NH Supreme Court reversed this decision on December 30, 1994, Slip Op. No. 92-285, 139 NH 277 (1994).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS, LOCAL 435 Complainant v. CITY OF CONCORD Respondent	CASE NO. P-0750:3 DECISION NO. 92-51

APPEARANCES

Representing I.B.P.O., Local 435:

Matthew Buckley, Esq., Counsel

Representing City of Concord:

Paul Cavanaugh, Esq., Counsel
Andrea Johnstone, Esq., Counsel

Also appearing:

Brian Braley, City of Concord
James Fletcher, City of Concord
Dennis Anderson, I.B.P.O., Local 435
Kevin Ganley, I.B.P.O., Local 435

BACKGROUND

On December 4, 1991, the International Brotherhood of Police Officers/Concord Police Association, Local 435 (IBPO) filed unfair labor practice charges against the City of Concord alleging violations of RSA 273-A:5, I (e) and (g) through the application of RSA 273-A:3. The City of Concord (City) filed an answer on December 18, 1991. The matter was then set for and heard by the Board on March 5, 1992.

During the course of negotiations for a successor collective

bargaining agreement (CBA), the union proposed a "just cause "disciplinary standard for the contract. The City refused to negotiate a just cause disciplinary standard, for the reasons set forth in its answer, Item 5 below. This unfair labor practice complaint was then filed.

FINDINGS OF FACT

1. The City of Concord is a public employer as defined by RSA 273-A:1 and is the employer of individuals in the bargaining unit represented by the IBPO.

2. The IBPO is the duly certified bargaining agent of certain employees, complainants herein, of the City of Concord Police Department.

3. At all times pertinent to these proceedings, the parties were engaged in the process of negotiating for a successor CBA.

4. One of the proposals advanced by the IBPO in that bargaining was a "just cause" standard relative to the imposition of discipline. The City refused to negotiate such a standard.

5. The City claims that negotiation of such a standard would be a prohibited subject of bargaining, to wit:

> The City is mandated by its Charter to establish a merit system of personnel administration. The rules and regulations of the merit system are required by the Charter to include provisions with regard to discipline. [Therefore] discipline is a prohibited subject of bargaining under the provisions of RSA 273-A:3, III and RSA 273-A:1, XI.

6. RSA 273-A:3 III provides:

> III. Matters regarding the policies and practice of any merit system established by statute, charter or ordinance relating to recruitment, examination, appointment and advancement under conditions of political neutrality and

> based upon principles of merit and competence shall not be subjects of bargaining under the provisions of this chapter. Nothing herein shall be construed to diminish the authority of the state personnel commission or any board or agency established by statute, charter or ordinance to conduct and grade merit examinations from which appointments or promotions may be made.

7. RSA 273-A:1 XI provides:

> XI. "Terms and conditions of employment" means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

8. The "just cause" proposal of the IBPO did not involve recruitment, examination, appointment or advancement under conditions of political neutrality, the grading of examinations, or the functions, programs and methods of the public employer, the use of technology, the public employer's organizational structure or the selection, direction and number of its personnel, under RSA 273-A:3, III and RSA 273-A:1, XI respectively.

9. Article 36 of the City's Charter (City Ex. No. 3) provides that "appointments and promotions...shall be made solely on the basis of merit and only after examination of the applicants' fitness." Article 37 thereof provides that Rules and Regulations under the Merit Plan" shall include provisions with regard to classification, compensation, selection, training, promotion, discipline, vacations, and any other matters

necessary to the maintenance of efficient service and the improvement of working conditions." Article 39 thereof provides for the establishment of a Personnel Advisory Board (PAB) whose duties include advising "The Council concerning personnel policies of the city and the manager regarding the administration of the merit plan and to hear appeals from any employee aggrieved as to the status and condition of his employment." The PAB is composed of one member appointed by the City Manager, one appointed by the Council, and a third member appointed by the first two. There is no union or employee representation on the PAB.

DECISION AND ORDER

Upon review of findings No. 6, 7 and 8, we conclude that neither RSA 273-A:3 nor RSA 273-A:1, XI was a ban to the "just cause" proposal advanced by the IBPO. Thus, there was no basis to refuse to negotiate what is a mandatory subject of bargaining. Likewise, the inclusion of the term "discipline" in Article 37 (Finding No. 9) does not ban the bargaining of a just cause standard. Were we to accept this rationale on behalf of the employer, other items enumerated in Article 37, such as "compensation", "vacations", and "training" would also be excluded from the collective bargaining process. This clearly cannot be the intent of the parties nor an appropriate reading of any legislation which must be read in conjunction with the mandates of RSA 273-A:3.

We believe this conclusion to be consistent with both national and state authority. For example:

> "[T]here still exist problems in defining merit system bargaining relationship and in establishing a reasonable scope of bargaining. Merely excluding merit system matters from the scope of bargaining does not necessarily bring about the proper relationship between the merit principle and bargaining, especially if the merit systems involved have authority over personnel matters not essentially related to the merit principle.... By extending bargaining to all matters not deemed essential to the merit principle, they provide a reasonably broad scope of bargaining and the same time apparently maintain a viable merit system." (Emphasis added)

Labor Relations in the Public Sector, Smith, Edward & Clark (Bobbs-Merrill, 1974), P 470

At the state level, this Board addressed a similar issue in State Negotiating Committee v. State Employees Assn., (Decision No. 77-08, February 24, 1977) when it said of the last sentence of RSA 273-A:1 XI:

> This Board considers the final phrase of that section to set its tone. The Legislature did not wish to allow governmental direction to be bargained away, which means, among other things, what the government is to do, how it is to do it, and who is to perform it. (Emphasis in original).

We find no evidence that the IBPO proposal would have overstepped any of these bounds, as confirmed in SEA v. PELRB, below.

Finally, the Supreme Court spoke to a this issue, on appeal in State Employees Assn. v. New Hampshire PELRB, 118 NH 885 (1978). Employee discipline had been found to be a "prohibited subject" under RSA 273-A:3 III and RSA 273-A:1 VI in Decision No. 77-08. Speaking first to RSA 273-A;3 III, the Court said:

> "We cannot agree with the PELRB that in enacting RSA 273-A:3 III, the legislature intended to exempt from the ...bargaining obligation all matters covered by personnel commission rules... The merit system exception excludes only 'matters regarding the policies and practice of any merit system;' it does not exclude everything that the personnel commission has passed upon." (118 NH 885, 889)

Then as to RSA 273-A:1 XI, the Court continued:

> "Nor does the managerial policy exception embodied in RSA 273-A:1 XI require such broad difference to the personnel rules; that exception excludes from negotiation 'managerial policy within the exclusive prerogative of the public employer by statute or regulations adopted pursuant to statutes'... Only that part of the subject which deals with managerial policy within the sole prerogative of the employer, or managerial policy which by statute or regulation is confided to the sole prerogative of the employer is excluded from negotiation." (118 NH 885, 890)

Our reading of the foregoing vis-a-vis the facts of this case leads us to conclude that the just cause proposal is not detrimental to or in conflict with the discipline features referenced in Article 39 of the charter, it is not a topic reserved exclusively to the merit system, and it is, therefore, negotiable. Given that the last sentence of SEA v. PELRB told us that, in the future, we should decide which contract proposals are proper subjects of negotiation but "we caution that body [PELRB] not to construe the merit system exception quite so broadly" and that there is no employee representative on the PAB to suggest there is a "workable grievance procedure" (RSA 273-A:4), we find the "just cause" proposal to be negotiable and the employer's refusal to bargain that proposal to be a violation of RSA 273-A:5 I (e).

We direct:

1. That the City of Concord violated RSA 273-A:5 I (e) by its refusal to bargain the just cause proposal;

2. That the City of Concord negotiate the "just cause" proposal with the IBPO; and

3. That the parties keep the Board informed of their progress on these negotiations.

So ordered.

Signed this 26th day of March, 1992.

Jack Buckley

JACK BUCKLEY
Alternate Chairman

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