



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

International Brotherhood of Police Officers,
Local 314

Complainant

v.

City of Somersworth

Respondent

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Case No. P-0705:11

Decision No. 2001-067

APPEARANCES

Representing International Brotherhood of Police Officers, Local 314:

Peter Phillips, Esq.

Representing City of Somersworth:

Renny Perry, Labor Relations Consultant

Also appearing:

- Dean Crombie, Chief of Police, Somersworth
- Daniel Donovan, City of Somersworth
- William M. Lemoi, International Brotherhood of Police Officers, Local 314
- Dianne Flaherty, International Brotherhood of Police Officers, Local 314
- Stephen Barresi, International Brotherhood of Police Officers, Local 314

BACKGROUND

The International Brotherhood of Police Officers (I.B.P.O.), Local 314 (Union) filed unfair labor practice (ULP) charges on February 26, 2001 against the City of Somersworth (City) alleging, in three counts, violations of RSA 273-A:5 I (a), (c), (d), (e) and (g) resulting in a refusal to bargain in good faith relating to shift rotations which were changed unilaterally and in violation of past practice (Count I), by failing to compensate a bargaining unit member for jury duty and thereby unilaterally changing a past practice and derivatively restraining and coercing that employee (Count II) and by scheduling personnel to work sixteen hours "straight" but attributing the shifts to two separate days in order to avoid overtime thus breaching the collective agreement (CBA) and refusing to bargain in good faith (Count III). The City filed its response on March 19, 2001.

Representatives of the parties attended a pre-hearing conference at the PELRB offices on April 4, 2001, the results of which were reported in a Pre-Hearing Decision and Order dated April 10, 2001 (Decision No. 2001-024). Thereafter, this matter was heard by the PELRB on May 8, 2001. At the opening of those proceedings, the Union advised the PELRB that Counts II and III had been resolved between the parties and were being withdrawn. Likewise, that portion of Count I alleging violations of RSA 273-A:5 I (c) and (d) was also withdrawn by the Union. This left subject to adjudication only that portion of Count I which alleged violations of RSA 273-A:5 I (e) and (g). The parties waived hearing on those charges and agreed to file legal memoranda thereon on or before June 8, 2001. The record was closed after receipt of post-hearing briefs from the parties on June 8, 2001.

FINDINGS OF FACT

1. The City of Somersworth, by virtue of its operation and control of the Somersworth Police Department and the employees therein, is a "public employer" within the meaning of RSA 273-A:1 X.
2. The International Brotherhood of Police Officers (I.B.P.O.), Local 314 is the duly certified bargaining agent for full time police officers through the rank of sergeant, full time secretaries, dispatchers, parking enforcement personnel and special officers employed by the Somersworth Police Department.
3. The City and the Union are parties to a collective bargaining agreement covering personnel listed in Finding No. 2 for the period July 1, 2000 through June 30, 2003. Pertinent among its provisions are:

ARTICLE 1 PURPOSE:

- 1.1 The objectives of this Agreement are the promotion of harmonious relations between the City, Union and members thereof, the establishment of an equitable and peaceful procedure for the resolution of differences arising between the, concerning wages, *hours* and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer as defined in RSA 273-A. (Emphasis added)

ARTICLE V DISPUTE PROCEDURE:

- 5.1 A grievance is defined as a claim or dispute arising out of the application or interpretation of this agreement, under express provisions by this agreement. Prior to the institution of the formal grievance procedure, any employee who believes to have been aggrieved must attempt to informally resolve the matter with the Chief or the Chief[']s Designee. The employee shall not be prohibited from being accompanied by a union representative if the employee desires. If the grievance cannot be resolved informally the following procedure shall be utilized or such grievance shall be deemed waived.

ARTICLE VII MANAGEMENT RIGHTS

- 7.1 The City and the Union understand that neither the City nor the Chief of Police may lawfully delegate to the Union powers, discretion, and authorities which by law are vested in them, and this Agreement shall not be construed so as to limit their

respective statutory powers, discretions, and authorities. Without limiting the preceding, matters regarding the policies and practices of the city as established by ordinance or regulation relating to merit/incentive systems, recruitment, examination, appointment or advancement, under conditions of political neutrality and based upon principles of merit and competence, shall not be subjects of bargaining under the Agreement.

ARTICLE IX HOURS OF WORK-OVERTIME:

9.1 The Work day shall be for eight (8) hours, which will include a twenty (20) minute lunch break, and two (2) ten (10) minute coffee breaks per shift.

4. By virtue of the pleadings in the ULP complaint and the responsive pleadings, it has been charged and admitted in Court One, paras. 6 and 7, that:
 6. Specifically, on or about, August 28, 2000, the Chief announced that he was changing the shift rotations from 7-3, 11-7 to 8-4, 4-12, 12-8, respectively. The 7-3, 3-11, 11-7 shift schedule had been in effect at least for the past 20 years and no notice or opportunity to bargain over the change, or its impact, was ever provided to the Union.
 7. The Union, and several of its members, objected to the Chief's action in a meeting held with him on August 29, 2000 and in a memorandum to him dated August 31, 2000.
5. On August 31, 2000, Officer William Lemoi, along with 13 other officers, wrote a "letter" or "memo" to Chief Dean Crombie [identified as Attachment C in complainant's pre-hearing work sheet and as Union Exhibit No. 2 in the Pre-Hearing Decision (Decision No. 2001-024)] stating in pertinent part and without being contested:

On 8/28/00 a decision was made by you to change the shift rotations from 7-3, 3-11, 11-7, to 8-4, 4-12, 12-8. I had a meeting with you, Capt. Donovan, Officer Barresi and myself on 8/29/00 to informally resolve a possible grievance by the Union on the issue of a shift change. On 8/10/00 an Arbitration Hearing was held at City Hall in which you testified that in your tenure with the Somersworth Police Dept., which is 27 years, that the shifts have always been 7-3, 3-11, 11-7, except for 6 months, when they went to the aforementioned 8-4, 4-12, 12-8 shift. You testified that the shift change did not work and was therefore changed back to its original way and has been that way for 20+ years.
6. On September 6, 2000, Crombie responded to the Lemoi memo by letter [identified as Attachment D in the Complainant's pre-hearing worksheet and as Union Exhibit No. 3 in the pre-hearing decision (Decision 2001-024)] in which Crombie said, in pertinent part, "In

answer to your grievance dated 9/1/00, this issue is not covered under the present contract which states: 'a grievance is a claim arising out of the application or interpretation of this agreement.'"

7. In another proceeding which proceeded to grievance arbitration [introduced here as "Arbitration Award, PELRB #P-0705:9" on the City's pre-hearing worksheet and as City Exhibit No. 4 in the pre-hearing decision (Decision No. 2001-024)] the issue of hours and shifts was presented to an arbitrator who found as follows:

Uniformed Officers typically work a regular schedule on one of three shifts. The Union and the City agree on what the shift times are, but testified to different understandings as to the shift's label, as follows:

SHIFT LABEL:	CHIEF CROMBIE	OFFICER LEMOI
1 st	2300 - 0700	0700 - 1500
2 nd	0700 - 1500	1500 - 2300
3 rd	1500 - 2300	2300 - 0700

Hearings in the above arbitration proceedings were held on August 18 and November 20, 2000. The arbitrator's decision was issued on March 14, 2001, making the information in that award contemporaneous with the pending ULP.

8. According to the post-hearing brief, the City would have us decide this case based on the "managerial policy within the exclusive prerogative" language of RSA 273-A: I and/or on a reading of Appeal of State, 138 NH 716 (1994) which would find that the issue of hours raised here does not satisfy Steps 2 and 3 of the three part test described in that decision. Conversely, the Union would have us decide this case based on "past practice," the doctrine set forth in State Employees Association of New Hampshire v. Board of Trustees of New Hampshire State Prison et al., 118 N.H. 466 (1978) and/or a reading of Appeal of State, above, which would find that the issue of hours satisfies all three tests of that decision, thus making hours a mandatory subject of bargaining.

DECISION AND ORDER

The Union has asserted three theories of the case (Finding No. 8) each of which supports the conclusion that it should prevail on the merits. The concept of "past practice" has been defined as a claim "in support of arguments against the unilateral abandonment by management of an existing wage, benefit or working condition not specifically covered by the labor agreement."¹ Here, there is such claim, whether the hours issue be considered either a benefit or working condition. Past practices have been described as being one of the most significant factors in labor-management relations because they "(1) provide the basis of rules governing matters not included in the written contract, (2)...indicate the proper interpretation of ambiguous contract language or (3)...support allegations that clear language of the

¹ Harold S. Roberts, Robert's Dictionary of Industrial Relations 4th Ed., Bureau of National Affairs (1994).

written contract has been amended by mutual action or agreement."² The use of past practice in this case clearly fits the purposes of both numbers 1 and 2 in the preceding sentence.

In the absence of a written agreement or succinct delineation of the contested benefit or term or condition of employment, "a 'past practice,' to be binding on both parties, must be (1) unequivocal, (2) clearly enunciated and acted upon [and] (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties"³ In the facts presented to us, the circumstances satisfy all three standards. There is no dispute as to the historical consistency of the "old" shifts, as noted in Finding Nos. 4, 5, and 7. The record shows that the "old" shifts were known, relied upon and acted upon consistently for more than twenty years. Finally, the 7-3, 3-11, 3-11 and 11-7 configuration was readily, knowingly and conspicuously accepted and followed by the parties for that twenty year period. Any question whether the complainant adequately satisfied standards of (1) frequency of the past practice, (2) consistency of the practice and (3) longevity of the practice must be resolved in favor of the Union.⁴

It is axiomatic that "a collective bargaining agreement should be deemed, unless a contrary intention is manifest, to carry forward for its term the major terms and conditions of employment, not covered by the agreement, which prevailed when the agreement was executed."⁵ We believe that prior assessments under Appeal of State, *supra*, and N.H. State Prison, *supra*, both tip the scales in favor of the proposition that hours or schedules, as contested in this case, are "major terms and conditions of employment" when weighed against "broad managerial policy" or other countervailing discriminators. In the meantime, we believe that the purposes of Chapter 490:1 of Laws of 1975 are, and continue to be, best served by a public policy that:

[T]he current of opinion has set strongly in favor of the position that existing practices, in respect to major conditions of employment, are to be regarded as included within a collective bargaining contract, negotiated after the practice has become established and not repudiated or limited by it. This also seems to me the reasonable view, since the negotiators work within the frame of existent practice and must be taken to be conscious of it.⁶

Having satisfied ourselves that the Union has asserted a bona fide "past practice" case within the meaning of that term as used in labor-management relations generally, we now turn to the more specific circumstances of the N.H. State Prison case in 1978. In that case, the prison trustees unilaterally altered the hours of work of certain prison employees on December 2, 1976. In so doing, they did not change the number of hours these employees worked. The Union (SEA-NH) then filed a ULP claiming that shift hours are subject to collective bargaining and not a matter of managerial policy for exclusive executive discretion. Both parties appealed different aspects of the PELRB order to "negotiate over the effects" of the unilateral change in shifts.

Upon review, the New Hampshire Supreme Court examined that portion of RSA 273-A:1 XI which defines "terms and conditions of employment" as meaning "wages, hours and other conditions of

² Frank Elkouri and Edna Asper Elkouri, How Arbitration Works, 5th Ed., Bureau of National Affairs (1997), p. 630.

³ *Id.* at p 632 and Celanese Corp of Am., 24 LA 168, 172 (1954).

⁴ See Bornstein, Gosline and Greenbaum, Labor and Employment Arbitration 2nd Ed., Ch. 10, "Past Practices § 10.02 [2] [a], [b] and [c], Matthew Bender & Co. (1997)

⁵ Cox and Dunlop, "The Duty to Bargain Collectively During the Term of an Existing Agreement," 63 Harv.L. Rev. 1097, 1116-17 (1950). See also Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) for the proposition that, in contract interpretation cases, "the source of law is not confined to the express provision" of the contract, as the industrial common law-the practices of the industry and the shop-is equally a part of the collective bargaining agreement although not expressed in it."

⁶ Phillips Petroleum Co., 24 LA 1308, 1312 (1989)

employment other than managerial policy... " In examining the term "hours" in the quoted portion of RSA 273-A:1 X1, the Court said "the base term 'hours' is vague and...neither the statutory context nor anything presented to us indicates that the legislature meant to reserve the assignment of shift time to managerial discretion...We will not overturn the PELRB finding that 'shift change in and of itself cannot...constitute a managerial policy.'" 118 N.H. 466, 468 (1978).

In the N. H. State Prison case, the Court said the PELRB essentially found a ULP when it said that "bargaining in good faith before the institution of the trustees' changes was necessary or their [the trustees'] unilateral action would be an unfair labor practice." 118 N.H. 466, 468 (1978). That case and the instant case are alike because, in both instances, the unilateral changes were implemented without any bargaining. Both cases involved a unilateral change in working conditions mid-term to a CBA, a factual occurrence which was uncontested in the instant case. The Court's remedy in the N.H. State Prison case is insightful to the extent that it suggested once a refusal to bargain [RSA 273-A:5 I (e)] violation was found vis-à-vis the unilateral imposition of a change in working conditions, then, under RSA 273-A:6 VI there is "no doubt that a cease and desist order should have issued returning the parties to the *status quo ante*."

We turn now to the contract language, at Article 1.1, which speaks to resolving differences "concerning wages, *hours* and other conditions of employment..." (Emphasis added) Given the specific reference to "hours" in the contract, we find Chief Crombie was wide of the mark and concluded incorrectly when he wrote to Lemoi telling him that the complaint or grievance, as the case may be, was not covered by the current CBA. (Finding No. 6.)

When we measure the issue of hours outside the context of the CBA and within the context of the statute, RSA 273-A:1 X1, we come to a similar result. "Wages, hours and other conditions of employment" are very essential ingredients to RSA 273-A:1 XI as well as to the purpose of RSA 273-A generally and the original purposes set forth in Chapter 490, Laws of 1975. In addition to the primacy given to wages and hours of work in the statute, that primacy is preserved when measured against the three-part test of Appeal of State, *supra*.

There is no question that hours or shifts are not "reserved to the exclusive managerial authority of the public employer." That matter has been conceded by the City and is not before us here.⁷ The City would, on the other hand, have us find that hours and shifts do not pass the second and third tests of Appeal of State so that they cannot be deemed to be mandatory subjects of bargaining. We disagree.

The second test in Appeal of State is the weighing of the proposed subject of bargaining as "primarily" being a "term and condition of employment" versus a "broad managerial policy." Fundamentally, the separation of "wages and hours" from other terms and conditions of employment suggests that they have a unique place in the very essence of any scheme of collective negotiations. Without resolution, either of these two topics could be what is known as a "deal breaker." Fortuitously, however, the example distinguishing working conditions from "broad managerial policy" in Appeal of State is dispositive. 138 N.H. 716, 722 (1994) "For example, although a school district's decision about whether or not to offer extra curricular programs is part of broad managerial policy, staff wages, *hours*, and other specifics of staff obligations and remuneration primarily affect the terms and conditions of employment." (Emphasis added.) In the case of hours, then, the scale tips in favor of working conditions over managerial policy.

The final test under Appeal of State is if the proposal is incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public

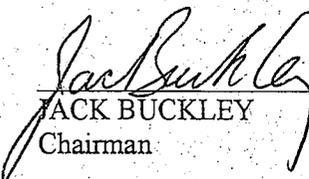
⁷ City's post-hearing brief, p. 4.

control of governmental functions. We have no grounds upon which to conclude that either adherence to the "old" schedule or the implementation of the new schedule would cause such interference because, first, twenty-four hour coverage is presumed under any set of circumstances, just as it was in the N.H. State Prison case and, second, because the former 7-3, 3-11 and 11-7 schedule had been in effect for twenty plus years without creating an impermissible impediment to the requisite public control. The party implementing the unilateral change, the City, had the burden of putting forth its rationale, if any, before the implementation occurred and the burden of negotiating under N.H. State Prison. It did not. We cannot presume justification where none was shown, just as we have drawn no conclusion from the fact that the unilateral change was implemented only 60 days after a new three year contract was signed.

In accordance with the foregoing, we find that the City, by and through the actions of its agents, employees and representatives, committed an unfair labor practice in violation of RSA 273-A:5 I (e) and (g), as the latter applies to RSA 273-A:3, when it unilaterally implemented a shift change mid-term to a CBA without negotiating that change. By way of remedy, we direct the City to return to the *status quo ante* in accordance with the N.H. State Prison case and to CEASE and DESIST from enforcing the "new" 8-4, 4-12, 12-8 shifts until such time as they may reimplement those shifts as the result of collective negotiations.

So ordered.

Signed this 25th day of July, 2001.



JACK BUCKLEY
Chairman

By unanimous decision. Chairman Jack Buckley presiding. Members Seymour Osman and Richard Molan present and voting.