



**STATE OF NEW HAMPSHIRE**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**AFSCME COUNCIL 93, LOCAL 365,  
NASHUA DEPT. OF PUBLIC WORKS**

**COMPLAINANT**

**CASE NO. G-0045-15**

**v.**

**DECISION NO. 2009-029**

**CITY OF NASHUA PUBLIC WORKS &  
PARKS-RECREATION COMMISSION**

**RESPONDENT**

**APPEARANCES**

Representing: AFSCME Council 93, Local 365, Nashua Department of Public Works  
Karen Clemens, Esq., Associate General Counsel, AFSCME Council 93,  
Boston, Massachusetts

Representing: City of Nashua Public Works & Parks-Recreation Commission  
James McNamee, Esq., Corporation Counsel, Office of Corporation Counsel,  
Nashua, New Hampshire

**BACKGROUND**

AFSCME Council 93, Local 365, Nashua Department of Public Works (the "Union") filed an unfair labor practice complaint on July 10, 2008. The Union contends that on January 14, 2008, UAW foreman Carl Gagnon performed bargaining unit work when he plowed on Kinsley Street in the vicinity of Euclid Avenue. The Union contends the parties arbitrated a similar issue which resulted in a June 5, 2007 arbitration award in favor of the Union. In its

complaint, the Union claims that the City “displayed a blatant disregard for the grievance procedure by authorizing and supporting actions found to be a clear violation of the collective bargaining agreement based upon a final and binding arbitration decision” and “undermined the statutorily mandated dispute resolution process established in the collective bargaining agreement.” The Union also contends that the “use of non-bargaining unit employees to do bargaining unit work breaches the collective bargaining agreement, violates the obligation to bargain in good faith, and invalidates portions of the collective bargaining agreement.”

The Union did not grieve the January 14, 2008 incident, and contends that the grievance procedure is unworkable because the City has disregarded the contractual grievance procedure by virtue of its alleged refusal to comply with a final and binding arbitration decision, and contends that the prosecution of a grievance is otherwise not required given the June 5, 2007 arbitration award.

The Union contends the City’s actions violated RSA 273-A:4 (requiring collective bargaining agreements to have workable grievance procedures) and RSA 273-A:5, I (g), (h) and (i). As remedies, the Union requests that the PELRB: a) find that the Board of Public Works failed to adhere to a final and binding grievance decision, in violation of RSA 273-A:4 and RSA 273-A:5:I (b), (g), (h) and (i); b) order the Nashua Board of Public Works to cease and desist having non-bargaining unit employees do bargaining unit work and further adhere to the final and binding arbitration decision on Case No. A-0410-82; c) order the Nashua Board of Public Works to Bargain in Good Faith; d) order the Nashua Board of Public Works to publicly post the board’s order for 30 business days; e) order the Nashua Board of Public Works to make the Union whole for any and all cost and expenses incurred to pursue the prohibited practice charge; and f) order any and all other relief as the board deems necessary and appropriate.

The City filed its answer on July 24, 2008. The City contends that the arbitration decision is not controlling in this case and UAW foreman Carl Gagnon' actions were proper. According to the City, Mr. Gagnon operates the foreman pickup truck which is equipped with plowing equipment, and he was performing his typical duties during a snowstorm. The City also contends that the disputed area is part of plow route 20, is an area routinely assigned to a private contractor, and is not exclusive bargaining unit work. The City claims the current dispute should have been addressed through the contractual grievance procedure.

The City requests that the PELRB: a) dismiss the complaint; b) deny the requested findings that the Nashua Board of Public Works committed improper labor practices; c) strike the Union's request for an order to bargain in good faith, particularly since no bad faith bargaining has been alleged; d) deny the union's request for costs and expenses; e) grant such other relief as is just and equitable

The hearing originally scheduled for October 9, 2009 was continued and rescheduled to November 25, 2008, at which time the undersigned hearing officer conducted a hearing at the PELRB offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. At the parties' request, the record was held open until December 31, 2008 to allow the parties to file briefs. Both parties have filed briefs, and the record is closed. The parties' stipulated facts are set forth as Findings of Fact 1-13.<sup>1</sup>

#### FINDINGS OF FACT

1. AFSCME Council 93 Local 365 ("Union") is the certified representative for the City of Nashua public works employees.

---

<sup>1</sup> The parties' respective relevancy objections to fact stipulations #5 (Union objection) and # 14 (City objection) are overruled.

2. The Nashua Board of Public Works (“Nashua”) is the public employer within the meaning of RSA 273-A:I:X.

3. On December 30, 2003 Nashua and the Union executed a collective bargaining agreement covering the period from July 1, 2002 through June 30, 2006. That agreement included Appendix E on “Snow Coverage”.

4. On December 23, 2004, the Union filed four grievances for employees in the Solid Waste Department. The Public Employee Labor Relations Board appointed Arbitrator Richard Higgins to hear the December 23, 2004 grievances, and that hearing took place on March 30, 2007. On June 5, 2007, Arbitrator Richard Higgins issued an arbitration award.

5. On November 10, 2007, the Union filed a separate arbitration request with the Public Employee Labor Relations Board claiming that the City must pay the solo driver rate and consider ‘shotguns’ as available to perform snow operations before using any non bargaining unit employees. The Public Employee Labor Relations Board has appointed an arbitrator to hear that grievance, Docket number G-0045-10, which alleges violations on March 16 & 17, 2007.

6. On January 14, 2008 the parties were operating under the collective bargaining agreement effective July 1, 2002 through June 30, 2006.

7. Nashua experienced a snow storm event of approximately 9 inches which lasted from 3:00 am on Monday January 14, 2008 and ended by 7:00 am on Tuesday, January 15, 2008.

8. At 3:15 am on January 14, 2008, the Street Department called in a limited number of Union employees for overtime, using the page call in program, to begin salting and sanding the main streets in the City.

9. At 6:45 am on January 14, 2008, the Street Department called all Union employees for snow operations using on duty employees, the page call in program and the Division-wide call in sheet.
10. The city called in an outside private contractor, John Marino, who plowed snow route 20 from 8:00 am until 5:00 pm on January 14, 2008.
11. Nashua declared a snow emergency from 6:00 pm on Monday, January 14 until 6:00 am on Tuesday, January 15. During this time parked cars can be towed off streets if they impede snow plowing.
12. Kinsley Street, Euclid Avenue and Hanover Street are all part of snow route number 20. Carl Gagnon is the Streets Department Foreman assigned to oversee snow operations on that snow route. During this snow event he was driving one of the pickup trucks which are equipped with a snow plow.
13. The City of Nashua did not use the pool of workers indentified in Section 4 to Appendix E of the collective bargaining agreement.
14. For snow clearing purposes, the City has divided its approximately 300 miles of streets into 40 main plow routes, with some routes being further divided into sub routes.
15. Each year the City qualifies a number of private contractors to assist with plowing. Private contractors are responsible for 17 snow plow routes.
16. Not all Nashua residents comply with off street parking requirements which require residents to keep vehicles off City streets at night when a snow emergency has been declared. As a result, plow crews are not able to clear all snow from the street until vehicles parked on the streets have been moved or towed. This sometimes requires plow trucks to return to certain streets multiple times in order to complete the snow removal process.

17. Most of the plowing is done using large plow trucks manned by a 2 person crew. During the plowing process, the plow trucks leave “windrows” which require additional passes in order to fully clean up and remove the snow. Snow also tends to accumulate at various points around intersections, a situation which also requires further clean up in order to completely remove the snow. Additionally, the large plow trucks are not well suited to plowing narrower streets, cul de sacs, and dead ends.

18. At the beginning of each snow season, the Superintendent of Streets, Scott Pollack, meets and reviews with his foremen the scope of their snow plowing responsibilities, with directions to limit their plowing efforts to areas such as cul de sacs and dead ends.

19. A snow storm on January 14, 2008 resulted in 8-9” of snowfall, and snow removal continued into the night.

20. On January 14, 2008 John Lyons and Rusty Gagne, members of the Union’s bargaining unit, were operating a large plow truck on Plow Route 20. During the afternoon they saw a foremen’s pickup truck driven by foreman Carl Gagnon plowing in vicinity of the corner of Kinsley Street. It was unclear to Mr. Lyons whether Mr. Gagnon was plowing a “windrow” on Kinsley Street or cleaning up snow at the corners. Later, at approximately 9:30 p.m. they observed Mr. Gagnon plowing on Hanover Street. According to Mr. Gagnon, he made 2-3 passes on each side of Hanover Street due to parked cars.

21. After seeing Mr. Gagnon on Hanover Street, Mr. Lyons and Mr. Gagne continued plowing for another 45-60 minutes, and then Mr. Gagne contacted Mr. Gagnon by radio to inform him of their observations. Mr. Gagne told Mr. Gagnon that he would file a grievance over the matter because Mr. Gagnon was doing bargaining unit work. However, neither Mr.

Gagne nor anyone else ever filed a grievance concerning Mr. Gagnon's plowing activities on January 14, 2008.

22. Article 14 of the parties' collective bargaining grievance sets forth a 4 step grievance procedure which culminates in final and binding arbitration. Section A of Article 14 provides that:

It shall be the purpose of this grievance procedure to settle grievances between the City and Union as expeditiously and fairly as possible. Any difference as to the interpretation of this Agreement in its application to a particular situation, or as to whether it has been observed and performed, shall be a grievance under this Agreement and the parties shall observe the following procedure for the adjustment and settlement of such grievance.

23. As a remedy, the June 5, 2007 arbitral award provides that "the two most senior of the four grievants will receive six hours of pay at overtime rates for December 20, 2004." The Union does not claim that the City has failed to make these payments.

## DECISION AND ORDER

### DECISION SUMMARY

The subject matter of the Union's complaint should have been addressed through the grievance process contained in the CBA. Whether the June 5, 2007 arbitral award is binding precedent and is the law of the contract is a question to be determined in arbitration, since the June 5, 2007 arbitral award does not clearly and unequivocally dictate the scope of its precedential effect. The complaint is dismissed.

### JURISDICTION:

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I. In this case, whether the PELRB's exercise of its jurisdiction is proper depends upon whether the underlying dispute should have been addressed through the parties' contractual grievance procedure.

## DISCUSSION:

The PELRB does not generally have jurisdiction to interpret a collective bargaining agreement when the agreement provides for final and binding arbitration. However, absent specific language in the agreement to the contrary, the PELRB is empowered to determine as a threshold matter whether a specific dispute falls within the scope of the collective bargaining agreement. See *Appeal of the City of Manchester*, 153 N.H. 289 (2006); *Appeal of Police Comm'n of City of Rochester*, 149 N.H. 528 (2003); *Appeal of State*, 147 N.H. 106 (2001); and *Appeal of Town of Bedford*, 142 N.H. 637 (1998).

A presumption of arbitrability exists if the CBA contains an arbitration clause, but the court may conclude that the arbitration clause does not include a particular grievance if it determines with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute. Furthermore, the principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties.

*Appeal of Town of Bedford*, 142 N.H. at 640 (quotations and citations omitted).

It is evident that the parties' collective bargaining agreement covers this dispute based upon the Union's contention that the City's actions on January 14, 2008 violate the collective bargaining agreement. However, the Union argues it is not required to follow the grievance procedure because the dispute arising from Mr. Gagnon's plowing activities on January 14, 2008 is controlled by the June 5, 2007 arbitral award, and the City's alleged failure to abide by the June 5, 2007 arbitral award demonstrates that the grievance procedure is not workable. As a result, the Union contends it is entitled to proceed with an unfair labor practice charge.

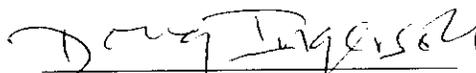
The Union's arguments presume that the June 5, 2007 arbitral award constitutes binding precedent, or is the "law of the contract," and also that the PELRB has jurisdiction to adjudicate the current dispute on that basis. The extent to which arbitral awards constitute binding precedent and in effect become the law of the contract must be determined by an arbitrator, not

the PELRB. *Appeal of the State of New Hampshire*, 147 N.H. 106, 108-10. “Unless the arbitral award clearly and unequivocally dictates the scope of its precedential effect, we hold that the PELRB lacks jurisdiction to determine whether, under the terms of a CBA, an arbitral award becomes the ‘law of the contract.’” *Id.* The June 5, 2007 arbitral award does not “clearly and unequivocally” dictate “the scope of its precedential effect,” and the PELRB otherwise lacks jurisdiction to interpret the parties’ collective bargaining agreement to determine whether the June 5, 2007 arbitral award constitutes binding precedent, or the law of the contract.

Accordingly, the Union was not excused from utilizing the grievance procedure to raise its claims that the June 5, 2007 arbitral award constitutes binding precedent and that the City’s actions violated such alleged binding precedent or otherwise violated the provisions of the parties’ collective bargaining agreement. The grievance procedure represents the parties’ agreed upon process to address and resolve these types of disputes and the PELRB lacks jurisdiction to adjudicate such claims. Based upon the foregoing, the complaint is dismissed.

So ordered.

February 5, 2009

  
Douglas L. Ingersoll, Esq.  
Hearing Officer

Distribution:

Karen Clemens, Esq.

James McNamee, Esq.