



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Derry Police Patrolman's Association, NEPBA Local 38

v.

Town of Derry

Case No. G-0135-2

Decision No. 2011-278

Appearances: Peter J. Perroni, Esq., Nolan Perroni Harrington LLP, Lowell,
Massachusetts for the Complainant

Thomas M. Closson, Esq. Jackson Lewis, LLP, Portsmouth, New
Hampshire, for the Respondent

Background:

The Derry Police Patrolman's Association, NEPBA Local 38 (Union) filed an unfair labor practice complaint against the Town on February 9, 2011 claiming that the Town committed an unfair labor practice in violation of RSA 273-A:5, I (a), (e), (g), and (i) when it refused to bargain the installation, use and/or impact of the installation of Digital In-Car Video Camera Systems and GPS in the cruisers operated by bargaining unit members. The Union asserts that the installation of Video Camera Systems and GPS and adoption of policies and procedure regarding their use are mandatory subjects of bargaining and constitute a significant change in terms and conditions of employment. The Union requests that the PELRB issue a cease and desist order prohibiting the Town from continuing the installation of Video Camera Systems and GPS, and the implementation of related policies and procedures, prior to engaging in good faith bargaining with the Union on the issues of installation and its impact on working.

conditions. The Union also requests that the PELRB order the Town to pay the Union's costs associated with this complaint.

The Town denies the charges and asserts, among other things, that the installation of Video Camera Systems and GPS is within its exclusive managerial prerogative, is not a mandatory subject of bargaining, and does not affect any terms and conditions of employment. The Town requests that the PELRB dismiss the complaint with prejudice and award the attorneys' fees the Town had incurred in responding to the Union's complaint.

This case was originally scheduled for hearing on April 21, 2011 but the parties subsequently agreed to submit the case for decision based on stipulated facts, exhibits, and briefs, with final filings due at the end of June, 2011. Both parties have submitted briefs, and the stipulations are reflected in the findings of fact set forth below. The parties stipulated exhibits 1-13 have been marked and are included in the record for decision and incorporated by reference in this decision.

Findings of Fact

1. The Derry Police Patrolman's Union, NEPBA Local 38 ("the Union") is the certified collective bargaining representative for all Patrol Officers employed by the Town of Derry ("the Town").

2. The Town is a public employer as defined by the provisions of NH RSA 273-A:1.

3. The Town and the Union are parties to a collective bargaining agreement ("the CBA") that covers the period July 1, 2007 through June 30, 2008. At various times since the expiration of this CBA, the Town and the Union have been engaged in negotiating a successor agreement.

4. At the beginning of January 2011, the Town began installation of the Digital In-Car Video Camera Systems and the Automatic Vehicle Location Equipment. The Town did not bargain with the Union prior to installing this new technology/equipment.

5. On January 10, 2011, the Town promulgated a written policy for the Digital In-Car Video Camera Systems. The Town did not bargain with the Union prior to promulgating this policy.

6. On January 13, 2011, the Union made a written demand to bargain the installation of the Digital In-Car Video Camera Systems and the Automatic Vehicle Location Equipment, and the promulgation of the written policy for the Digital In-Car Video Camera Systems.

7. Both the Digital In-Car Video Camera Systems and the Automatic Vehicle Location Equipment will collect data that could be used to enforce existing work rules of the Derry Police Department.

8. The Digital In-Car Video Camera System includes two video cameras in each cruiser: one camera records out the front window of the cruiser, and one camera records into the prisoner/citizen transport area of the cruiser.

9. The forward facing video cameras that are part of this Digital In-Car Video Camera System are automatically activated upon the triggering of the cruiser's emergency lights and/or crash detection sensor. The video camera that faces the prisoner/citizen transport area of the cruiser must be manually activated, and policy requires that it be activated during a prisoner/citizen transport.

10. The policy promulgated by the Derry Police Department requires that the Digital In-Car Video Camera System remain activated for the entire duration of a motor vehicle stop and while the cruiser's emergency lights are activated. The policy promulgated by the Derry Police Department also requires that the Digital In-Car Video Camera System remain activated for the entire duration of a prisoner/citizen transport.

11. The Digital In-Car Video Camera System also includes an audio record function. The policy promulgated by the Derry Police Department requires that this audio record function must be activated during motor vehicle stops and for the entire duration of a prisoner/citizen transport.

12. According to Edward Budroe, Union President, during prisoner transport a portion of the Officer's face is typically captured on the Digital In-Car Video Camera, and more of an Officer's face is captured if the Officer leans toward the center console area of the cruiser. See Affidavit of Edward Budroe.

13. The following is true about the video and GPS technology according to Chief Edward Garone. While data collected from the Digital In-Car Video Camera Systems and the Automatic Vehicle Location Equipment can be used to enforce existing work rules relating to matters such as vehicle operation, high speed vehicle pursuits, and use of force, this is not a primary or significant purpose of the new equipment. The Digital In-Car Camera Systems are "intended to collect data to fortify criminal cases; to collect data to prevent and respond to unfounded claims of Officer misconduct; and to assist Officers in the effective and safe monitoring of any individuals transported in the rear seat of police cruisers." The Automatic Vehicle Locators (GPS) are "intended to assist in the efficient dispatch of patrol units; to improve patrol units' response time to emergency situations; and to help locate a patrol unit should it become disabled and not responsive to radio communications." See Affidavit of Edward B. Garone.

Decision and Order

Decision Summary:

The Town's decision to install Digital In-Car Video Camera Systems and Automatic Vehicle Location Equipment in police cruisers operated by bargaining unit employees is a matter of managerial policy within the exclusive prerogative of the public employer in this case under RSA 273-A:1, XI. This decision constituted a permissive, not mandatory, subject of bargaining and the Town did not commit an unfair labor practice when it refused to bargain whether to utilize this technology with the Union. However, the Town did commit an unfair labor practice on account of its failure to bargain the impact of this managerial decision on the terms and

conditions of employment of bargaining unit employees. The parties are ordered to proceed with impact bargaining but the Union's request to suspend use of the new equipment pending the outcome of impact bargaining is denied.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

In general, pursuant to RSA 273-A:3, I, the Town is obligated to negotiate in good faith the terms and conditions of employment with the Union.

"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.*

RSA 273-A:1, XI (emphasis added). Despite the foregoing statutory description of "terms and conditions of employment" and "managerial policy" disputes still arise between public employers and employee organizations, like the Town and the Union in this case, about their respective bargaining obligations and rights as to certain subject matter. To address and resolve such disputes the Court has developed a three part test, which when applied divides bargaining proposals into three general categories: mandatory, permissive, and prohibited. Public employers must bargain mandatory subjects, may bargain permissive subjects, and may not bargain prohibited subjects. The Court's three part test, set forth in *Appeal of State*, 138 N.H. 716 (1994)¹, is as follows.

¹ Examples of the categorization of different bargaining subjects reviewed in this decision include wages (mandatory), discipline (permissive), number of personnel (permissive), submission of employee appointment and termination disputes to grievance procedure (permissive if no constitutional or statutory prohibitions), and whether to offer extracurricular school activities (permissive).

First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation.... Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy....Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI. A proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.

Appeal of State, 138 N.H. at 724.

In this case, the Town's decision to acquire and install the Digital In-Car Video Camera Systems and Automatic Vehicle Location Equipment (collectively the "technology") is not a prohibited subject of bargaining, and therefore the Union's proposal to bargain the Town's decision to use the technology survives the first part of the Court's test. This is true because the Town has not identified any constitutional provision, statute, or statutorily adopted regulation that reserves the decision to use the disputed technology to the exclusive managerial authority of public employers. In this regard it should be noted that the reference to "statutes" reserving particular subjects to the exclusive managerial authority of the public employer means statutory authority independent of the managerial policy exception expressed in RSA 273-A:1, XI. *See Appeal of Nashua Board of Education*, 141 N.H. 768,774 (1997).

Whether the Union's proposal to bargain the Town's decision to use the technology passes the second part of the Court's test requires consideration of the competing employer and employee interests at issue. The Union's request to bargain the decision to use the technology in this case is similar to the Union's request to bargain a layoff and recall proposal reviewed in *Appeal of State* and which was found to be a permissive subject of bargaining under the second part of the test. In this case, like the layoff and recall proposal, the disputed technology affects the terms and conditions of employment, but it primarily relates to "managerial policy as defined by the managerial policy exception," namely the use of technology, a program or method of the

employer, and the direction of personnel. *Appeal of State*, 138 N.H. at 726-727. As noted by the Union and acknowledged by the Town, the technology is capable of generating data that could be relevant to employee compliance or non-compliance with existing work rules. However, the Town maintains that this is not the primary or significant purpose for this technology. Upon due consideration of how the different employer and employee interests are affected, I therefore conclude that the decision to use the technology, including the decision about the circumstances in which the technology will be activated, primarily affects matters of broad managerial policy, even though it also incidentally affects terms and conditions of employment as conceded by the Town. However, taking into account the Town's stated objective for its decision to proceed with this technology, which I accept as candid, accurate, and clearly related to the Town's interests in safe, efficient, and effective police department operations, as well as the fact that the Town's decision to use this technology plainly falls within the purview of statutorily described managerial policy in the areas of use of technology, programs or methods of the employer, and direction of personnel, it is evident that the Town's decision primarily relates to and represents a legitimate exercise of managerial rights in these areas.

This does not mean there is nothing to address at the bargaining table. Because the terms and conditions of employment are affected, as reflected by changes in the working conditions of Officers operating police cruisers in general, during citizen/prisoner transport, during pursuits with emergency lights engaged, and during motor vehicle stops, the Union has the right to engage in impact bargaining. While the Town did not improperly refused to bargain its decision to use the disputed technology, and that charge is dismissed, the Town did commit an unfair labor practice under RSA 273-A:5, I (e) and (g) on account of its refusal to bargain the impact of its decision in violation of its good faith bargaining obligations. See *Hudson Federation of Teachers, AFT, AFL-CIO, Local No. 2263 v. Hudson School Board*, PELRB Decision No. 86-64 (school board ordered to participate in impact bargaining to include discussion about impact of

schedule change, return to status quo not ordered); *Rochester Federation of Teachers, Local 3606, AFT, AFL-CIO v. Rochester School District*, PELRB Decision No. 1999-040 (topics protected under managerial policy exception are subject to impact bargaining because employer unilateral action changed working conditions); *Laconia Education Association/NEA-NH v. Laconia School District*, PELRB Decision No. 2008-204 (District ordered to impact bargain class schedule change).

In accordance with the foregoing the Town committed an unfair labor practice in violation of RSA 273-A:5, I (e) and (g) on account of its refusal to bargain the impact on working conditions of its decision to acquire and install the technology under consideration in this case. The Town is ordered to cease and desist from its refusal to participate in impact bargaining and is further ordered to proceed with the impact bargaining process in accordance with this decision. However, the Union's request to suspend the use of the technology pending the completion of impact bargaining is denied. The Union's charge that the Town violated its obligation to bargain its decision use and install the technology is denied, and that portion of the Union's complaint is dismissed.

The parties are directed to proceed as follows. They shall commence the impact bargaining process by meeting to define and agree upon appropriate impact bargaining proposals and subjects. By "appropriate impact bargaining proposals and subjects" I mean, for example, bargaining topics like employee privacy concerns stemming from the camera capture of an Officer's face, procedures for Town storage of and employee access to data, data retention practices, notice and procedure in the event data may or will be used in conjunction with employee evaluation or discipline, and similar matters consistent with the findings and determinations made in this decision. The preliminary impact bargaining session shall take place within 30 days unless a different schedule is agreed to by the parties and should include a review of the Union's proposed subjects of impact bargaining and notation of the Town's acceptance or

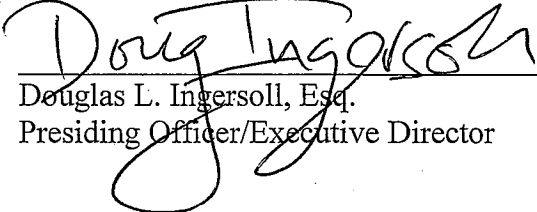
objection to any proposed topics. The parties should then proceed with the bargaining process with the good faith intention of reaching agreement.

This case will remain open for 90 days and the board will exercise its continuing jurisdiction under Pub 304.03 (c) in order to allow either party the opportunity to bring any subsequent disputes that relate to or arise during the impact bargaining process to the PELRB for review, consideration, and, as appropriate, decision. However, the parties are strongly cautioned to avail themselves of this option only if there is clear and direct evidence that a party to the bargaining process has failed to fulfill its good faith bargaining obligations and further filings with the PELRB should not be pursued or threatened simply to gain an advantage at the bargaining table.

The Town shall immediately post this decision in a conspicuous place at locations where bargaining unit employees work for a period of sixty days and complete and return a certificate posting.

So ordered.

November 8, 2011



Douglas L. Ingersoll, Esq.
Presiding Officer/Executive Director

Distribution:
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