



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Hampton Police Association	*	
	*	
Complainant	*	Case No. P-0719-20
v.	*	
	*	Decision No. 2006-075
Town of Hampton	*	
	*	
Respondent	*	

APPEARANCES

Representing the Association: J. Joseph McKittrick, Esquire, McKittrick Law Offices

Representing the Town: Elizabeth A. Bailey, Esquire, Sheehan Phinney Bass +Green, PA

BACKGROUND

This case is before the Board based upon an improper practice charge filed by the Hampton Police Association (hereinafter "the Association") against the Town of Hampton (hereinafter "the Town") on September 20, 2005 alleging that the Town violated RSA 273-A:5 I (a), (b), (c), (e), (g) and (h) as a result of its actions in unilaterally implementing a nepotism policy prohibiting relatives of current employees from being hired by the Town in any capacity. The Association further alleges that this action was undertaken despite the existence of a past practice of hiring related individuals to serve within the police department and specific communications from the Town Manager to the Association that the proposed nepotism policy would not affect the Association's members.

The Town filed its answer to the Association's improper practice charge on October 5, 2005, wherein it asserted that the nepotism policy has been in effect, and included in its personnel manual since January 1, 2004 affecting only employees hired after that date. On

January 19, 2006 the Town filed a motion to dismiss the Association's complaint as being untimely filed pursuant to RSA 273-A:6, VII because more than six (6) months has transpired since the institution of the policy and the date the Association's complaint was filed with the PELRB. Alternatively, the Town asserts that in the event the Association's complaint is not deemed time barred, that dismissal is still warranted because instituting the policy is within the rights reserved to management to set the criteria for hiring personnel and the policy is not in conflict with the parties' collective bargaining agreement ("CBA"). The Association filed its objection thereto on February 6, 2006 responding that it did not have knowledge that the policy would affect its membership until being informed by the Town on September 12, 2005 and therefore its filing was made within the statute of limitations. Additionally, the Association re-asserts that the policy violates the statute by conflicting with the terms of the parties' CBA, affecting wages, hours and conditions of work, and conflicts with a long standing past practice.

A pre-hearing conference was conducted on January 9, 2006. A final evidentiary hearing was conducted on March 22, 2006 at which both parties were represented by legal counsel, presented joint exhibits and had the opportunity to present witnesses and conduct cross-examination. Following the presentation of evidence brief oral argument was made and the record closed after a ruling by the Chairman that supplemental legal briefs were not necessary to the Board's deliberations unless the Board later deemed them to be so.

FINDINGS OF FACT

1. That the Town of Hampton (hereinafter "Town") is a public Employer as defined by the provisions of 273-A et. seq.
2. That the Hampton Police Association, Inc. (hereinafter "Association") is the Exclusive Bargaining Representative for two (2) bargaining units: the first consisting of all Police Sergeants; the second consisting of all full-time and all part-time Police Officers.
3. That the Association and the Town are parties to two (2) separate collective bargaining agreements ("CBA's") for the units noted above for the period April 01, 2003 to March 31, 2006. Neither CBA (Joint Exhibits #2, #3) makes a specific reference to the prohibition of the employment of relatives of other Town employees.
4. The Association filed its unfair labor practice complaint with the PELRB on September 20, 2005 following a response by the Town Manager to the Association's representatives, in a meeting on or about September 12, 2005, that the provisions of the Town's Personnel Policy related to the employment of relatives was being enforced.
5. The parties have engaged in the practice of hiring relatives of Town employees in the past without any evidence of conflict or employment problems based upon any degree of consanguineous or marital relation.

6. There are presently individuals employed by the Town on a part-time basis who are related to other full time employees of the Town.
7. Since 1996, no police officer, excepting managing police officers holding rank such as "Lieutenant", has been hired into the police full-time ranks without first serving as such in a part-time capacity with the Town. The hiring process for a part-time position is very stringent and has resulted in certain relatives being "screened out" in the past
8. Each CBA makes a reference in the Health Insurance provision that recognizes the existence of Town employees being married to other Town employees and provides a procedure for the application of health insurance in that event.
9. Each CBA contains a so-called "Management Rights" provision that provides in relevant part, " The prerogative or authority which management has not officially abridged, delegated or modified by this Agreement are retained by management, such as, but not limited to: ... "3. The selection, direction and number of personnel so as to continue the public control of government." (Joint Exhibits #2, #3).
10. The Board of Selectmen instructed the Town Manager to review and update the Town's Personnel Policy. The Town Manager endeavored to do this over a period that extended to five years without the Association's involvement. The Personnel Policy was distributed to approximately 230 Town employees in or about January 2004.
11. The Personnel Policy (Joint Exhibit #1, p.2) provides in relevant part, " The contents of this policy...do not alter contracts or labor agreement provisions."
12. The Town Manager testified that a "Receipt and Acknowledgement of Personnel Manual" was distributed to all town employees, accompanying the new Personnel Policy, however, there was little or no follow up to the actual receipt of the new Personnel Policy as only one employee returned such a signed receipt. (Town Exhibit #1 stamped :Jan 20 2006 for unrelated purposes) Steven Henderson, president of the Association signed his receipt more probably than not on January 3, 2004, despite what is likely to have been a scrivener's error indicating "2003", based upon the totality of the evidence.
13. The Personnel Policy contains a provision relating to the "Employment of Relatives" (Joint Exhibit #1, p.6) that provides in relevant part that (1) certain family relatives of employees "are not eligible to be hired for full-time Town employment."; also, (2) "Employees who become related or begin sharing living quarters as partners with one another subsequent to employment, will not both be permitted to continue working for the Town."; and finally (3) " a waiver may be granted by the Town Manager" in certain instances and (4) his decision to terminate either employee "is not subject to appeal or the grievance procedure."
14. In introducing the new Personnel Policy to the Town Employees, the Town Manager stated that the policy "has been designed to provide guidance and information concerning

the Town's policies for all employees and shall not apply in those areas that are found to conflict with collective bargaining agreements..." (See Joint Exhibit #4).

15. The terms relating to employees who become related after employment, as referred to in Finding of Fact #7, above, at (2) were not being applied by the Town Manager at the time of this hearing.
16. Association president Steven Henderson, along with other organized bargaining unit presidents requested to meet to discuss the changes contained in the policy document previously distributed with the Town Manager following his distribution of the new Personnel Policy and in response to his invitation to do so. (See Joint Exhibit #4).
17. Several meetings took place from shortly after the Personnel Policy was distributed and continued between the two parties through to at least November 2004. Application of the prohibition on hiring employee relatives was not evident until September 2005 when the Town Manager's use of it to deny potential employment to a relative of a present employee of the Department of Public Works prompted a direct question by the Association's counsel to the Town Manager regarding the implementation of the Personnel Policy in light of the parties' non-concurrence resulting from the meetings and the existing collective bargaining agreements between the parties. (See Plaintiff's Exhibits #1 and #6; testimony of Steven Henderson, Association President).
18. These meetings between the Town Manager and representatives of the several bargaining units, including the Association party in this action, involved the changes incorporated into the Personnel Policy that reasonably could effect certain provisions of the parties' collective bargaining agreement, including the employment of relatives of police employees.
19. As a result of these meetings, other issues besides the issue of employing persons related to present employees were addressed by the parties and although language in the policy document has not been changed, the Town Manager's application of policy to meal reimbursement and "overnight stays" was altered. However, no agreement was reached regarding the implementation of the provisions contained in the CBA article addressing "Employment of Relatives."
20. The Association president testified credibly that there is a long tradition in police and fire service of multiple family members being employed contemporaneously by a municipality.

DECISION AND ORDER

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate violations enumerated within RSA 273-A:5,I between the duly elected "exclusive representative", as that designation is applied in RSA 273-A:10, of a certified bargaining unit comprised of public employees, , and a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I).

In the instant case, the Association has alleged that the Town's relevant conduct constitutes violations of the following subsections of the prohibited practice provision RSA 273-A:5,I: (a) constraining, coercing or interfering with employees exercising their rights; (b) dominating or interfering in the formation or administration of an employee organization; (c) discriminating against employees in the hiring and tenure; (e) refusing to negotiate in good faith with the exclusive representative of a bargaining unit; (g) failing to comply with RSA 273-A and any rule adopted under it; and (h) breaching the parties' collective bargaining agreement.

Among the defenses raised by the Town, is one asserting that the Association's complaint was not filed in a timely manner. Jurisdiction over this threshold matter similarly lies with the PELRB as RSA 273-A:6, VII authorizes this Board to determine whether such claims are filed in conformity with the six (6) month statute of limitations set forth in that provision.

DISCUSSION

In or about 1997 or 1998, the Board of Selectmen for the Town of Hampton instructed the Town Manager to review and update the Town's Personnel Policy. On or about January 1, 2004, the Town Manager implemented a Town Personnel Policy manual informing employees that the policy "has been designed to provide guidance and information concerning the Town's policies for all employees and shall not apply in those areas that are found to conflict with collective bargaining agreements...". There was no evidence presented that would indicate that any further formal action was necessary to be taken by the Board of Selectmen in adopting the manual. The Town Manager also invited the employees, including union representatives, to discuss the provisions of the new policies with him. A series of meetings between the Town Manager and representatives of the Town's several unions, including the Association which is a party to this action, were conducted over the course of the year 2004. Give and take discussion during these meetings resulted in certain modifications being undertaken by the Town Manager to provisions related to meal reimbursement and "overnight stays"; clarification regarding tuition reimbursement and, most relevant to these proceedings, unresolved matters regarding the application of new provisions affecting the employment of relatives. We believe that the evidence produced by the Town and the Association establishes that while it is definite that changes of policy had been propounded by the Town Manager in January 2004, the parties continued in discussion about the applicability of certain provisions in light of the existing terms

and conditions of work attached to employment with the Town prior to any specific application of the new policies. In addition, credible testimony was provided indicating that a particular provision relating to persons who become related after both are employed has yet to be applied.

When attempting to fix the date from which the statute of limitations begins to run, we have historically looked to define what could be reasonably referred to as the "triggering event", that is, the date in a chain of events on which the harm occurred. We deem a substantial degree of uncertainty as to the applicability of all of the new provisions because of the continuing discussions between the parties. These discussions occurred after the announcement of the new Personnel Policy. In light of this continuing dialogue, we determine that the triggering event which put the Association on notice that the Town Manager was going to execute his new policies, occurred when employment was actually denied to a relative of an existing employee in or about September of 2005. This act of execution, *i.e.* the non-hiring of an employee relative lead to another meeting between the parties and a direct exchange between the Town Manager and Association counsel on September 12, 2005. At that time the Town Manager declared to a surprised audience of union representatives that he had executed the policy in that instance with the implication that he would continue to do so in the future, but that he had not executed another of the new provisions regarding employees who became related after employment. Since we find the triggering event to have occurred in or about September 2005 and the Association's complaint was filed on September 20, 2005, we determine that it was timely filed and hereby deny the Town's motion to dismiss the Association's complaint on this ground.

Having addressed the timeliness issue of the Town's Motion to Dismiss, we merge the management rights issue of that same motion with our consideration of the merits of the Association's complaint related to the actions of the Town Manager. His actions related to his institution of a new Personnel Policy. This policy contains provisions prohibiting the hiring of relatives of existing employees, and establishing a right to terminate either of two employees that may become related after being employed by the Town, in the event neither of the related employees previously had chosen to resign.

We begin our analysis with the proposition that individuals employed by the Town and who hold positions that are recognized as falling within a certified bargaining unit are entitled to collectively bargain with the Town over terms and conditions of their work. The determination of what constitutes the terms and conditions of work calls for an examination, in the context of organized labor relations, of the terms of the parties' collective bargaining agreement and the recognition of other terms and conditions of work that may have arisen through the existence of "past practice". The application and substantial effect of "past practice" on the working relationship between two parties to an agreement is unique to labor law. It is generally defined as "a practice which is not subject to change except by mutual agreement." Roberts, Harold S., Roberts' Dictionary of Industrial Relations, p.573 (4th ed. 1994). The two aspects of a past practice's existence that have been traditionally considered are its length of duration and the depth to which it is ingrained in the employment. The key purposes of the "past practice" doctrine relevant to this matter are "to provide the basis of rules governing matters not included in the written contract ...or to support allegations that clear language of the written contract has been amended by mutual action or agreement." *Id.* Thus, we must look to whether the "practice" of employing relatives of existing employees qualifies as past practice. "In the absence of a

written agreement, 'past practice,' to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." Elkouri and Elkouri, How Arbitration Works p.608 (6th ed. 2003). Uncontroverted testimony was presented that acknowledged the existence of this practice for many years. Uncontroverted testimony was also presented referencing a strong tradition in some families for employment in police service. It appears to us that the practice has been supported by the Town knowingly hiring related employees onto the part-time force. There is also uncontroverted testimony that the only source of hiring for so-called "rank and file" full-time police officers was the part-time force. This Town practice created a *de facto* training ground. There is no doubt in our minds that prior to September 2005 the practice of hiring employee relatives was known to and "accepted by both parties." Management's open and knowledgeable participation in perpetuating the practice and the reasonable expectations of existing employees and of their family members who are qualified and desire employment is obvious to us based upon the evidence presented at hearing. It is important at this point to note that the bargaining unit involved in these proceedings and the CBA between them includes part-time employees.

If the finding of the existence of a "past practice" was solely determinative of the issues before us, our analysis would be complete and our order would fully incorporate the past practice and prevent the institution of the Town's new prohibition against hiring relatives and penalizing employees who became related after employment.

However, before reaching any final determination in this case, the application of the doctrine of past practice, when applied in public sector labor relations, must be undertaken in recognition of what, in this instance, may be considered a contrasting doctrine of "management rights." These rights are a manifestation of management sovereignty expressed as policy within the prerogative of the public employer exclusively reserved to management. See RSA 273-A:1, XI. Often, as is the case here, management rights are addressed in the parties' CBA. Here the CBA provides, "The prerogative or authority which management has not officially abridged, delegated or modified by this Agreement are retained by management, such as, but not limited to: ..."3. The selection, direction and number of personnel so as to continue the public control of government." (Joint Exhibits #2, #3, Article 4).

Alone, this provision of the parties' CBA reserves to the Town, solely, the authority to set the criteria for employment and to exercise the discretion of selecting from among interested individuals those that are to become its employees. If, however, the past practice as described above is deemed sufficient proof that the Town has "abridged, delegated or modified" its prerogative or authority to unilaterally set hiring criteria, then the parties' actions in establishing the past practice can be said to have added to the express terms and conditions contained within their CBA. However, we also do not believe that the modification that we find to have occurred as a result of the past practice endowed the Association with an unrestricted right to affect the hiring criteria for police officers, be they part-time or full-time officers, for infinity. Likewise our finding of a past practice does not topple management from the exercise of its hiring authority forever.

We find that a past practice existed until approximately September of 2005 that enabled an individual to become employed without concern of preventing a relative of his or hers from also becoming employed. It also created a circumstance that enabled an individual to become employed without exposing himself or herself to involuntary termination should he or she marry another Town employee. That practice established rights that have inured to bargaining unit members as terms and conditions of their employment. We therefore conclude that in this instance, a long-standing past practice has modified the rights reserved to management in the parties' CBA and result in the Town Manager's actions in utilizing his new Personnel Policy provision regarding the employment of relatives constituting a change in terms and conditions of work without negotiations with the Association that violates RSA 273-A: 5 (e). In so finding on the merits, we deny the second ground of the Town's separate motion to dismiss based upon management rights.

Therefore, we hereby

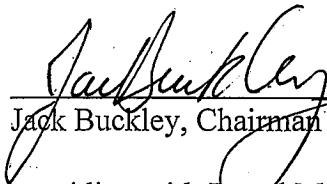
(1) Order the Town of Hampton to cease and desist from executing that provision of its new Personnel Policy entitled "Employment of Relatives". (Joint Exhibit #1, p.6) to the extent that it would affect any presently employed full-time or part-time individual and their existing or future relatives, as defined in the Employment of Relatives provision, or spouses. As to those relatives of present employees who are not yet employed but may become desirous of employment by the Town, by way of further explanation, they are not to be prohibited from employment, discriminated against in the hiring process, nor terminated from employment based upon a consanguineous or marital relationship with an existing employee;

And further;

(2) Order the parties to return to negotiations, forthwith, to resolve their respective differences caused by the execution of this "Employment of Relatives" provision. The parties are not, of course, precluded from mutually agreeing to modify any such other provisions of their existing CBA as may become necessary and reasonable to the timely and efficient resolution of their differences in regard to the employment of relatives thereby returning the Town and the Association to a state of harmonious and cooperative labor relations.

So ordered.

Signed this 10th day of May, 2006.



Jack Buckley, Chairman

By unanimous vote. Chairman Jack Buckley presiding with Board Members Carol M. Granfield. and Teresa B. Jones also voting.

Distribution: J. Joseph McKittrick, Esq., Elizabeth A. Bailey, Esq.,