under Appeal of Milton School District, 137 NH 240 (1993) because there is no "cost item" or new money involved. The supplemental pay program was an existing term and condition of employment due to be continued in its prior form under expired CBA's. "Maintaining the status quo

during collective bargaining after a previous CBA has expired is essential to preserving 'the balance of power guaranteed by RSA Chapter 273-A.'" Appeal of Milton School District 137 NH 240 at 245 (1993) and Franklin Education Association, 136 NH 332 at 337 (1992).

Thus, we find the City's enactment and implementation of a new and un-negotiated version of Ordinance 18-47 on June 28, 1994 and July 5, 1994 to have been violative of its obligation and duty to negotiate under RSA 273-A:5 I (e) and RSA 273-A:3 I, except as that duty applies to USWA, Local 8938. To hold otherwise would mean that any wage or benefit, acquired through negotiations or by past practice, could be unilaterally modified or eliminated by passing an ordinance. Such unilateral discretion is not consistent with the purposes of Chapter 273-A and would make the obligation to bargain contained therein meaningless. Likewise, such unilateral authority in one party to a CBA would vitiate the purposes for having written agreements under RSA 273-A:4.

As to United Steelworkers of America, Local 8938, we DISMISS their complaint of ULP because the contractual language they have negotiated with the City acknowledges that supplemental pay will be controlled by state statutes and the city ordinance, "as amended from time to time." (Emphasis added. Finding No. 5). As to all other complainants the City shall (1) reinstate the status quo as it existed prior to the enactment of modifications to Ordinance 18-47 on June 28, 1994, (2) make whole any employees who have suffered a loss as the result of unilateral changes implemented concerning that ordinance since June 28, 1994 and (3) cease and desist from any further modifications to Ordinance 18-47 without first negotiating those changes with the certified bargaining agents for the employee organizations involved.

So ordered.

Signed this 17th day of JULY, 1995.

Jack Buckley

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Alternate Chairman Jack Buckley presiding. Members E. Vincent Hall and Frances P. LeFavour present and voting.