

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Professional Firefighters of Salem, Local 2892,
IAFF, AFL-CIO

Complainant

v.

Town of Salem

Respondent

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Case No. F-0116-26

Decision No. 2003-005

APPEARANCES

Representing Professional Firefighters of Salem, Local 2892:

John Krupski, Esq., Counsel

Representing Town of Salem:

Robert P. Leslie, Esq., Counsel

Also appearing:

Jeffrey C. Towne, Town of Salem
Mary E. Donovan, Town of Salem
Arthur Barns, Town of Salem
Jeffrey J. Breen, Town of Salem
Eric Korb, Local 2892
James Goucher, Local 2892

BACKGROUND

The Professional Firefighters of Salem, Local 2892, IAFF, AFL-CIO ("Union") filed unfair labor practice (ULP) charges on June 4, 2002 against the Town of Salem ("Town") alleging violations of RSA 273-A:5 I (e), (g), (h) and (i) resulting from breach of contract, ordering unit personnel to work outside established shifts, refusal to bargain resulting from a unilateral change in working conditions and direct dealing with unit members on Workers'

Compensation supplemental payments. On July 3, 2002 the Town filed its answer and a Motion for Leave to File Late Answer. On July 10, 2002, the Union filed a Motion for Default because the Town had not timely filed its response. Rule PUB 201.03. The Union filed an objection to the Town's Motion for Leave to File Late Answer on July 16, 2002 followed, on July 24, 2002, by its objection to the Town's Motion to Dismiss the ULP. On July 25, 2002, the Town filed its Motion to Dismiss and an objection to the Union's Motion for Default. The Union also submitted a Pre-Hearing Conference Statement dated July 25, 2002.

A pre-hearing conference was subsequently held in this matter on July 29, 2002, as memorialized by Decision No. 2002-086. The Town filed a Motion to Recuse on August 5, 2002 in accordance with Decision No. 2002-086 which has been observed, in PELRB procedures since that filing. Additional post pre-hearing conference submittals have been the Union's Motion to Clarify/Amend filed August 7, 2002, the Union's objections to the Town's Motion to Dismiss filed August 9, 2002, the Town's Answer and Objection to the Union's Motion to Clarify/Amend filed August 22, 2002 and the Union's Answer to the Town's Objection to Motion to Clarify/Amend filed on August 30, 2002. The Town then sent the Executive Director a clarifying letter dated September 12, 2002 pertaining to its withdrawal of a statute of limitations defense raised in its Answer and Objection to the Union's Motion to Clarify/Amend.

This matter was scheduled for hearing before the PELRB on September 26, 2002, subsequently continued at the request and consent of the parties and ultimately heard on November 19, 2002. At the commencement of the proceedings, counsel for the Union withdrew those portions of the ULP pertaining to Worker's Compensation supplemental payments¹, breach of contract and direct dealing, thus leaving open only the charges pertaining to RSA 273-A:5 I (e), (g) and (i) resulting from alleged improper shift assignments and a refusal to bargain related thereto. At the conclusion of their respective presentations before the PELRB on November 19, 2002, the parties agreed to file post-hearing briefs on or before December 31, 2002. Both briefs were timely filed by the parties on December 30, 2002 and December 31, 2002, respectively.

FINDINGS OF FACT

1. The Town of Salem employs firefighters and other personnel in the operation of its municipal fire department and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.
2. The Professional Firefighters of Salem, IAFF Local 2892 is the certified bargaining agent for all full and part-time employees of the Salem Fire Department in the job categories of firefighter, lieutenant, captain, firefighter/paramedic, dispatcher, part-time dispatcher, communications supervisor, fire inspection, fire mechanic, assistant fire mechanic, fire alarm technician and personal safety equipment technician. (Joint Ex. No. 1, Article 3.)

¹ See Town Ex. No. 1, Arbitrator's award relating to Grievants Boisvert and Enos which addressed the issues of "Did the Town violate the contract by requiring the grievants to work a schedule at variance with Scheduled "B" of the collective bargaining agreement? If so, what shall be the remedy?" The award in this case was dated September 24, 2002 and further denominated AAA Case No. 1139-0374-02.

3. The Town and the Union are parties to a collective bargaining agreement (CBA) for the period April 1, 2001 to March 31, 2004. Article 14 addresses "Hours of work and overtime" by providing, in pertinent part, "all line personnel shall work an average of forty-two (42) hours per week in accordance with the schedule set out as Appendix B." Appending B is a "10 and 14" fire department schedule consisting of 10-hour day shifts and 14 hour night shifts where employees typically work two 10-hour days, two 14-hour nights and then have four days off. This is repeated over an 8-week cycle as defined by Appendix B.

4. Eric Korb has been employed by the Town as a firefighter for 24 years. He has been president of Local 2892 the past 4 years and participated in the negotiations for 2001-2004 CBA. He testified that, during the course of negotiations for the 2001-2004 CBA, no efforts were made to raise, discuss or negotiate issues relating to alternate or "light" duty or circumstances pertaining to unit members when injured on duty or off duty. Korb said he was under the impression that Articles 40 and 44 of the CBA protected the Union from unilaterally imposed changes after the parties agreed upon the new contract. In this vein, he referred to Article 40, Section 4 which provides, "It is mutually acknowledged that there exist Town Personnel Rules which specify rights, privileges, and/or procedures which are applicable to unit members. When the [collective bargaining] agreement and the rules specifically cover the same subject and conflict, the agreement will prevail. Such rules may be unilaterally changed by the Town." Article 44 provides, "All hours of work, benefits and conditions of employment not specifically addressed in this contract shall remain in full force and effect."

5. Article 6 of the CBA is directed to "Management Rights." Section 1 (F) and 3 provides:
 1. The parties agree that all rights and responsibilities of the Town which have not been specifically provided for in this agreement are retained in the sole discretion of the Town whose right to determine and structure the goals, purposes, functions and policies of the Town without prior negotiation with the Unit shall include but not be limited to the following:

* * * * *

- F. The right to make rules, regulations, and policies not inconsistent with the provisions of this agreement and to require compliance therewith.

* * * * *

3. No part of this Article shall be construed so as to preclude any employee from filing a grievance concerning application of any Article of this Agreement that concerns wages, hours, or conditions of employment.

6. After the conclusion of negotiations for the 2001-2004 CBA (Joint Ex. No. 1), the Town adopted a "Town of Salem Policy Manual" for all departments, effective on or about July 1, 2001, and denominated both as Union Ex. No. 1 and as Attachment A to Union's Motion to Clarify/Amend in these proceedings. Paragraph 3 of the "Introduction" to the Policy Manual says:

To the extent that policies in this manual are contrary to the terms of an applicable collective bargaining agreement, department general order, department standard operating procedure, or department administrative bulletin, the terms of the collective bargaining agreement, general order, standard operating procedure or administrative bulletin will govern.

This document also includes, at page 26, a Temporary Alternate Duty ("TAD") policy. The policy objective of the TAD, listed as HR01-09, is stated as:

In compliance with RSA 281-A:23-b, the Town of Salem provides temporary alternative work opportunities to all employees disabled by a work-related injury or illness. As soon as the employees' treating physicians have released them to lighter duties than their current positions require, the employees shall notify their department heads and Human Resources. The employees may be called upon to return to employment in a temporary alternate position. Such temporary re-assignment may require an employee to perform different duties, work in a different position or department, or work a different work schedule than his or her permanent position requires.

7. A Memorandum of Agreement between the Town and the Union dated November 21, 1997 and identified here as Town Ex. No. 2, provided, at Item 3 thereof, that "The Town agrees that until a formal temporary alternate duty policy is adopted by the Town under the rules of RSA 281-A:23-b, employees will be scheduled to work temporary alternate duty within the confines of the employee's normal work schedule." This document was signed by Frederick Doucette, the then president of Local 2892 and by Stephen Daly, Town Manager, and Mary Donovan, Human Resources Manager for the Town.

8. Korb further testified that after the Town's Policy Manual was adopted effective July 1, 2001, he and Union counsel Krupski met with Town Manager Jeffrey Towne in October of 2001 to express their concerns to him about the

TAD and other matters.² Korb represented that Towne said the Policy Manual had been time sensitive, that there had been pressure to get it out and that he would negotiate the TAD as well as drug and alcohol issues with the Union. Korb concluded by saying the Union has since approached the Town and asked to negotiate with the result that the Town has declined to do so.

9. Fire Chief Arthur Barnes confirmed that firefighters Dennis Boisvert and Francis Enos were assigned TAD pursuant to policy HR01-09 in December of 2001. More specifically, Boisvert was assigned to work a Monday-Friday 8 to 5 shift, with a mechanic, a bargaining unit position during the normal hours for that position, from approximately December 10 to 21, 2001. Enos was assigned to work 4 hours a day, five days a week (Monday through Friday) based on his doctor's note.
10. Jeffrey Towne, the Town Manager, testified that the Policy Manual, Union Ex. No. 1, was designed to and does apply to all 235 full-time and seasonal employees of the Town, regardless of whether they are covered by any of the four collective agreements. He believes the provisions of the Policy Manual are subordinate to the provisions of the CBA if the two conflict. He recalled meeting with Korb and Counsel Krupski in October and discussing what would control if a Policy Manual provision conflicted with a CBA provision.

DECISION AND ORDER

Light duty, or "temporary alternate duty" as it is referred to in this case, is not a topic which has escaped contemplation or definition by the parties, as is evident from Town Ex. No. 2 which dates to November of 1997. That "Memorandum of Agreement" remained in place from November of 1997 to the expiration of that CBA in March of 1998, throughout the 1998-2001 CBA, and from April 1, 2001 until July 1, 2001 of the current CBA when temporary alternate duty ("TAD") provisions went into effect under the "Salem Policy Manual," Union Ex. No. 1.

On or about November 21, 1997, the parties jointly signed a Memorandum of Agreement (MOA) which provided that, "*until* a formal temporary alternate duty policy is adopted by the Town..., employees will be scheduled to work temporary alternate duty within the confines of the employee's normal schedule." (Emphasis added.) The restriction on how long the "normal schedule" provisions would last was self-defined, namely, until a formal temporary alternate duty is adopted by the Town. The MOA has no provisions requiring consultation, consensus or agreement on the TAD policy by the Union and the Town before implementation. To the contrary contract language suggests that the Town had authority for unilateral implementation, *infra*.

After the parties signed the 1997 MOA, they negotiated their 1998-2001 CBA in which the Management Rights clause was identical to its 2001-2004 counterpart recited at Finding No.

² See Union Ex. No. 2, a letter from Union counsel Krupski to Town Manager Towne dated October 5, 2001, memorializing this meeting.

5, above. Likewise, those provisions of Articles 40 and 44 quoted in Finding No. 4, above, appeared in the 1998-2001 CBA. Thus, within six months of signing the MOA, the parties signed a CBA which acknowledged the existence of personnel rules, albeit not then in the same form and content as now found in Union Ex. No. 1, which "may be unilaterally changed by the Town." They reiterated this acknowledgement and authority in the signing of the 2001-2004 CBA in the spring of 2001 (Joint Ex. No. 1).

With the limited, self-defined protective authority of Town Ex. No. 2 and two subsequent, specific reiterations of authority, namely, those found in Article 40 ("maybe unilaterally changed by the Town") and Article 6, Section 1 (F) (3) ("the right to make rules, regulations and policies not inconsistent with the provisions" of the CBA), we believe this language and authority to be controlling over the less specific provisions of Article 44 ("All hours of work, benefits and conditions of employment not specifically addressed" in the CBA) and Article 14 as it addresses hours of work and overtime.

Language appears in two places which resolves conflicts between rules and the CBA or between policies and the CBA in favor of the CBA. See CBA Article 40, Section 4 (Finding No. 4, above) and the Salem Policy Manual (Union Ex. No. 1 and Finding No. 6, above). In each instance, however, in order for the conflict to be resolved in favor of the CBA, there must be a discrepancy between the rules and the contract (Article 40) or between the policies and the contract (Policy Manual, "Introduction" section, Finding No. 6, above). We do not find such a discrepancy to exist because what has been referred in these proceedings as temporary alternate duty is not referenced in the CBA, Joint Exhibit No. 1. We do not find the "to be resolved in favor of the contract" provisions to be applicable here because we find no contract language which is at odds with HR 01-09 as appears at Finding No. 6, above.

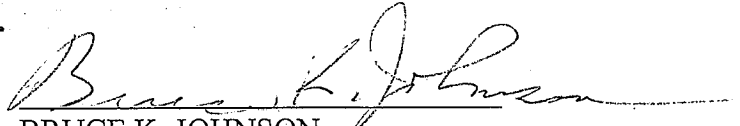
We find no violation of past practice resulting from the adoption of the TAD provisions of the Salem Policy Manual because of the discretions and authorities conferred by the parties to each other relative to the Town's unilateral authority to make or change Town Personnel Rules, as referred to in CBA Article 40. Having so found, we direct no remedies to or on behalf of bargaining unit members Boisvert and Enos.

We are troubled by what appears to have been, or may have been understood to have been, an offer to negotiate, as described in Finding No. 8, above, and not rebutted by the Town. We urge the Town to participate in "impact bargaining" relating to terms and conditions of employment when and if it should be requested. We also encourage the parties to be mindful of their respective duties to respond to all demands to bargain over issues concerning "terms and conditions of employment" in the course of negotiations for a successor agreement. It has been the parties' choice over many years to have separate contracts for separate operating departments in the Town. An implicit desire to have a Town policy or policy manual which is applicable equally to all departments and all employees, whether organized or not, is not cause to ignore provisions of a CBA or the obligations to bargain found in RSA 273-A:3.

In accordance with the foregoing, the ULP is DISMISSED.

So ordered.

Signed this 7th day of February 2003.


BRUCE K. JOHNSON
Alternate Chairman

By unanimous decision. Alternate Chairman Bruce K. Johnson presiding. Members Richard W. Roulx and E. Vincent Hall present and voting.