



**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Manchester Professional Firefighters Association,  
Local 856, IAFF, AFL-CIO,CLC

Complainant

v.

City of Manchester, Fire Department

Respondent

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Case No. F-0104-41

Decision No. 2002-102

PRE-HEARING DECISION and ORDER

BACKGROUND

Manchester Professional Firefighters Association, Local 856, IAFF, AFL-CIO,CLC (hereinafter referred to as the "Union") filed unfair labor practice charges on June 24, 2002 pursuant to RSA 273-A:5 I (e) and (h) alleging that the City of Manchester (hereinafter referred to as the "City") and its agents have breached the parties collective bargaining agreement (hereinafter referred to as "CBA") by failing to abide by certain final and binding provisions contained within the parties' CBA involving the establishment of a drug and alcohol testing policy, the creation of a treatment fund and the indemnification of the Union from legal suits related to the application or enforcement of a drug and alcohol policy. As relief, the Union requests that the PELRB find that the City's alleged actions constitute a violation of its duty to negotiate in good faith and to submit negotiated cost items to its legislative body and by not doing so has also breached the parties' collective bargaining agreement (CBA). In addition, the Union asks that a cease and desist order issue to cure the alleged infractions of the City's obligations or that the PELRB declare the parties' previously agreed Article 35.3 of the CBA contrary to public policy, violative of RSA 273-A:3, II (obligation to bargain) and as null and void *ab initio*.

In connection with its unfair labor practice complaint, on June 24, 2002, the Union also filed a Request for Interim Orders requesting that the Arbitrator not render a decision until the PELRB has heard the merits of the unfair labor practice complaint.

The City filed its answer on July 9, 2002 denying that it has undertaken actions that amount to either a statutory violation or a breach of the parties' CBA. The City admits to certain facts alleged by the Union in its complaint but asserts that it has fully participated in the dispute resolution process agreed to by the parties. By way of further answer, the City states that it addressed the issue of the scope of the arbitrator's authority under well-settled New Hampshire law as it concerned the Union's proposals of creating an indemnity fund and of establishing a "hold harmless" provision in favor of the Union related to the Drug and Alcohol Testing Program. The City also asserts that the Union's action in filing the unfair practice complaint represents an abuse of process. By its answer, and a separate motion, referenced below, the City seeks to have the Union's complaint dismissed.

On July 9, 2002, the City also filed a Motion to Dismiss the Union's complaint for failing to state a claim under either RSA 273-A:5 (e) or (h) and asserting that no facts alleged indicate a breach of the parties' CBA by the City. In further response, the City also filed its Objection to the Union's Request for Interim Orders stating that an arbitrator cannot bind a municipality on cost items and pointing out that the Union did not contest or otherwise object to the Arbitrator's jurisdiction to rule on the matter. The City asserts that the Union raised the argument only responsively. Further, the City alleges that the Union representative acknowledged the legitimacy of the City's assertion of the possible restriction on the arbitrator's authority and admitted that the filing of the Union's unfair labor practice complaint (See Case No. F-0104-41) was undertaken only to invoke the PELRB's authority to issue interim cease and desist orders for the purpose of delaying, impeding or otherwise derailing the parties' agreed upon dispute resolution process. The City requests that the PELRB deny the Union's request for interim orders preventing the Arbitrator from issuing its award.

Following discussion between the parties and the Hearing Officer at the Pre-Hearing Conference, the parties were given leave to draft a "Joint Pre-Hearing Conference Statement" that was to contain, *inter alia*, such facts as may be mutually agreed to by the parties. This document was submitted to the PELRB on August 21, 2002, reviewed and considered by the Hearing Officer and appropriate aspects of that document are incorporated into this order.

#### PARTICIPATING REPRESENTATIVES

For the Complainant: John S. Krupski, Esq.

For the Respondent: Daniel Muller, Esq.

PRIMARY ISSUE FOR DETERMINATION BY THE BOARD

1. Whether sufficient facts have been alleged by the Union to sustain a claim of unfair labor practice against the City on the basis of either RSA 273-A:5, I (e) or (h)?
2. Whether the City has breached Article 35.3 of the parties' collective bargaining agreement (CBA) by not abiding by "final and binding" language agreed to by the parties in negotiations?
3. Whether or not the Union filed the instant complaint in bad faith?

STIPULATED FACTS

The parties submitted a jointly executed Pre-Hearing Conference Statement that, *inter alia*, contained the following stipulated facts:

- a. The Manchester Professional Firefighters Association, Local 856, IAFF, AFL-CIO, CLC (hereinafter, the "Union") has a principal address of 85 Sheffield Road, Manchester, NH 03101.
- b. The Manchester Fire Department has a principal business address of 100 Merrimack Street, Manchester, NH 03101 and the City of Manchester has a principal business address of One City Hall Plaza, Manchester, NH 03101.
- c. The City is a "public employer" within the meaning of RSA 273-A:1, X.
- d. The Union is the certified bargaining representative of certain employees of the City of Manchester, New Hampshire Fire Department.
- e. The Union and the City are signatories to a Collective Bargaining Agreement with an effective date of July 1, 1999 to June 30, 2002.
- f. During the course of negotiations for the above-referenced Collective Bargaining Agreement, the parties agreed to new section in the contract entitled "Drug and Alcohol Testing which states in full:

"Article 35.3. Drug and Alcohol Testing. Effective July 1, 2001, all bargaining unit members shall be subject to a Drug and Alcohol Testing Policy. The Department and the Association will mutually agree to this policy and may amend it from time to time. If a policy is not in place by July 1, 2001, the Parties will submit all remaining issues in the dispute to an arbitrator for his/her final and binding decision. The parties shall

mutually select an arbitrator. If the parties are unable to agree on an arbitrator, they shall jointly request that an arbitrator be appointed by the Public Employee Labor Relations Board in accordance with its rules.

- g. Following the conclusion of the negotiations, the Union ratified the contract.
- h. On or about September 3, 1999, David A. Hodgen, the City's Chief Negotiator, forwarded a memorandum entitled "Tentative Agreement-Firefighters" to the Board of Mayor and Aldermen, the legislative and governing body of the City.
- i. In the September 3, 1999 memorandum, Mr. Hodgen set forth the changes in the Collective Bargaining Agreement, including among others, a notation in Section E, Management Rights Improvements, drug and alcohol testing.
- j. Pursuant to the terms of Article 35.3, the Parties began negotiations on or about October 18, 2000 in an effort to reach a mutual agreement upon the terms of the Drug Alcohol Testing Policy. Despite the efforts on the part of both parties to reach a general agreement and the resolution of some issues, the Parties agreed on October 19, 2001 that they had reached(sic) and impasse in their negotiations over certain aspects of the Drug and Alcohol Testing Policy and agreed to submit those outstanding issues to arbitration.
- k. Amongst the issues in dispute were proposals by the Union that a one hundred thousand dollar (\$100,000) indemnity fund be created by the City and that the City indemnify the Union and hold it harmless for any suits brought in conjunction with the application or enforcement of the drug and alcohol policy.
- l. The Parties agreed to the appointment of Paul Dorr of Sandwich, Massachusetts to serve as an arbitrator in this dispute. An arbitration hearing was held on May 21, 2002 at the Manchester (sic) before Arbitrator Dorr.
- m. The City, in part, asserted to Arbitrator Dorr its belief that "...with all due respect that it would be illegal for an arbitrator to impose this cost upon the City."
- n. The City asserted, in part, to Arbitrator Dorr that "only the Board of Mayor and Aldermen have the authority to give such an indemnification" and that "[f]urther, such an indemnification would be 'cost item' just as is the \$1000,000 "indemnity fund" discussed above under Section 11-. All cost items are subject to approval by the Board of Alderman."

The Parties are unable to agree on all factual matters which they respectively believe are relevant to the determination of this complaint and, as such, such matters must be subject to evidence at a hearing.

WITNESSES

For the Complainant:

1. Jean Brassard
2. William Clayton
3. Jeffrey Duval
4. Patrick Garrity
5. Richard Molan
6. David Hodgen

For the Respondent:

1. David Hodgen, Chief Negotiator, City of Manchester
2. Francis Monnelly,

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order, or upon proper showing, later reasonable notice to the other party. It is understood that each party may rely on the representations of the other party that witnesses appearing on their respective list will be available at the hearing.

EXHIBITS

Joint:

1. Collective Bargaining Agreement effective July 1, 1999 to June 30, 2002

For the Complainant:

1. Memorandum from David Hodgen dated October 6, 1999
2. City's Position Paper submitted to Arbitrator Paul Dorr
3. Decision of Arbitrator Dorr (pending)

For the Respondent:

1. March 8, 1999 City proposal on drug and alcohol testing
2. July 29, 1999 memorandum from David Hodgen with Union proposal
3. August 6, 1999 negotiation notes of David Hodgen
4. February 3, 2000 letter from Jean Brassard with Union proposal
5. June 5, 2001 Drug and Alcohol Testing, Proposal #4 by Union
6. January 22, 2002 letter from Richard Molan to Paul Dorr
7. May 22, 2002 letter from Richard Molan to David Hodgen

8. May 24, 2002 letter from David Hodgen to Richard Molan
9. June 21, 2002 letter from Richard Molan to Paul Dorr
10. June 28, 2002 letter from David Hodgen to Paul Dorr

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order, or upon proper showing, later reasonable notice to the other party. Copies of all exhibits are to be submitted to the presiding officer in accordance with Pub 203.02. It is to be understood by the parties that each party may rely on the representations of the other that the exhibits listed above will be available at hearing.

#### LENGTH OF HEARING

The time being set aside for the hearing of this matter is one day. If either party believes additional time is required, written notice of the need for additional time shall be filed with the PELRB no later than ten (10) days from the date of this Order.

#### DECISION AND PRE-HEARING ORDER

1. Following a post-hearing telephonic conference between the parties' legal counsel and the Hearing Officer, it was agreed by the parties that this matter would be scheduled for November 14, 2002. It was further agreed that neither party would suffer prejudice by that scheduling.
2. The party representatives have submitted Joint Pre-Hearing Conference Statement that includes their respective Witness and Exhibit lists. The party representatives shall meet, or otherwise arrange, to pre-mark for identification purposes and exchange copies of their respective proposed exhibits, excepting those singularly required for impeachment purposes prior to the scheduled evidentiary hearing. Such exhibits shall be produced in sufficient number at the hearing as required by Pub 203.02.
3. Any preliminary, procedural or dispositive motions shall be filed by the parties no later than ten (10) days prior to the scheduled hearing date.
4. Unless otherwise ordered as a result of the filing of any subsequent motion, an evidentiary hearing between the parties is scheduled to be conducted at the Office of the Public Employee Labor Relations Board on Thursday November 14, 2002 beginning at 9:30 AM.

Signed this 9<sup>th</sup> day of September, 2002.



Donald E. Mitchell, Esq.  
Hearing Officer