



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CITY OF KEENE	:	
	:	
	:	
Complainant	:	
	:	CASE NO. S-0360:13
v.	:	
	:	DECISION NO. 1998-048
KEENE POLICE OFFICERS,	:	
SEA, LOCAL 1984	:	
	:	
Respondent	:	

APPEARANCES

Representing City of Keene:

Thomas J. Flygare, Esq., Counsel

Representing Keene Police Officers, SEA, Local 1984:

Teresa DeNafio Donovan, Esq., Counsel

Also appearing:

Martha Matson, City of Keene
Tom Powers, City of Keene
Al Merrifield, City of Keene
Kelly Kramer, City of Keene
Carl Patten, Jr., SEA 66
Peter Thomas, SEA 66
Eliezer Rivera, SEA 66

BACKGROUND

The City of Keene (City) filed unfair labor practice (ULP) charges against the Keene Police Officers, State Employees Association, S.E.I.U., Local 1984 (Union) on March 3, 1998, alleging violations of RSA 273-A:5 II (d) and (f) relating to bad faith bargaining and breach of contract by attempting to arbitrate matters controlled by the management rights clause of the collective bargaining agreement (CBA). The Union filed its answer on March 18,

1998 after which this matter was heard by the PELRB on May 7, 1998. Posthearing briefs were timely filed by both parties on May 26, 1998.

FINDINGS OF FACT

1. The City of Keene employs police officers and other personnel in the operation of its city government and, thus, is a "public employer" within the meaning of RSA 273-a:1 X.
2. The Keene Police Officers, State Employees Association Local 1984, Service Employees International Union (SEIU), is the duly certified bargaining agent for all permanent, full-time police officers, exclusive of corporals and sergeants, employed by the City and who have completed their respective periods of probationary employment with the City.
3. The Union and the City are parties to a CBA for the period July 1, 1997 through June 30, 2000 (Joint Ex. No. 1). Article II of that agreement is entitled "Management Rights." It provides, in pertinent part, "The City Council and/or its designee will continue to have, whether exercised or not, all of the rights, powers and authority, heretofore existing or which hereafter exist, including, but not limited to the following...the right to determine the standards of selection for employment; the right to direct its employees... issue and enforce reasonable rules and regulations...[to] determine the content of job classifications...the City retains all rights, responsibilities and prerogatives not specifically modified by this Agreement." Article XIX, Section 4 of the CBA provides, in part, "Excluded from arbitration are unadjusted grievances which question the exercise of rights set forth in Article II of this Agreement entitled 'Management Rights,' or which question the use or application of any right over which the City or its designated agents have unilateral direction."
4. The City also has standard operating procedures ("SOP's") for the police department, which are now also referred to as "operational guidelines." SOP No. G-91-055 was issued on October 1, 1991 and pertains to promotions and lateral transfers. In that document, "minimum qualifications" for promotion to corporal or sergeant are listed as

"four years continuous service as a police officer and a two year college degree or equivalent." (City Ex. No. 1.) This standard was replaced on March 1, 1997 by Operational Guidelines 3401 in which the promotion standards for corporal were changed to "at least 5 years' continuous service as a police officer and 60 or more college credits." The reference to a degree was dropped and there is no reference to the subject area of any of the sixty credits. (City Ex. No. 2.) According to testimony from Chief Thomas Powers, he implemented this change (City Exhibit No. 2) after the conferences with, but not concurrence from, union leaders, namely Chapter President Carl Patten.

5. In March of 1997, the Union, after commencing negotiations for a successor agreement, proposed deletions to Article II, namely, the wording "establishment of work and shift schedules and assignments and rotation; take disciplinary action for just cause." It also proposed a new Section 2 to Article II which would have permitted the use of "the grievance procedure contained herein to process a complaint pursuant this Article." (City Ex. No. 3.) On May 1, 1997, the City rejected this proposal. (City Ex. No. 4.) Likewise, on or about April 15, 1997, the Union proposed an amendment to Section 1 of Article XX which would have read, "All cases of discipline, discharge and any provision of this Agreement are grievable." (City Ex. No. 5.) This language was not adopted by the parties for inclusion in the 1997-2000 CBA.
6. When the City and the Union reached tentative agreement on the 1997-2000 contract on August 15, 1997, the parties had not negotiated any changes to City Ex. No. 2 and the agreed upon contract language was as appears in Finding No. 3, above. The CBA was signed on December 10, 1997. (Joint Ex. No. 1.) In the meantime a notice of promotional testing for the position of corporal was issued by Powers with an application deadline of November 3, 1997. On November 2, 1997, Officer Peter Thomas submitted a letter of application for that position vacancy. (Joint Ex. No. 2.)

7. On November 12, 1997 Powers issued a memo to all police officers in which he expanded on promotional standards or criteria. In a portion of that memo, Powers said, "Those police officers who have completed 10 years of police service may substitute the additional 5 years of service for the 60 academic credits required in section II of Operational Guideline 3401 for the current promotional testing process." Powers also rebutted assertions about education and college credits by saying, "This is not a new standard. [I]t was a preferred qualification the last time and is a constant discussion in evaluations annually." (Joint Ex. No. 3.) Thomas, who had approximately 8 1/2 years of service with Keene in November of 1997, testified that he never expected this provision to provide him with sixty additional credit hours, in addition to the 30 hours, more or less, which he has now accumulated. Thomas did note in his testimony that the 1991 standards (City Ex. No. 1) were denominated "minimum qualifications" and called for "...a 2 year college degree or equivalent." The 1997 minimum qualifications (City Ex. No. 2) called for "60 or more college credits" without mentioning a degree.
8. By letter of November 26, 1997 to Capt. Hal Brown, Thomas filed a grievance complaining that the promotional process to corporal constituted an unreasonable rule and regulation in violation of Article II, Section 1 of the CBA. He added, "In January 1997 [City Ex. No. 2] was put into effect making it a requirement that an officer have 60 college credits to be eligible for testing and/or promotion to Corporal.... Prior to this date college credits were preferred but not required....[I]t is unreasonable to require that an officer obtain 60 college credits between January 1997 and November 1997 in order to be eligible for promotion. The fact that prior to January 1997 college credits were not a requirement makes it even more so." (Joint Ex. No. 4.)
9. On December 4, 1997, Powers issued a memo to Thomas denying his grievance "because there is no specific article of the contract [which was] violated, and because the establishment of standards is the right of the City." (Joint Ex. No. 6.) Also on December 4, 1997, Thomas filed his grievance with City Manager

John MacLean under Section 3 of the grievance procedure. (Joint Ex. No. 5.) On January 9, 1998 MacLean denied the grievance because he found the promotional procedures to be reasonable, that "college credits have long been a 'preferred' element of the position requirements," and because City Ex. No. 2, the 1997 promotional guidelines, were properly "promulgated by the Chief of Police in furtherance of valid provisions of the Management Rights Clause" of the CBA.

10. In the proceedings before the PELRB, as compared to the earlier steps of the grievance procedure described above, the Union argued that the language found in Article IX Section 2 of the CBA which reads "The promotional examination process shall provide an equal opportunity for those desiring to participate" was equivalent to a modification to the Management Rights clause of the CBA and was an additional basis enabling this matter to be processed to conclusion by way of the grievance procedure.

DECISION AND ORDER

The gravamen of this case is whether the Union violated the CBA or its duty to bargain by processing Thomas's grievance through the grievance procedure and to arbitration in violation of RSA 273-A:5 II (d) and (f). The PELRB has the "implicit authority to decide whether a dispute involves a matter addressed by a CBA" which makes that dispute susceptible to the grievance and arbitration provisions, such as they may be, of the contract. Appeal of Westmoreland School Board, 132 NH 103, 104 (1989) and Nashua School District v. Murray, 128 NH 417, 421 (1986). In order to do this, we look to both the language of the CBA as well as the history of the parties' negotiations for the 1997-2000 agreement.

We find the contract language to be compelling in this case. First, the management rights language (Finding No. 3) of Article II is very broad. It includes the right to determine the standards of selection for employment and to determine the content of job classifications. To the extent one must possess certain minimum qualifications (Finding Nos. 4 and 7) in order to be promoted and, thus, to fill certain job classifications, the contract language validates and affirms the City's planning, drafting, adopting and distributing City Exhibit No. 2 through the auspices of the office of the chief of police. As if to remove all doubt, the parties also negotiated the exclusionary provisions of Article XIX, Section 4 which excluded any grievances challenging the exercise of management rights,

as recited in Article II, from the arbitration process. (Finding No. 3.) Together, these two contract provisions convince us with the requisite "positive assurance" that the parties did intend to exclude grievances, such as the one which was raised by Thomas, from arbitration.

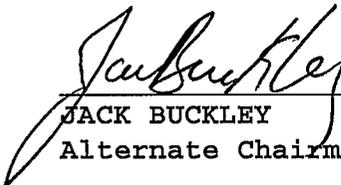
Second, the negotiations history of the parties leads us to the same conclusion. The Union, on at least two occasions, attempted to negotiate changes which would have opened Article II disputes to the grievance and arbitration provisions of the CBA. (Finding No. 5.) They were unsuccessful in doing so. It would be inappropriate for them to attempt to achieve benefits pursuant to these proceedings which they were unable to obtain through negotiations or on which they relented during the negotiations process.

Third and finally, the City has relaxed its standards for corporal promotions from a two year degree requirement to sixty credit hours. This means that a candidate with sixty credit hours in anything, not necessarily a curriculum leading to fulfilling a degree requirement, is qualified to apply and compete under City Exhibit No. 2. This appears to be making it easier to qualify to be examined for promotion to corporal. It also appears to us that members of the bargaining unit were, or should have been, aware of a degree requirement dating back at least to 1991 (City Exhibit No. 1). Given that obtaining credit hours is a precursor to obtaining a degree, we cannot and do not accept the argument that the transition from City Exhibit No. 1 relating to a degree to City Exhibit No. 2 relating to credit hours was either a hardship on or surprise to bargaining unit members.

For the foregoing reasons, we find the Union's conduct to have been violative of RSA 273-A:5 II (f) and direct that it CEASE and DESIST forthwith from any further processing of the instant grievance.

So ordered.

Signed this 29th day of May, 1998.



JACK BUCKLEY
Alternate Chairman

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