

THE SUPREME COURT OF NEW HAMPSHIRE

APPEAL OF PORTSMOUTH POLICE COMMISSION

No. 99-670 June 20, 2001

In Case No. 99-670, Appeal of Portsmouth Police Commission, the court upon June 20, 2001 made the following order:

The Portsmouth Police Commission (Commission) appeals a decision of the New Hampshire Public Employee Labor Relations Board (PELRB) finding that the Commission committed an unfair labor practice when it failed to apply a retroactive wage increase to outside work details. We reverse.

The relevant facts follow. In March 1998, the Portsmouth Police Commission and Local #402 executed a collective bargaining agreement covering the three-year period from July 1, 1995, to June 30, 1998. It provided retroactive wage increases of two percent for the first two contract years and three percent for the third year. The agreement contained the following language: "Outside or private work details shall be paid at the overtime rate for maximum patrolman with a guaranteed minimum of four (4) hours." When the city failed to apply the retroactive increases to payments for outside work details, the union filed a grievance, pursuing its claim through the contractually established grievance procedure to binding arbitration. The arbitrator found that it was undisputed that no discussion had taken place between the parties during negotiations, fact-finding or settlement concerning the applicability of the retroactive payments to outside detail pay. He also found that no discussions had taken place about the applicability of the raise to any of the individual items tied to the wage rate. Based upon the contractual language governing outside work details, he sustained the grievance and ordered retroactive pay increases for outside work details performed during the contract period. When the Portsmouth City Council refused to fund the arbitrator's decision, the union filed an unfair labor practice with the PELRB. The PELRB concluded that the City had committed an unfair labor practice and ordered retroactive payments as well as interest "on any sums remaining due and owing more than thirty-one (31) days after the date of this decision."

On appeal the Portsmouth Police Commission contends that the PELRB erred in: (1) ordering the implementation of an arbitrator's award that included a cost item never approved by the local legislative body, the Portsmouth City Council; (2) failing to consider the collective bargaining agreements of 1990 and 1994 which contained the same language concerning outside work

details; (3) finding that the Commission had violated RSA 273-A:5; (4) ordering the City to fund a cost item when the unfair labor practice charge was filed against the Commission; and (5) ordering the City to pay interest on the arbitrator's award.

When addressing the merits of an unfair labor practice charge, the PELRB must necessarily "address the issue of an arbitration award's consistency with the terms of the CBA." Bd. of Trustees v. Keene State Coll. Educ. Assoc., 126 N.H. 339, 342 (1985). We review the PELRB's decision pursuant to RSA chapter 541, deferring to its factual findings as prima facie lawful and reasonable. See RSA 541:13 (1997); Appeal of Timberlane Reg. School Bd., 142 N.H. 830, 833 (1998). "The party seeking to set aside or vacate an order of the PELRB must show that the order is contrary to law or, by a clear preponderance of the evidence, that the order is unjust or unreasonable." Appeal of AFSCME Local 3657, 141 N.H. 291, 293 (1996).

A review of the PELRB record reveals that the last three contracts between the parties have contained the same language concerning the pay rate for outside work details. All have been approved after the effective date and all have provided for retroactive payment of the wage increase. The 1989 and 1992 raises were not applied to outside work details and no complaints were filed about that exclusion. After the parties approved the third contract, the union asked the factfinder for the first time whether the retroactive increases covered outside duty pay, noting in its request: "Granted there was no evidence offered on this issue at hearing. The Union is also resigned to the fact that, at least in recent contract settlements, there has been no retroactive pay for outside work." After noting that "detail pay was not raised during the proceeding" and that he "gave no thought to the issue," the factfinder declined to address it in his response.

Given the evidence in the record of the history of contracts between the parties and the negotiations which took place on the 1998 contract, we conclude that the PELRB erred in finding that the Portsmouth Police Commission committed an unfair labor practice in failing to apply retroactive payments made pursuant to the 1998 contract to outside work details. "A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." Restatement (Second) of Contracts § 223 (1981). "There is no requirement that an agreement be ambiguous before evidence of a course of dealing can be shown, nor is it required that the course of dealing be consistent with the meaning the agreement would have apart from the course of dealing." *Id.* comment (b). In this case both the use of identical language in two previous contracts as well as the record concerning the negotiations of the 1998 contract support a conclusion that the 1998 contract did not include retroactive payment for outside work details. Accordingly, we reverse.

Reversed.

BRODERICK, DALIANIS and DUGGAN, JJ., concurred.

Date of clerk's notice of decision: June 21, 2001