State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

City of Portsmouth Petitioner	*	Case No. A-0411-41 Decision No. 2004-111
AFSCME Council 93, Local 1386 Portsmouth City Employees Respondent	*	

APPEARANCES

Representing the City of Portsmouth:

Thomas J. Flygare, Esquire

Representing AFSCME Council 93, Portsmouth City Employees Local 1386,

Katherine McClure, Esquire, AFSCME Counsel

DECISION AND ORDER

BACKGROUND

The City of Portsmouth (hereinafter "the City") filed an improper practice charge on December 2, 2003 alleging that the Portsmouth City Employees, AFSCME Local 1386 (hereinafter "the Union") committed an unfair labor practice by demanding arbitration of three (3) grievances after the time limit for submitting the grievances to arbitration had already expired. In its complaint, the City specifically references provisions contained in the parties' collective bargaining agreement (CBA) that establish a time period of thirty (30) workdays, following the Union's receipt of the City's Step 2 answer, for the Union to file for arbitration and deem any grievance not so submitted to arbitration as being "dropped." Whereas the Step 2 answers for the subject grievances were issued by the City Manager on June 10, 2003 and the Union did not file for arbitration until October 7, 2003, the City argues that the arbitration demands are

untimely and the grievances not arbitrable. The City states that the Union's actions in this regard violate RSA 273-A:5 II (d), (f) and (g).

The Union filed its answer to the City's charge on December 15, 2003. The Union initially filed a counter-claim against the City that it later withdrew. The Union admits the City's allegations of certain actions being undertaken on certain dates but asserts that the City, itself, has consistently disregarded the time limits set forth in the parties' grievance procedure. In support of this assertion, the Union cites a grievance that it filed on July 29, 2002 that was subsequently answered by the City, at Step 1, on October 9, 2002 and, at Step 2, on December 20, 2003. By way of further answer, the Union states that the grievance procedure allows for the parties to extend time limits by mutual agreement and that, through their prior actions, a course of dealings had developed where this provision was not strictly enforced.

After a joint motion to continue a March 11, 2004 hearing was granted, an evidentiary hearing was convened at the offices of the Public Employee Labor Relations Board in Concord on May 20, 2004. At this hearing both parties were represented, had the opportunity to make offers of proof or present witnesses and exhibits and to cross-examine witnesses. Both parties made oral closings to the Board. The Board reviewed all filings submitted by the parties and considered all relevant evidence. It accepted stipulated facts offered by the City to which the Union had no objection and they are included as #'s 1-4 among the Board's findings listed below. Upon conclusion of oral argument, the Board closed the record, reviewed the cases as submitted and determined the following:

FINDINGS OF FACT

1. The City of Portsmouth ("City") is a public employer under RSA 273-A. It is a party to a collective bargaining agreement ("CBA") from July 1, 1998 to June 30, 2003 with AFSCME Local #1386 ("Union"). The City and the Union are currently negotiating for a successor agreement.

2. On June 10, 2003 the City Manager of Portsmouth, John B. Bohenko, issued written "Step 2" decisions in three grievances filed by Kenneth Fanjoy, president of the Union ("Fanjoy grievances").

3. On October 7, 2003, the Union demanded arbitration for the Fanjoy grievances.

4. On November 17, 2003, Donald E. Mitchell, Esq., Executive Director of the PELRB, issued one list of arbitrators for the Fanjoy grievances.

5. The Portsmouth City Employees, AFSCME Local 1386 ("Union") is the certified exclusive bargaining representative for certain non-supervisory employees of the City of Portsmouth.

6. The parties' collective bargaining agreement ("CBA") provides, in relevant part, within ARTICLE 20.2.F that:

> "All demands for arbitration shall be submitted to the PELRB within thirty (30) work days of the Union's receipt of the City's Step 2 answer. Any grievance for which a demand for arbitration is not submitted to the PELRB within thirty (30) work days shall be deemed dropped."

7. On June 10, 2003, the City Manager issued so-called "Step 2" decisions in three grievances filed by the Union. (See Attachments D, E, and F to the City's Complaint).

8. On October 7, 2003, the Union demanded arbitration of the same three grievances. (See Attachments A, B, and C to the City's Complaint).

9. There were in excess of thirty (30) working days, defined as Mondays through Fridays, not including holidays (CBA, ARTICLE 20.4) between the receipt the Step 2 decisions by the Union and the submission of the Union's demand to the PELRB.

10. The parties' collective bargaining agreement ("CBA") provides, within ARTICLE 20.2.H that:

> "The time limits set forth in Items B, C, D, and F may be extended by mutual agreement of the parties. It is understood that if the union wishes expedited treatment of a grievance it should so notify management so that hearings and decisions will be handled quickly."

11. The Union did not express any request to the City for an extension of time to file any of the three grievances at issue in these proceedings.

12. The City did not express any approval of an extension in any of the three grievances at issue in these proceedings.

13. There is no documentary evidence submitted by the Union as proof that extensions of the thirty work day time limit contained in the parties' CBA ARTICLE 20.2.F were allowed without the express consent of the City in the past.

14. Although the Union's witness testified that there was a "relaxed procedure between the parties" regarding the timeliness of grievance filing he could

remember no grievances, other than the three at issue here, when he did not ask for an extension from the City if he needed it.

15. The Union Representative did make requests regarding the extension of the time limit for filing for arbitrations prior to the three at issue here. (See City Exhibit #3 and #5).

JURISDICTION

The PELRB has primary jurisdiction of all complaints alleging violations of RSA 273. See RSA 273-A:6. In this matter, the City alleges that the Union's untimely demand for arbitration violates RSA 273-A:5, II (d), (f), and (g) and thereby constitutes an unfair labor practice. The Board therefore assumes jurisdiction over this complaint.

DECISION SUMMARY

The parties' collective bargaining agreement clearly expresses a thirty (30) work day time period within which a party must demand arbitration of its grievance or that grievance is "dropped". That limited period lapsed by a substantial number of days before the Union filed its demands for arbitration without satisfactory proof that any extension had been granted by the City. Nevertheless, it filed its demand for arbitration and in doing so committed an unfair labor practice.

DISCUSSION

The City and the Union in this action are parties to a collective bargaining agreement. (Joint Exhibit #1). As part of this agreement, they have agreed to be bound by a grievance procedure for the resolution of disputes that may arise during the administration of their agreement. This procedure consists of several incremental steps whereby, as in this case, an employee who files a grievance first discusses it with his or her union representative, if still dissatisfied, the grievance is submitted to the appropriate Department Head (referred to as "Step 1") who issues his or her decision. If no agreement is reached, then the Union submits the grievance to the City Manager who also is required to issue a written decision (referred to as "Step 2." Thereafter, if there is no resolution the grievance may be submitted to final and binding arbitration. However, in order to preserve the right to submit an unresolved grievance to arbitration, the parties have agreed that such a demand for arbitration shall be submitted "within thirty (30) work days" (Finding of Fact #6, CBA ARTICLE 20.2.F) of their receipt of the City Manager's written decision. The parties' further agreed that if a demand for arbitration is not submitted within the thirty work days it "shall be deemed dropped." (*Id.*)

In the three grievances at issue here, the parties agree that the City Manager issued his written decision in letter form on June 10, 2003. (Finding of Fact #7, City

Exhibits D, E, and F.) They further agree that the Union did not submit its demands for arbitration of each of the three grievances until October 7, 2003. (Finding of Fact #8, Union Exhibits 1, 2, and 3). The period of time between June 10, 2003 and October 7, 2003 substantially exceeds the thirty work day time limit the parties agreed to when they executed their collective bargaining agreement.

We find the relevant provisions ARTICLE 20.2.F and ARTICLE 20.2.H to be clear and unambiguous. The Union argues that past actions of the parties created a course of dealing, or what is commonly referred to as "past practice" within the labor relations community, which should allow time extensions for actions by either party without the approval or consent of the other. It offers as support for its position that there existed a "relaxed" attitude about extensions. Its own exhibits reveal demands, following Step 2 decisions, for arbitration involving matters not before us that were timely made within the thirty work day limit. (See Union Exhibits #7 and 8). We will not give weight in examining past practice to demands made in response to Step 2 decisions that occurred after the matters presently before us. We do have before us two clear examples of written requests for extensions and responses. (City Exhibit #4 and 5).

In short, we do not find that there was any mutual extension of the time limit required pursuant to the collective bargaining agreement nor other sufficient evidence presented by the Union to convince us that we should read the contract provision as being other than a clear expression that the parties wanted to limit to thirty days the period within which either of them could elect to proceed to binding arbitration. Certainly if the parties have any other intention, they are free to express it in their next collective bargaining agreement.

We find that the Union has committed an unfair labor practice and order that it is to immediately withdraw its demands to arbitrate these three grievances. No award of costs and fees is made.

So Ordered.

Signed this 3rd day of August, 2004.

Bruce K. Johnson

Bruce Johnson, Alternate Chairman

By unanimous vote. Alternate Chairman Bruce Johnson presiding with Board Members Richard E. Molan and Richard W. Roulx also voting.

Distribution:

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