NH Supreme Court affirmed in part, vacated in part and remanded this decision on March 12, 2002, Slip Opinion No. 2000-458.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CITY OF LACONIA Complainant v. LACONIA PROFESSIONAL FIREFIGHTERS, LOCAL 1153, IAFF Respondent	CASE NO. F-0103:18 (Unit Modification)
LACONIA PROFESSIONAL FIREFIGHTERS, LOCAL 1153, IAFF Complainant v. CITY OF LACONIA Respondent	CASE NO. F-0103:19 (Unfair Labor Practice) DECISION NO. 2000-038

APPEARANCES

Representing City of Laconia:

Mark Broth, Esq.

Representing Laconia Firefighters, Local 1153, IAFF:

John Krupski, Esq.

Also appearing:

Bill Wardwell, City of Laconia
George Landry, City of Laconia
Steve Carrire, City of Laconia
Bob Landry, Local 1153
Chris Shipp, Local 1153
Jeff Mayer, Local 1153

Kirk Boattie, Local 1153
Louis Wool, Retired Chief
Michael Drake, Local 1153
Timothy Woods, Local 1153

BACKGROUND

The City of Laconia (City) filed a Modification Petition on January 28, 2000 seeking to remove the positions of captain and lieutenant from the bargaining unit represented by the International Association of Firefighters, Local 1153 (Union) which includes those two job titles plus firefighters, as more particularly described at Article II, Section 1 of their collective bargaining agreement for the period July 1, 1996 to June 30, 2000 (Joint Exhibit No. 1). The Union filed its answer thereto on February 11, 2000 along with an unfair labor practice complaint of the same date alleging violations of RSA 273-A:5 I (e) resulting from the City's setting preconditions of resolving the pending modification petition before it would conclude negotiations on a successor CBA. The City filed its answer to the ULP after which both matters were consolidated for hearing and first heard by the PELRB on March 16, 2000.

At the March 16, 2000 hearing the ULP was presented first with the Union as the moving party. The Union presented a witness and rested, there being two implicit understandings, namely, that the parties reserved the right of cross examination and rebuttal and that evidence and testimony presented in the ULP proceedings would be considered in the modification petition proceedings and vice versa. After the City presented a witness in response to the ULP, the Union interposed a Motion to Dismiss. The City asked for and received approval to file a memorandum opposing this Motion to Dismiss on or before March 17, 2000 which it did in a timely manner. Simultaneously, the City filed a motion for Summary Judgment to which the Union filed objections on April 5, 2000. The pending motions were collectively considered by the PELRB on April 6 and 13, 2000 after which the PELRB informed the parties that those motions would be taken under advisement pending completion of the case. The second and final day of hearing in the consolidated matters occurred on May 2, 2000 and concluded with closing oral arguments by both sides after which the record was closed.

FINDINGS OF FACT

1. The City of Laconia, by and through its fire department, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Laconia Professional Firefighters, Local 1153, IAFF (Union) is the duly certified bargaining agent for all employees of the Laconia Fire Department

except the Chief, Deputy Chiefs, Assistant Chief, Fire Alarm Superintendent, Fire Prevention Specialist, mechanic and secretarial personnel (Joint Exhibit No. 1, Article II, Section 1), said positions, with the exception of the assistant chief, mechanic and secretarial personnel, having been in place under RSA 273-A since February 12, 1976 (Joint Exhibit No. 7) and permissively observed since May 24, 1956 (Union Exhibit No. 1).

3. The City and the Union are parties to a CBA for the period July 1, 1996 until June 30, 2000, said agreement having been executed on April 20, 1998. The "Recognition Clause" is found at Article II thereof and is referenced in Finding No. 12, above. Article IX, Section 12 of the CBA is entitled "Performance Evaluations" and provides:

> Every employee shall be evaluated in writing at least annually. Performance evaluations shall be completed on forms developed by the Personnel Division of the City for that purpose. The purpose of performance evaluations shall be to identify areas of unsatisfactory performance and means of correcting that performance, to identify superior performance, and to formally notify employees of the Department's assessment of their job performance since the last evaluation. Performance evaluations shall be a permanent record of the City. Performance evaluations shall not be deemed to be disciplinary action by the Department, however, employees receiving evaluations showing job performance requiring improvement shall be expected to improve any such job performance to acceptable levels. The use of formal performance evaluations by the department shall not preclude any alternative means of notifying employees of superior or satisfactory performance, and shall not be a prerequisite to disciplinary action.

It is uncontested that this is the first contractual reference to written performance evaluations. Likewise, witnesses for both sides (current Chief Robert Landry former Chief Louis Wool) confirmed that unwritten evaluations had been conducted by captains and/or lieutenants as early as 1972 or 1956, respectively.

4. Richard E. Molan, Esquire has represented Local 1153 as chief negotiator and legal counsel since 1979. He

testified that during that time captains and lieutenants have always been in the bargaining unit without any issues being raised as to their causing internal conflict within the unit or being considered supervisory personnel within the meaning of RSA 273-A:8 II. Molan confirmed that negotiations for the current CBA started in 1996. His letter of June 18, 1997 to Mark Bennett, Esquire, formerly of the City of Laconia Legal Department, addressed, *inter alia*, performance evaluations, i.e., "...this was language proffered by the City at the October 11 [1996] meeting and which I indicated to you on December 12 [1996] we would accept." (City Exhibit No. 9.) Molan's testimony on March 16, 2000, however, explained the agreement on this contract language with the caveat that it was agreed that it was not to be used to demonstrate management functions on behalf of the lieutenants and captains such as to exclude them from the bargaining unit. Molan said he was assured by management that this was not the intention and that there would be training about how to complete evaluation documents. Molan opined that the job functions of lieutenants and captains "haven't changed at all" from 1979 to 1999.

5. Molan sent a request to negotiate on behalf of Local 1153 to City Manager Daniel McKeever on September 23, 1999. (Joint Exhibit No. 2.) When Molan spoke with management negotiator William Wardwell, in preparation for the first negotiating session on December 17, 1999, Wardell told him that the City wanted to split the lieutenants and captains out of the bargaining unit, but that they would be "treated fairly" and even allowed to negotiate, even though they were less than ten (10) in number. This proposal was memorialized in Joint Exhibit No. 3 and confirmed by Wardwell's testimony on March 16, 2000. Molan brought that proposal back to the membership and, by letter of January 19, 2000 to Wardwell, reported that the "Union voted unanimously...to keep the bargaining unit as it is and will decline to agree to a unit separation." (Joint Exhibit No. 4.) Both in that letter and in his testimony before the PELRB, Molan pointed out that such a unit could not be certified by PELRB, that courts, and not the PELRB, would have to be used to settle disputes, that there were no impasse resolution procedures available under RSA 273-A to members of such a unit and that the unit's size did not make it a financially viable entity. Conversely, Molan cited the historic cohesiveness of the current bargaining unit, its being involved within the confines of the same profession and all unit members having geographical proximity, one with the other, as justification to maintain its current posture under RSA

273-A:8. By letter of February 1, 2000, Mark Broth, Esquire, wrote Molan saying that "issues regarding the composition of the bargaining unit may require a slight delay in the commencement of bargaining." "Alternatively, the City would consider an earlier start to bargaining if the unit bargaining committee excludes lieutenants and captains and if the issues discussed in bargaining are limited to and affect only firefighter matters." (Joint Exhibit No. 5.)

6. Robert Landry is presently chief of the department, since 1994, and an employee of the department since 1972. He confirmed that captains, lieutenants and firefighters are all covered under the current CBA, receive wages and benefits as determined by that agreement, accrue vacation and seniority benefits as provided by the contract, and qualify for premium or overtime pay, promotions and assignments under the terms of the contract. All these employees are shift employees, with 24 hour coverage provided, utilizing the 2-2-4 system described at Article XI of the CBA. Lieutenants typically are the senior officers on each shift and provide shift oversight, compared to captains who have the higher degree of responsibility involving station oversight. Landry was familiar with the situation that unwritten performance reviews had been done during the 1970's, by the deputy chief in those days. There were no performance evaluations from 1994 to 1998, until Article IX, § 12 appeared in the contract. As did Molan, Landry confirmed that the Union did not want performance reviews linked to discipline. Training to conduct performance reviews occurred in the summer of 1998. Since that time all firefighters have been evaluated at least once. (City Exhibit No. 4). Three quarters of these evaluations were done by lieutenants. Regardless of who does the evaluation, the document must be signed off by the deputy chief and the department head (chief). (See Joint Exhibit No. 6.) Evaluation forms for both fire officers and fire fighters were created by the City and show a date of "6/98," after the CBA was signed.

7. As was the case with the performance evaluation forms (Joint Exhibit No. 6), the job descriptions of lieutenant and captain were both revised in June of 1998 and approved by the City Manager on June 29, 1998. (City Exhibit Nos. 3-A and 3-B.) Each requires the incumbent to "conduct annual performance evaluation for employees on his/her shift." Also, as provided in the job descriptions and under the Department's administrative discipline procedure dated April 4, 1997 (City Exhibit No. 7), lieutenants and captains have the authority to administer discipline. Lieutenants and

captains can call back subordinates, hold them over on shift, commit to overtime or elect to run short, none of which has changed from the practices which existed prior to the current CBA. During cross examination, Landry agreed that the concept of performance evaluations, without disciplinary consequences, was agreed to during negotiations and that both the performance evaluation forms of June, 1998 (Joint Exhibit No. 6) and the Hiring Rules dated November 30, 1999 (Joint Exhibit No. 7) were developed and drafted by the City without consultation or input from the bargaining agent.

8. Michael Drake became a fire lieutenant in 1989. He was on the last negotiating team and remembers the expressed concerns that the new evaluation procedure might be used as a disciplinary tool, to "separate the union" by segregating officers and firefighters or as justification for decisions about compensation. He confirmed that there was a discussion during negotiations that the performance evaluations would be used only as a tool for improvement and, with this understanding, the Union accepted the City's language. (See also City Exhibit No. 9.) Drake, who was hired in 1983, recalled that his first non-written evaluation was done by Lt. Bordeau. The first written evaluations occurred in 1998. Looking back over the past seventeen years, he said that the captains, lieutenants and firefighters all have the same working conditions under the contract, with the exception of pay differentials, and have a "self-felt community of interest." His personal experience has been that his role as local president has neither impacted nor influenced his role and responsibilities as a lieutenant. To his perception, the disciplinary and supervisory authority of lieutenants has not changed or been altered since 1989, written documents to the contrary notwithstanding.

DECISION AND ORDER

We first address the unfair labor practice charges concerning the City's alleged refusal to bargain in good faith in violation of RSA 273-A:5 I (e). This obligation is further explained at RSA 273-A:3 I:

> It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to "negotiate in good faith." "Good faith" negotiations involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment. . .but the obligation to negotiate in good

faith shall not compel either party to agree to a proposal or to make a concession.

A collateral grant of authority is found at RSA 273-A:11 which requires that "public employers *shall* extend the following rights to the exclusive representative of a bargaining unit...the right to represent employees in collective bargaining negotiations." (Emphasis added.)

The chronology of events in the ULP is clear and undisputed. The Union, through counsel, gave notice of intent to negotiate on September 23, 1999. (Joint Exhibit No. 2.) On or before the first negotiating session on December 17, 1999, the City proposed an agreed-to modification in the bargaining unit which would have excluded the captains and lieutenants. (Joint Exhibit No. 3.) During the next month, the membership considered this proposal and, ultimately, unanimously rejected it, as conveyed in Molan's letter of January 19, 2000. (Joint Exhibit No. 4.) The City then filed the modification petition on January 28, 2000 followed by Broth's letter to Molan on February 1, 2000, described in detail in Finding No. 5, above. (See also Joint Exhibit No. 5.)

The City's conduct had both the appearance and the consequence of grinding the parties' negotiations to a halt, purportedly to allow the unit modification issue to be resolved. This is tantamount to a refusal to bargain and a violation of RSA 273-A:5 I (e) because, notwithstanding the issue of the captains and lieutenants, it disenfranchised the firefighters from their rights to pursue collective bargaining under RSA 273-A:3 and their bargaining agent from being able to do so on their behalf under RSA 273-A:11. As filed in these proceedings, the modification petition "belonged'" exclusively to the City. The City cannot be permitted, whether by design or result, to stymie the obligation to bargain and the negotiations process itself. Such a result would give a party to the proceedings a tool to take unilateral control of the bargaining process, a means to delay a settlement indefinitely and a mechanism to upset the "balance of power" guaranteed by RSA 273-A. Appeal of Franklin Education Association, 136 N.H. 332, 337 (1992). In as much as such a situation imperils the "level playing field necessary for productive and fair labor negotiations," we cannot condone the City's conditioning future bargaining on either a "concession" on unit composition as proscribed by RSA 273-A:3 I or a disenfranchisement of bargaining rights for unit members whose positions are not under challenge in the modification petition. (See Appeal of Alton School District, 140 N.H. 303, 308 (1995) as to "level playing field.") Either would be contrary to the Statement of Policy found at Chapter 490:3 of the Laws of 1975.

Notwithstanding that Article IX, Section 12 (Finding No. 3, above) provides that performance evaluations will be done on forms

developed by the City's personnel department, the PELRB's law, dating to 1985, distinguishes between a decision to conduct performance evaluations versus the procedures or methods of implementation of such evaluations, the latter being mandatorily negotiable to the extent they will "effect the conditions of employment encompassed and foreseen by [RSA 273-A]." Laconia Association of Support Staff v. Laconia School Board, Decision No. 1985-086 (October 25, 1985). "Evaluations of employees must be viewed as an exclusively managerial function involving the employer's control over the 'functions, programs and methods of the public employer'...However, insofar as this new managerial policy may impact other effects, either 'terms and conditions of employment,' these other effects (under RSA 273-A:1 XI) must be proper subjects of negotiation." Laconia Association of Support Staff v. Laconia School Board, Decision No. 1984-078 (October 25, 1984). Public employers have been found to have violated RSA 273-A:5 by "implementing an evaluation policy that could impact terms and conditions of employment" and have been directed to negotiate revised evaluation models with the certified bargaining agent. Concord Education Association v. Concord School District, Decision No. 1990-027 (April 11, 1990.)

Modification petitions may be filed under Rule PUB 302.05 where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed or where a prior unit recognized under RSA 273-A:1 is alleged to be incorrect to the degree of warranting modification. Conversely, such a petition must be denied if it might be resolved through the election process or if the petition attempts to modify the composition of a bargaining unit negotiated by the parties and the circumstances alleged to have changed, actually changed prior to negotiations on the collective bargaining agreement presently in force.

We attempt here to focus on "the composition of a bargaining unit negotiated by the parties." Notwithstanding the parties' history of having bargained contracts prior to the passage of RSA 273-A in 1975, from the time of the first certification issued by this board in February of 1976, the bargaining unit has consisted of "all employees with the exception of the chief, deputy chiefs, fire prevention officer and fire alarm superintendent", as amended. (Joint Exhibit No. 7) Thus, the captains, lieutenants and firefighters have been in the same bargaining unit since the original certification and for some twenty years before that, according to the "contract" dated May 24, 1956. (Union Exhibit No. 1.) They are still members of the bargaining unit today as reflected in the recognition clause which was "negotiated" as Article II of the current CBA (Joint Exhibit No. 1).

While we are mindful of the advent of performance evaluations under Article IX, Section 12 of the current CBA (Joint Exhibit No. 1), we are also mindful of the statutory considerations of RSA 273-A:8. Departmental employees in the job categories of captains, lieutenants

and firefighters satisfy all the criteria for a valid community of interest under RSA 273-A:8 I (a) through (d), inclusive. We look, then, to RSA 273-A:8 II which says that "persons exercising supervisory authority involving the significant exercise discretion may not belong to the same bargaining unit as the employees they supervise."

The presents us with a conundrum because captains and lieutenants have been presented to us as having a supervisory role in the department, especially vis-a-vis matters of performance evaluations and discipline. Yet, with the possible exception of the transformation of a series of evaluations into a written mode from the former non-written protocol, there seems to be no requisite "change of circumstances" as contemplated by Rule PUB 302.05 (b) (2). Given two additional levels of "sign off" authority beyond that of the original evaluator, we find no evidence of the "significant exercise of discretion" in the first level evaluators.

Molan (Finding No. 4), Landry (Finding No. 5) and Drake (Finding No. 8) all agreed that the Union did not want and the parties agreed that performance reviews would not be linked to discipline. Molan's testimony was uncontroverted that performance evaluation language would not be used as a basis for excluding captains and lieutenants from the bargaining unit. Molan and Drake both testified that the job functions of captains and lieutenants had not changed from 1979 or 1989, respectively, to date with respect to discipline and supervisory authority. Finally, consistent with a strong history of promoting from the ranks, Drake and, for that matter, even Chief Landry speaking to when he was a captain and lieutenant, testified that they experienced no difficulties exercising their responsibilities as officers when it came to managing, controlling and disciplining subordinates. They were able to do so in a manner which kept their duties as officers separate from their allegiances as union members.

Confronted with these circumstances, it is difficult for us to identify what is "broken" or what has "changed" sufficiently to trigger the qualifying requirements for a modification petition. We find no meaningful change from what has been "business as usual" at least since RSA 273-A was passed, with the possible exception of a written format. We have testimony that evaluations and discipline over the duration of many contracts have not caused any problems in distinguishing responsibilities between union roles and management roles and have created no schism between firefighter and officer positions. For that matter, there is overwhelming evidence of a self-felt community of interest and a lack of a division of loyalties within the contemplation of PUB 302.02 (b) and (c), respectively. Finally, there appears to have been an agreement as to the composition of the bargaining unit (Joint Exhibit No. 1, Article II) and on the purposes for which the newly-negotiated evaluation language (Joint Exhibit No. 1, Article IX, § 12) would and would not be used. We will

We will not interfere with the sanctity of that agreement during the duration of the CBA. Whatever pleadings may be filed after the expiration thereof will stand on the facts as then presented based on terms and conditions of employment existing as of the time of that filing. In the meantime, within the context of these proceedings and without a meaningful and actual change in working conditions and responsibilities on members of the bargaining unit, there is insufficient evidence to grant the modification petition.

By way of remedy, we DISMISS the modification petition for the reasons stated and direct the City to CEASE and DESIST from refusing to bargain in violation of RSA 273-A:5 I (e) and 273-A:3 as explained on page 7 above.

So ordered.

Dated this 10th day of May, 2000.

JACK BUCKLEY
Chairman

By unanimous decision. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.