State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Council 93, Local 298, Manchester Master Agreement Complainant v. City of Manchester Respondent	*	Case No: A-0544-64 Decision No. 2004-119

PARTICIPATING REPRESENTATIVES

For the Complainant: Katherine M. McClure, Esquire, Associate General Counsel
AFSCME, Council 93, Local 298

For the Respondent: Daniel D. Muller, Jr., Esquire

BACKGROUND

AFSCME Council 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 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, 2003, 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 parities' 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 necessary to rebut the claim of bias. 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 invalidates 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 of interference with the formation or administration of the bargaining unit, 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.

Following a pre-hearing conference, conducted on March 10, 2004, the PELRB conducted a final hearing on June 8, 2004 at the offices of the Public Employee Labor Relations Board in Concord. At this hearing both parties were represented by counsel. The parties agreed to submit their respective cases of the Union's complaint and of the City's motion on stipulated facts as are listed below and exhibits without the need for additional evidence as there is no dispute as to the relevant facts. However, prior to proceeding to consider the parties' arguments on the merits, the Board heard oral argument on the City's Motion to Dismiss on the bases of (1) lack of PELRB jurisdiction to consider the Union's complaint; (2) failure of the Union to state a cognizable claim; and (3) failure of the Union to file its complaint within the required six-month limitation on actions; and (4) estoppel. The Board first heard arguments on the City's motion before considering any testimony on the merits of the Union's case. In first considering its ruling on the City's motion to dismiss, the Board reviewed all filings submitted and arguments advanced by the parties. It accepted the parties' joint exhibits and accepted the stipulated facts appearing as #'s 1-20, below.

FINDINGS OF FACT

1. The City of Manchester (hereinafter, the "City") is a public employer.

2. AFSCME, Local 298 (hereinafter, "AFSCME") is the exclusive representative of, among other persons, certain employees within the City's Parks, Recreation and Cemetery Department (hereinafter, the "Parks Department").

3. The City and AFSCME are parties to the Master Agreement Between the City of Manchester, NH and Local 298, AFSCME, AFL-CIO, 2002-2004 (hereinafter, the "CBA").

4. Any language in the CBA relative to the annual performance evaluation had its origins in the collaborative bargaining negotiations between the City and all of its unions, including AFSCME, in 1999.

5. The language in Appendix A of the CBA relative to the appeals process resulted from proposals and counterproposals by both the City and the unions, including AFSCME, during the 1999 collaborative bargaining negotiations.

6. Scott Danielson is employed in the Parks Department as a Recreation Maintenance Worker I, a position represented by AFSCME.

7. Mr. Danielson received step increases in pay as the result of satisfactory evaluations in 2001-2002.

8. On June 10, 2003, a "City of Manchester, New Hampshire Human Resources Department Employee Development Plan Annual Performance Summary" was filled out with respect to Mr. Danielson. *See* Exhibit "2" attached to Improper Practice Complaint.

9. The score included on said form indicated that Mr. Danielson's performance was below quality standards.

10. On June 11, 2003, a "City of Manchester Employee Performance Appraisal" form was filled out with respect to Mr. Danielson. *See* Exhibit "3" attached to Improper Practice Complaint.

11. The form stated that a step increase was not recommended.

12. In response to the comments, Mr. Danielson wrote on said form that "I do not agree with alot*(sic)* of these commets*(sic)*, It is and has been a personality conflicts*(sic)* instead of a working conflict, Im*(sic)* waitng*(sic)* to get heard by the review board on these commets*(sic)* These commets*(sic)* are personaltys*(sic)* over principles".

13. Mr. Danielson filed an appeal with Employee Development Appeals Committee (hereinafter, the "Appeals Committee").

14. A hearing on Mr. Danielson's appeal was conducted on August 12, 2003 before the Appeals Committee.

15. Michael Rockwell, AFSCME's President, attended the hearing before the Appeals Committee with Mr. Danielson.

16. At the appeal hearing, Mr. Danielson made the first presentation to the Appeals Committee.

17. At the appeal hearing. Mr. Ludwig made the second presentation to the Appeals Committee.

18. During his presentation to the Appeals Committee, Mr. Ludwig made references to Mr. Danielson's work history as well as identified deficiencies in his performance over the last year.

19. Mr. Rockwell objected to the discussion of the work history, but the Appeals Committee overruled his objection.

20. The Appeals Committee denied Mr. Danielson's appeal and Mr. Danielson was advised of the same by letter dated August 13, 2003.

DECISION AND ORDER TO DISMISS

The City's motion to dismiss the Union's complaint is granted based upon two premises. First, as to any cause arising from the filling out of the two evaluation forms in June, 2003 the Union's Complaint filed February 12, 2004 is barred by the statute of limitations as set forth in RSA 273-A:6, VII. Second, as to any cause of action arising from the admittance of Mr. Danielson's

historical performance on the job by the Appeals Board, the Union has failed to state a claim upon which relief from the PELRB may be granted. The Union has not articulated, by pleadings or by argument, that any reasonable reading of the express language the parties negotiated into their collective bargaining agreement, *i.e.* "final, binding, and non-grievable" or the actions of the joint management-labor Appeals Committee that they mutually established resulted in an the City's commission of an improper labor practice based upon RSA 273-A:5, I (b) (dominating or interfering with formation or administration of the bargaining unit) or RSA 273-A:5, I (i) (requiring the public employer to unilaterally invalidate a provision of the parties' agreement.)

The Board believes that the parties received what they had bargained for as expressed in their collective bargaining agreement and its Appendix A. The Appeals Committee is a joint management and labor entity. From what evidence is presently before us, we do not interpret its decision to constitute an exclusive action by the City or an exclusive action by the Union. If the parties desire to alter the authority of the Appeals Committee, or require it to employ formal evidentiary or procedural rules, or otherwise contract for the conduct of employee performance evaluations and appeals from such evaluations, either side may introduce modifications during its next round of negotiations.

As indicated above, the motion to dismiss the Union complaint is hereby granted.

So Ordered,

On this 6th day of August, 2004.

Doris M. Desautel, Alternate Chair

By unanimous decision. Alternate Chairwoman Doris M. Desautel presiding with Board Members E. Vincent Hall and Carol Granfield also voting.

Distribution:

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