



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Council 93, Local 298,
Manchester Master Agreement

Complainant

v.

City of Manchester

Respondent

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Case No: A-0544-64

Decision No. 2004-029

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

AFSCME Counsel 93, Local 298 (hereinafter "the Union") filed an unfair labor practice complaint on February 11, 2004 alleging that the City of Manchester (hereinafter "the City") committed unfair labor practices in violation of RSA 273-A:5 I (b) and (i) as the result of the certain conduct arising out of the performance evaluation of an employee. More specifically, the Union states that its member, Scott Danielson ("Danielson"), who is employed by the City as a Recreation Maintenance Worker I, was given an annual review of his work performance on June 10, 2003 and then again on June 11, 2003. The Union claims that contrary to required policy, Danielson's supervisor, Donald Sowa ("Sowa"), did not fill out the first evaluation, and that after an initial denial it was acknowledged that Ron Ludwig ("Ludwig"), Director of Parks and Recreation, had actually completed the form. Based upon the results of the first evaluation, Danielson was denied a step increase in pay. When he was evaluated once more on June 11th, this time by his direct supervisor, he was again denied a step increase. Danielson thereafter appealed the denial of his step increase pursuant to the procedures set forth in Appendix A of the parties' collective bargaining agreement. The Union avers that when the appeal was heard on August 12, 2003, the City presented evidence of work history dating back to 1976.

The Union contends that the City's actions in having the Danielson performance evaluation filled out by the Director and not the Supervisor, conducting a second evaluation, and using decades old work history all constitute violations of the negotiated performance appraisal system. The Union states that such conduct serves to invalidate portions of an agreement entered into by the City, and thus the City has knowingly and willfully violated RSA 273-A:5 I (i). The Union also asserts that the City's conduct interferes with and undermines the whole evaluation

process, thereby constituting an interference with the formation or administration of its employee organization in violation of RSA 273-A:5 I (b). The Union requests, among other things, that the PELRB sustain its complaint against the City, grant Danielson his step increase for the 2003 annual review period and make him whole for any and all lost pay and benefits.

The City filed its answer denying the complaint on February 25, 2003. While the City generally admits to the chronological history as alleged by the Union, it denies that it has committed an unfair labor practice. At the outset, the City states that with respect to claims made relative to performance appraisals, Article 7.6 of the parties' CBA provides that "[e]mployee appeals on their annual performance evaluation will be according to the process agreed to by the Union and the City" and specifically references Appendix A of the contract. The mutually agreed process described in Appendix A provides for an appeal hearing before a committee whose decisions are "final" and "binding." Accordingly, the City states that the Union's filing of the instant complaint constitutes a breach of the terms of the parties' CBA, contrary to RSA 273-A:5 II (f), and a failure to negotiate in good faith, contrary to RSA 273-A:5 II (d).

While the City denies that Director Ludwig filled out Danielson's June 10, 2003 evaluation, it admits that Sowa, the Supervisor, mistakenly used an outdated version of the evaluation form on that date and therefore completed a new evaluation form on June 11, 2003. Under both evaluations, the City admits that the recommendation was for Danielson not to receive a step increase. Moreover, despite the City's admission that Ludwig did present evidence of Danielson's work history dating back to 1976, it states that such evidence was in response to representations first made by Danielson to the appeals committee relative to his work history, particularly in support of Danielson's claim of bias being held against him by Ludwig. In this manner, the City alleges, Danielson "opened the door" for the presentation of such evidence. The City also states that the terms of the CBA do not prohibit such evidence from being presented.

As to the Union's RSA 273-A:5 I (i) allegation, the City contends that the Union has not only failed to identify any law, regulation or rule adopted by the City which allegedly invalids a portion of the parties' CBA, but it has not even alleged that the City adopted any law, regulation or rule in the instant case. Similarly, as to the Union's RSA 273-A:5 I (b) allegation, the City submits that the Union has failed to state a claim under this section as there are no facts alleged to support such a conclusion. The City requests that the PELRB (1) find that the Union has filed the instant charge in bad faith, (2) dismiss the charge, (3) order the Union to cease and desist in its effort to circumvent the mutually agreed grievance process for performance appraisals, and (4) order such other just and proper relief, including the awarding costs against the Union.

The City also filed a Motion to Dismiss on February 25, 2004 wherein it raises four basic arguments. The City asserts that based upon the "final and binding" appeal procedure negotiated by the parties, the PELRB does not have jurisdiction to hear allegations raised concerning Danielson's 2003 annual performance evaluation. The City further submits that the Union's complaints relative to Danielson's evaluation being prepared by the Director and the so-called second evaluation, both occurring in June 2003, must be summarily dismissed because they are time barred under the PELRB's six-month statute of limitations. Alternatively, the City avers

that the Union has failed to state a claim upon which relief can be granted in both its sub-section (b) and (i) allegations under RSA 273-A:5 I. Finally, the City asserts that under the doctrine of estoppel, the Union is prohibited from complaining about Director Ludwig introducing evidence of Danielson's work history where it was Danielson himself who first raised the issue before the appeals committee.

A pre-hearing conference was conducted at the PELRB on March 10, 2004 during which both parties were represented by counsel.

PARTICIPATING REPRESENTATIVES

For the Union: Katherine M. McClure, Esq.

For the City: Daniel D. Muller, Jr., Esq.

ISSUES FOR DETERMINATION BY THE BOARD

- (1) Should the Union's complaint be dismissed based upon the PELRB's lack of jurisdiction over the instant matter?
- (2) Should the Union's complaint, or any portions thereof, be dismissed as being violative of the six-month statute of limitations per RSA 273-A:6 VII?
- (3) Should the Union's complaint, or any portions thereof, be dismissed for failure to state a claim upon which relief may be granted?
- (4) Is the Union "estopped" from contesting the City's introduction of work history evidence during the appeals committee hearing?
- (5) Has the City committed an unfair labor practice within the meaning of RSA 273-A:5 I (b) by unilaterally changing the parties' negotiated evaluation procedure?
- (6) Has the City committed an unfair labor practice within the meaning of RSA 273-A:5 I (i) by dominating or interfering with the administration of the employee organization?

WITNESSES

For the Union:

1. Scott Danielson
2. Michael Rockwell

For the City:

1. David Hodgen

2. Virginia Lamberton
3. Ronald Ludwig
4. Donald Sowa
5. Member(s) of the Appeals Committee, if necessary

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 with 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 Exhibits:

1. AFSCME Master Agreement, July 1, 2002 to June 30, 2004.
2. Performance Review 6/12/02-6/11/03
3. Performance Review 6/11/02-6/11/03
4. August 13, 2003 letter to Scott Danielson denying appeal.

For the Union

1. None other than those marked as "Joint."

For the City:

1. AFSCME Master Agreement, 1999 -2002
2. Bargaining notes of 1/11/99 meeting with Union
3. Chief Negotiator's notes of collaborative bargaining sessions (4/12/99-10/12/99)
4. City and CBC proposals and counterproposals on salaries and employee development appeals process (6/25/99 - 10/19/99).
5. Any records of the Appeals Committee on the Danielson appeal.
6. Any exhibits presented to the Appeals Committee in the Danielson appeal.

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 with 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 understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

LENGTH OF HEARING

The time set aside for this hearing will be one (1) day. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least twenty (20) days prior to the date of the evidentiary hearing.

DECISION AND ORDER

1. As indicated above, the City filed a Motion to Dismiss with the PELRB on February 25, 2004. The PELRB thereafter notified the Union that its response to the City's motion was due on or before March 11, 2004. At the pre-hearing conference, Union counsel requested an additional period of time to file its response to which City counsel indicated his assent. Accordingly, the Union's answer to the City's motion is due to be filed with the PELRB on or before **March 18, 2004**.
2. The parties' representatives shall meet, or otherwise confer, on or before **April 15, 2004** in order to compose a mutual statement of agreed facts. The parties' representatives shall memorialize those facts upon which they can so stipulate and file that document with the PELRB at least five (5) days prior to the date of the hearing.
3. The party representatives shall forward any amendments to, or deletions from, their Witness and Exhibit lists, as detailed above, to the opposing representative or counsel, and to the PELRB, at least five (5) days prior to the scheduled hearing date. The party representatives shall meet, or otherwise arrange, to pre-mark any exhibits, for identification, prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.
4. The parties shall file any additional preliminary, procedural or dispositive motions, including a Motion to Dismiss, no later than twenty (20) calendar days prior to the scheduled hearing date.
5. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an evidentiary hearing between the parties will be held on

May 6, 2004 at 9:30 AM

at the offices of the Public Employee Labor Relations Board, Concord, New Hampshire.

So ordered.

Signed this 15th day of March, 2004.



Peter C. Phillips, Esq.
Hearings Officer

Distribution:

Katherine M. McClure, Esq.

Daniel D. Muller, Jr. Esq.