STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Berlin School District v. AFSCME Council 93, Local 1444

and

AFSCME Council 93, Local 1444 v. Berlin School District

Case No. E-0020-1
Case No. E-0020-2
(Consolidated Cases)

Decision No. 2011-282

Appearances:

Peter C. Phillips, Esq. for the Berlin School District

Karen E. Clemens, Esq. for the AFSCME Council 93, Local 1444

Background:

The District filed an unfair labor practice complaint against the Union on March 30, 2011. The District claims that the Union violated RSA 273-A:5, II (d), (f), and (g) when it filed a demand to arbitrate a grievance concerning "bargaining unit work" allegedly being performed by non-bargaining unit personnel. The District requests that the PELRB find that the Union's grievance is not arbitrable and order the Union to cease and desist from pursuing the grievance. The Union denies the charges and claims that the grievance is arbitrable and was timely filed. The Union requests that the PELRB dismiss the District's complaint.

The Union filed an unfair labor practice complaint against the District on April 18, 2011. The Union claims that the District's unilateral decision to assign "bargaining unit work" to non-bargaining unit personnel, which allegedly resulted, among other things, in loss of overtime, constitutes a change in conditions of employment and violates RSA 273-A:5, I (e), (g), (h), and

(i). The Union requests that the PELRB find that the District violated RSA 273-A:5, I (e), (g), (h), and (i) and order that all bargaining unit employees who lost overtime opportunities due to the District's actions be made whole. The District denies the charges and asserts, among other things, that matters such as reorganization, hiring, and assignment of work duties are within the District's management rights and that the Union has never requested to bargain the impact of the District's reorganization decision. The District requests that the PELRB dismiss the Union's complaint.

These cases were consolidated for the purposes of hearing and decision at the parties' request and the hearing was conducted on May 17, 2011 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. The parties filed post-hearing briefs and the decision is as follows.

Findings of Fact

1. The District is the public employer within the meaning of RSA 273-A:1, X.

2. The Union is an employee organization certified as the exclusive representative of certain employees of the District including all regular/permanent school custodians and bus drivers.

3. The Union and the District are parties to a collective bargaining agreement (CBA) effective from July 1, 2008 to June 30, 2011, which "may be terminated at the end of a contractual year, by notice in writing by either party, served thirty (30) days prior thereto upon the other party." See Joint Exhibit 1.[1]

4. In the summer of 2010, the School Board approved Superintendent Corinne Cascadden's plan to reorganize the maintenance department by, among other things, retraining custodial employees to perform jobs that were previously performed by contractors, by eliminating the Custodial Foreman position, and by creating a new non-bargaining unit Building

[1] All exhibits referenced herein are incorporated in full into the Findings of Fact.

and Grounds Director position with greater supervisory authority than that of a Custodial Foreman (hereinafter, reorganization). The main purpose of the reorganization was to cut maintenance-related costs.

5. The District informed the Union about the reorganization plan at the October 4, 2010 meeting, attended by Superintendent Cascadden, Business Administrator Bryan Lamirande, President of Local 1444 Mark LaPointe, and AFSCME Staff Representative Michael Blair, at which time the Union received a copy of the job description for the new position of Building and Grounds Director. The job description did not include snowplowing or sanding among the Director's responsibilities. See Union Exhibit 2.

6. The District posted a vacancy notice for the position of Buildings and Grounds Director for the 2010-2011 school year internally on October 7, 2010 and advertised the vacancy in the Berlin Daily Sun newspaper on October 8, 2010. See District Exhibits 3 & 4.

7. During a meeting, held at the end of October, 2010, the Union representatives told Superintendent Cascadden that, in their view, bargaining unit employees could perform all duties and responsibilities in a Building and Grounds Director job description and asked that this position be classified as a bargaining unit position. The Superintendent denied their request on the ground that the new position had supervisory responsibilities, including evaluation of Custodians. The Superintendent also encouraged bargaining unit employees to apply for a Building and Grounds Director position.

8. At the November, 2010 School Board meeting, a group of Custodians presented a letter to the Board in which they expressed opposition to the reorganization of the custodial department and creation of a new non-bargaining unit position and made several proposals including the following:

> Rather than try to arbitrarily eliminate the foreman's position, causing the bumping and displacement of several custodians along with the lay off of a part-time custodian, your custodial staff is recommending keeping the

> present structure and revising the foreman's position to absorb most of the duties listed in building and grounds supervisors (sic) job description except for the hiring and dismissal of custodians which is administrative responsibility.... The other option to consider is the way the school district utilizes sub-contractors for the electrical and plumbing needs in the school buildings. The school district could conceivably hire an electrician and a plumber to handle these on-going needs and utilize them for reconstruction projects when things are slow' or the district might attempt to negotiate a special rate for services with local contractors.... Therefore, your custodians respectfully request that the Board of Education will consider their proposals, and delay the hiring of the Buildings and Grounds supervisor and come to the table to further discuss their options for re-structuring and further maximize the efficiency of maintenance series for the Berlin Public Schools.

The School Board accepted a copy of the letter but did not address the Union's proposals at the meeting. See Union Exhibit 3.

9. By November 23, 2010 the District had modified the Building and Grounds Director job description to include snowplowing and sanding among responsibilities. The District had not negotiated this modification with the Union. See Joint Exhibit 2.

10. On December 2, 2010 Superintendent Cascadden communicated with Staff Representative Blair regarding the scheduling of contract negotiations. See Union Exhibit 4.

11. On December 15, 2010 the School Board approved the hiring of Richard Girard as a new Building and Grounds Director with the starting date of January 3, 2011.

12. On December 17, 2010 the Union filed a grievance against the District alleging that the District violated Section 1.2, 1.1, 2.1 of the CBA and "any other section that may apply in allowing management personnel to perform bargaining unit work.... Bargaining unit work includes but is not limited to plowing, sanding, and performing minor maintenance (i.e. use of small hand tools). In addition, management has unilaterally violated the spirit and intent of the CBA through unwarranted changes to District practice." The Union requested that the District "[d]iscontinue the practice of allowing management to perform bargaining unit work and make all affected employees whole in all ways for lost overtime and other benefits." Joint Exhibit 3.

13. The grievance was denied at both the Superintendent and School Board levels of the grievance procedure on December 27, 2010 and January 27, 2011, respectively. Superintendent Cascadden's response to the grievance provides in part:

> ... The inability for the Buildings and Ground Director to use the District pickup truck for the plowing of snow would require the payment of overtime and/or require the district to reassign staff to accommodate the Union's demand, regardless of how inefficient the reassignment may be. In addition, the grievance would prohibit management from performing minor maintenance or even from using small hand tools....

See Joint Exhibit 4.

14. On January 4, 2011 Superintendent Cascadden sent a letter to Staff Representative Blair regarding the scheduling of contract negotiations for a successor agreement. The letter provides in part:

> . . . In accordance with Article XI, 9.1 and 9.2 of the collective bargaining agreement, this letter shall serve as notice that the District is terminating the contract upon its expiration of (sic) June 30, 2011. The District shall negotiate in good faith with the certified representative of the union on all matters of mandatory subjects of bargaining. It is the District's intent to negotiate a successor collective bargaining agreement prior to the contract's expiration date.

Union Exhibit 5.

15. On January 3, 2011 Superintendent Cascadden had a meeting with Custodians regarding the reorganization. On January 10, 2011 she sent Custodians a follow up memo, which provides in part:

> .... Due to much discord, I have notified Local #1444 staff rep Michael Blair, that the district is terminating the collective bargaining agreement effective June 30, 2011. We will begin the process, next week, of negotiating another collective bargaining agreement.
> I am continuing to move forward with a structure change in the custodial department so that we can be as well-trained and efficient in the upkeep of our buildings as possible....

Union Exhibit 6. According to the Superintendent, the District's notice of contract termination was caused by the desire to strictly adhere to the CBA language and to start the contract

negotiation process as soon as possible.

16. On March 2, 2011 the Union filed a demand for arbitration with the American Arbitration Association as the last step of the contractual grievance procedure. The Nature of Dispute section of the demand letter provides:

> Management has hired a Building/Grounds Director whom they are allowing to perform duties that have been routinely and consistently performed by the bargaining unit. In violation of, but not limited to: Section 1.1, 1.2, 2.1 as well as established past practices.

The Union requested that the District "[d]iscontinue practice of management performing bargaining unit work and make all affected employees whole." See Joint Exhibit 6.

17. A non-bargaining unit position of Supervisor of Buildings and Grounds was created in 1989. In 1998 the position was renamed "Plant Operations" and in 2004 it was renamed "Operations Manager". Since at least 1994, the District had both a non-bargaining unit position of Operations Manager and a bargaining unit position of Custodial Foreman. The Operations Manager supervised the maintenance department. In June, 2009 the Operations Manager position was eliminated. District Exhibit 7.

18. According to the job description, the Operations Manager's responsibilities included "snow plowing and sanding services during the winter months." The Operations Manager never performed snowplowing or sanding. See District Exhibit 1.

19. The Custodial Foreman's responsibilities included plowing snow at all schools, sanding all areas when necessary, in major snow storms calling in back up help to plow when necessary, and shoveling all walkways at Bartlett School. His responsibilities also included "overall supervision of all custodians," assisting in "custodial evaluations of personnel," and providing "leadership for all custodians." See Union Exhibit 1 and District Exhibit 2.

20. The Building and Grounds Director's job description includes the following responsibilities:

> 1. Assumes responsibility for the comprehensive overall planning and scheduling of maintenance and repair requirement of the District;
> 2. Establishes appropriate maintenance, grounds keeping, security, and custodial requirements for each school building and installation; . . .
> 16. Assists in the preparation and administration of the budget for maintenance, grounds, security, and custodial supplied and equipment;
> 17. Supervises and inspects the improvement and renovation work performed by outside contractors and verifies that the terms of all such contracts have been fulfilled before authorizing final payment; . . .
> 21. Assists in the recruitment, employment, assignment, transfer, promotion, demotion, or dismissal of custodial and maintenance personnel; . . .
> 23. Conducts a continuing program of staff training and personnel development; . . .
> 31. Performs written evaluations according to Board policy on all custodial and maintenance personnel . . . .

These responsibilities were not part of the Custodial Foreman's job description. See Joint Exhibit 2 and Union Exhibit 1.

21. In the past, all snowplowing and sanding work, both regular time and overtime, was performed by a Custodial Foreman and other bargaining unit employees. Managerial personnel did not perform either snowplowing or sanding.

22. In 2009 the total of all overtime hours worked by custodial employees was 1575.25, out of which 209.25 hours were snow-related. The Custodial Foreman worked 105 hours of this snow-related overtime. In 2010 the total overtime hours for custodial employees was 1397, out of which 145 hours were snow-related. The Custodial Foreman worked 73.5 hours of this snow-related overtime. In 2011 (not the full year) the total of all overtime hours worked by custodial employees was 953.50, out of which 205 hours were snow-related. The Custodial Foreman worked 29.5 hours of this snow-related overtime. These numbers do not reflect the differences in the amount of snow and other winter precipitation that fell in 2009, 2010, and 2011. See District Exhibit 6.

23. Mr. Girard, the new Building and Grounds Director, performed some snowplowing and sanding after being hired.

24. Prior to the hiring of Building and Grounds Director, the snow-related overtime hours were distributed among the bargaining unit members based on the seniority. After the District commenced the reorganization of the custodial department, the pattern of distribution of the snow-related overtime has changed. According to Business Administrator Lamirande, the overtime is now distributed more equally among the employees.

25. According to Business Administrator Lamirande, the reorganization, among other things, led to the elimination of some overtime available to custodial employees.

26. The parties' CBA sets forth the following steps of the grievance procedure: Supervisor, Superintendent, School Board, and Arbitration. It also provides that a "grievance must be filed within five (5) working days of its occurrence or when the employee, by reasonable diligence, should have known of its occurrence"; and that any grievance not processed within the time limits shall be deemed a waiver of the claim. See Joint Exhibit 1.

27. Article 6.1 of the CBA defines a grievance as "a complaint against the employer, by an employee or employees, with respect to the meaning and/or application of a provision or provisions of this agreement"; and Article 6.3 (g) provides that "[n]o third party involved in the grievance procedure shall have the power or authority to add to or subtract from or in any way modify the terms of this agreement, but shall make their decisions based solely upon the specific provisions contained within the written agreement of the parties." Joint Exhibit 1.

28. Part I of the CBA, titled Job Security, provides in relevant part:

> GENERAL
> 1.1 The Board of Education of the City of Berlin, New Hampshire ... and Local No. 1444 of the [AFSCME] ... in order to increase general efficiency in the operation of the school system, to promote and maintain existing harmonious relationships and to promote the morale, equal rights, well being and security of said employees, hereby agree as follows:
>
> RECOGNITION
> 1.2 The Board recognizes that the Union is the sole and exclusive representative of all school custodians who are engaged in the performance of custodial services in the public schools; and all bus

drivers, for the purpose of bargaining with respect to wages, hours of labor and working conditions.

Joint Exhibit 1.

29. Part II of the CBA, titled Vacancy, provides in relevant part:

* * *

2.1 A job posting shall be posted within 30 days in the School Department when:

a. A vacancy occurs in a full-time or part-time position and provided that funds are available...

b. A new position is created in a new or existing job classification and/or the location of a previously bid position is changed.

c. In the event that the District creates or eliminates one or more positions affected employee(s) shall be allowed to exercise seniority to bump down to any position held by junior employee(s). This shall be known as "The Bumping Procedure". Note: The bumped employee(s) also affected by the elimination, shall be allowed to bump down (seniority permitting).

d. If significant changes in job duties are proposed, the District agrees to meet with the union to discuss said changes to determine the necessity of job postings.

* * *

2.2 The job posting shall be posted for 10 working days and shall be filled within fifteen (15) working days from the closing date of the posting provided a qualified candidate has been found. The posting shall specify the job duties and the qualifications for the job, including education, experience, and other requirements. The Superintendent of Schools shall determine job duties and qualifications.

* * *

2.4 Qualifications of bidders shall be determined by the Superintendent of Schools with the advice and consent of the Board, and such determination shall be final.

2.5 Where qualifications of bidders are equal, the Superintendent shall select the employee with the greatest departmental seniority . . .

* * *

2.7 The Board reserves the right to assign permanent employees to job foreman or lead custodian positions in accordance with qualifications and seniority.

* * *

2.10 If no school department employee, who is a member of Local 1444, meets or accepts the conditions above, the Superintendent may fill the position any way he finds appropriate.

2.11 ... If the custodial foreman is absent for any reason, and if he is to be replaced, the custodian having the most departmental seniority shall replace him/her and receive the foreman rate of pay during the replacement period...

Joint Exhibit 1.

30. Article 7.1 of the CBA is titled Wages and contains an agreed upon classifications and wage schedules for maintenance department employees, including Custodian Foreman and Custodians, for the time period from July 1, 2006 to July 1, 2010. See Joint Exhibit 1.

31. Part IV of the CBA, titled, Work Week, provides in part:

> OVERTIME-CUSTODIANS
>
> 4.3 Overtime is defined as hours worked over the scheduled 40-hour work week. Employees who do not work 40 hours in a week and are scheduled to work weekend overtime, may remain scheduled, but will be paid at straight time for Saturday until the employee has worked more than 40 hours in that week or over eight hours in a day. Work performed on Sunday is paid at time and one-half regardless of the number of hours worked in that week. There shall be no duplication of overtime. When an employee is assigned to work another shift, all overtime shall be calculated at time and one-half of the rate in which the assignment occurs.
>
> * * *
>
> OVERTIME-CUSTODIANS-DISTRIBUTION BETWEEN EMPLOYEES
> 4.6 All overtime work shall be distributed equally among eligible employees, as far as possible. Overtime shall be assigned on weekly basis as soon as it becomes known, whenever possible.

Joint Exhibit 1.

32. Part VIII of the CBA, titled Jurisdiction and Authority of the School Board, provides in relevant part:

> 8.1 The Board, subject only to the language of this agreement, reserves to itself full jurisdiction and authority over matters of policy and retains the right in accordance with applicable laws and regulations to direct and manage all activities of the school district.
>
> The parties understand that neither the Board nor the Superintendent may lawfully delegate powers, discretions and authorities which by law are vested in them, and this agreement shall not be construed so as to limit or impair their respective statutory powers, discretions, and authorities.
>
> 8.2 It is understood that both parties have had an opportunity to make proposals and counterproposals on all negotiable issues during negotiations and that this written agreement reached as a result represents the total of all understanding between the parties for the contract term.

Joint Exhibit 1.

Decision and Order

Decision Summary:

A. The District's Complaint: The District's complaint against the Union is denied because the Union's grievance was timely and the District failed to prove that, under the positive assurance standard, the CBA cannot be interpreted to encompass the subject of matter of the grievance.

B. The Union's Complaint: The District is not obligated to bargain its reorganization decision because, under the circumstances of this case, the reorganization constitutes a permissive and not mandatory subject of bargaining. Although the District is obligated to bargain the impact of its decision to reorganize the custodial department and assign work previously performed by the bargaining unit employees to a non-bargaining unit employee, the Union's evidence is insufficient to prove that the District refused to bargain the impact. Accordingly, the Union's RSA 273-A:5, I (e), (g), and (i) claims are denied. The Union's breach of contract claim is dismissed because the parties' agreement provides for a final and binding arbitration and there is no positive assurance that the dispute at issue is excluded from the contractual grievance procedure.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6. The PELRB's jurisdiction to interpret collective bargaining agreements is addressed in the Discussion section below.

Discussion:

A. The District's Unfair Labor Practice Complaint

The only disputed issue in the District's case against the Union is whether the Union's request for arbitration violates RSA 273-A:5, II (d), (f), and/or (g). The District claims that the

dispute is not arbitrable on procedural grounds because the Union's grievance was untimely. Because the subject of the grievance is the assignment to a new Building and Grounds Director snowplowing and sanding duties, which were previously performed by bargaining unit members and the resulting loss of overtime, the relevant "occurrence" for the purpose of filing of the grievance is the actual hiring of the Building and Grounds Director. Although the District informed the Union about its plan to reorganize and hire a new Building and Grounds Director in October of 2010, the actual hiring did not occur until December 15, 2010. The CBA requires that the grievance be filed within five working days of its occurrence. The Union filed the grievance on December 17, 2010. Therefore, the filing of the grievance was timely.

The District also argues that the Union's grievance is not arbitrable because the parties did not agree to arbitrate the issues raised in the grievance and because the grievance interfered with the District's exercise of its management rights. The determination of whether the Union's grievance is arbitrable does not involve the determination of the merits of the Union's grievance. The New Hampshire Supreme Court has adopted four principles to guide the PELRB in determining whether a dispute is arbitrable under an arbitration clause in a CBA:

> (1) arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit . . .; (2) unless the parties clearly state otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator; (3) a court should not rule on the merits of the parties['] underlying claims when deciding whether they agreed to arbitrate; and (4) under the "positive assurance" standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists, and in the absence of any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . .

Appeal of AFSCME Local 3657, Londonderry Police Employees, 141 N.H. 291, 293 (1996). In this case, it is undisputed that the CBA does not by its terms grant the arbitrator authority to determine arbitrability. Absent such contractual provision, "the PELRB has the discretion to determine whether a dispute involves a matter covered by a collective bargaining agreement." *Id.*

at 293-94 (internal quotation marks omitted). To satisfy the "positive assurance" standard, the District must show that the CBA in this case "is not susceptible of a reading that will cover the dispute." See *Appeal of City of Nashua, School District #42*, 132 N.H. 699, 701 (1990). See also *Contoocook Valley School District, SAU #1 v. Contoocook Valley Education Association/NEA-New Hampshire*, PELRB Decision No. 1998-102.

The CBA defines a grievance as "a complaint against the employer, by an employee or employees, with respect to the meaning and/or application of a provision or provisions of this agreement." In its grievance, the Union described the issues broadly claiming that the District violated sections 1.2, 1.1, 2.1 of the CBA and "any other section that may apply." The grievance concerns the assignment of the snowplowing and sanding duties to a non-bargaining unit managerial employee and the resulting redistribution and loss of overtime. It is clear from the evidence presented in this case that the assignment of snowplowing and sanding duties previously performed only by the bargaining unit employees, often during overtime hours, to a non-bargaining unit employee, will likely affect the overtime hours and, consequently, wages of the bargaining unit employees. The grievance in this case concerns work for which the parties have negotiated wage rates. "There can be little doubt that workers generally consider the money which comes to them as a result of their labors, whether it be regular pay, overtime or vacation pay as a part of their wages and courts have recognized this fact." *Brampton Woolen Company v. Local Union 112*, 95 N.H. 255, 257 (1948). Wages are included in the definition of "terms and conditions of employment" under RSA 273-A:1, XI. In this case, the bargaining unit employees' wages are covered by the parties' CBA, Article 7.1, and are not expressly excluded from the grievance procedure. In addition, the evidence shows that the reorganization also affects the distribution of overtime, which is covered under Article 4.6 of the CBA and is not expressly excluded from the grievance procedure. Therefore, claims arising from the alleged violations of the CBA provisions covering wages and distribution of overtime are arbitrable.

As stated above, the issue here is not whether the Union's grievance has merit but rather whether its subject matter is covered by the CBA. In this case, the District's evidence is insufficient to establish with "positive assurance" that the CBA is not susceptible of a reading that will cover the dispute concerning the assignment of snowplowing duties to a managerial non-bargaining unit employee and its impact on wages and distribution of overtime. In addition, the District's claim that the subject matter of the grievance is excluded from the grievance procedure because it interferes with the District's exercise of its managerial prerogative is without merit because, under the CBA Article 8.1, the District's authority over matters of policy is expressly limited by the language of the parties' CBA: "The Board, *subject only to the language of this agreement*, reserves to itself full jurisdiction and authority over matters of policy ..." Although the decision to reorganize the custodial department involves matters of policy, the impact of this decision on wages of bargaining unit employees is not a policy matter but rather a matter involving change of agreed upon terms and conditions of employment covered by the CBA. Furthermore, to allow either party to the CBA to decide whether an issue is excluded from the grievance procedure under the management rights clause would give that party an "exclusive and complete control over the interpretation and utilization of the grievance procedure [and] would make it unacceptable and unworkable as contemplated under RSA 273-A:4, thus making it meaningless as a tool for resolution of disputes under the CBA." *State Employees Association of New Hampshire, Local 1984, SEIU v. Town of Bedford*, PELRB Decision No. 96-037. Accordingly, without deciding whether the Union can prevail on the merits of its grievance, the dispute on which the Union's grievance is based is arbitrable and the District's unfair labor practice complaint is denied.

B. The Union's Unfair Labor Practice Complaint.

In its complaint the Union claims that the District violated RSA 273-A:5, I (e), (g), (h), and (i) by unilaterally changing the structure of the custodial department and assigning

"bargaining unit work" to a non-bargaining unit employee. RSA 273-A:5, I provides in relevant part:

> It shall be a prohibited practice for any public employer ... (e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit ... (g) To fail to comply with this chapter or nay rule adopted under this chapter; (h) To breach a collective bargaining agreement; (i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer ....

The Supreme Court has recognized that "[a] public employer's unilateral change in a term or condition of employment . . . is tantamount to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations." *Appeal of Hillsboro-Deering Sch. Dist.*, 144 N.H. 27, 30 (1999). Under RSA 273-A:1, XI, "the obligation to bargain covers the terms and conditions of employment." See *Appeal of White Mountains Regional School Board*, 125 N.H. 790, 794 (1984). RSA 273-A:1, XI defines "terms and conditions of employment" as follows:

> 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.

The Supreme Court has adopted the following three-part test to determine the applicability of the managerial policy exception in the context of the obligation to bargain:

> 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 Nashua Police Commission, 149 N.H. 688, 691-92 (2003) (citations omitted). The reference to "statute or statutorily adopted regulation" 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). In this case, the reorganization of the custodial department of the school and assignment of "bargaining unit work" to a managerial non-bargaining unit employee is not a prohibited subject of bargaining because the District has not identified any constitutional provision, statute, or statutorily adopted regulation, apart from RSA 273-A:1, XI managerial policy exception, that reserves the decisions to reorganize the custodial department and to re-assign duties from bargaining unit employees to a non-bargaining unit employee to the exclusive managerial authority of the public employer.

Further, "an employer must bargain over mandatory topics and may - but need not - bargain over permissive or 'permissible' topics." *Appeal of City of Nashua Board of Education*, 141 N.H. 768, 773 (1997). The determination of whether this case involves a permissible or mandatory subject of bargaining depends on whether the District's actions primarily affect the terms and conditions of employment or matters of broad managerial policy. In *Appeal of Hillsboro-Deering School District*, 144 N.H. 27, 33 (1999), the Supreme Court recognized that terminating members of the bargaining unit and subcontracting with private companies to perform the work involving the same duties during the term of a CBA may constitute an unfair labor practice. *Id.* at 33. In that case, the Court applied the three-part test and found, among other things, that where an independent contractor's employees merely replace the existing employees to do the same work under similar conditions of employment and where the decision to

subcontract does not alter the school district's basic operations, the district is required to bargain with the union over the subcontracting issue. See *id.* See also *Appeal of City of Nashua*, 141 N.H. 768, 776 (1997) ("management rights" article of CBA provided no refuge for employer who laid off full-time union employees and then hired various part-time employees to perform same duties at reduced wages and benefits). The Court also recognized that a true layoff or reorganization does not violate the CBA or constitute an unfair labor practice. See *Appeal of Hillsboro-Deering School District*, supra, 144 N.H. at 30.

In *AFSCME Local 3657, Chapter 11, Windham Police Department Employees v. Town of Windham*, PELRB Decision 2008-132, the PELRB dismissed the union's complaint finding that the issue involved the number of personnel required for particular shifts and was therefore a proper exercise of management rights. Similarly, in *Matthew Kennedy and the Hinsdale Federation of Teachers v. Hinsdale School District*, PELRB Decision No. 2010-045, the PELRB found that the elimination of a high school band program, including a termination of a high school band teacher, and entering into an agreement with other schools to accommodate students who wished to participate in a band, where the elimination of a program was a part of school reorganization and where no subcontractor was hired to do the same work previously performed by a band teacher, did not constitute an unfair labor practice.

In the present case, the reorganization of the custodial department, including elimination of the Foreman's position and hiring of, and assignment of duties to, a Building and Grounds Director, is akin to the school reorganization in *Hinsdale* case and entails changes to the District's organizational structure as well as the selection, direction and number of its personnel. In addition, unlike independent contractors in *Hillsborough-Deering* case, a new Building and Grounds Director has not merely replaced a Custodial Foreman, a bargaining unit employee, to do the same work under similar conditions of employment but has been assigned managerial responsibilities that were not part of a Custodial Foreman's job description. Furthermore, Article

2.2 of the CBA reserves to the Superintendent the right to determine job duties and qualifications of the employees and Article 2.4 provides that the qualifications of bidders for a position "shall be determined by the Superintendent of Schools with the advice and consent of the Board, and such determination shall be final." The contractual language provides the District with authority to determine matters such as the hiring of new employees and assignment of duties. Therefore, the District's decisions to reorganize the custodial department and assign snowplowing and sanding duties to a non-bargaining unit employee constitute permissible subjects of bargaining and the District has no obligation to bargain with the Union prior to making these decisions.

The remaining issue is whether the District has an obligation to bargain the impact of its reorganization-related decisions. The District has such an obligation if:

> 1) the Association has demonstrated an impact on the terms and conditions of employment, such as wages, hours and other conditions other than managerial policy; and 2) the District has refused the Association's request to bargain on such subjects.

Laconia Education Association/NEA-NH v. Laconia School District, PELRB Decision No. 2008-204. The PELRB has recognized that "topics protected under the managerial policy exception to the obligation to bargain terms and conditions of employment are still subject to impact bargaining if the employer's unilateral actions have modified wages and benefits under an existing contract or status quo conditions." See *id.* See also *Rochester Federation of Teachers, Local 3606, AFT, AFL-CIO v. Rochester School District*, Decision No. 1999-040. Thus, while management may reorganize, the impact of the reorganization on bargaining unit employees must be bargained. See *Concord School District v. Concord Education Association, NEA-New Hampshire*, PELRB Decision 96-023. The impact bargaining, however, does not give the Union the right to bargain the District's underlying managerial decision. See *Laconia Education Association/NEA-NH v. Laconia School District*, PELRB Decision No. 2008-204.

In this case, the evidence demonstrates that the reorganization will likely affect the amount of overtime related to snowplowing and sanding and, therefore, the wages of the bargaining unit employees. "[C]ourts have rather consistently held that such items as overtime pay, extra duty pay, vacation and holiday pay, bonus or merit pay, severance pay, shift differentials, and pensions are mandatory subjects of bargaining encompassed within the term 'wages.'" *Appeal of Berlin Educ. Ass'n, NHEA/NEA*, 125 N.H. 779, 783-84, 485 A.2d 1038 (1984). Therefore, the District is obligated to bargain over the impact of its decision to assign to the Building and Grounds Director the snowplowing, sanding and other duties previously performed by the bargaining unit members.

Here, although the District is obligated to bargain the impact of its reorganization-related decisions, the evidence is insufficient to prove that the Union demanded and the District refused to bargain the impact. The Union repeatedly expressed its opposition to the reorganization and requested that the District reconsider its decision to eliminate a Custodial Foreman's position and hire a new Building and Grounds Director and negotiate with the Union the alternative resolutions but the Union did not demand that the District bargain the impact of its reorganization decisions on the terms and conditions of the bargaining unit members' employment. Furthermore, the District, faced with the Union's opposition, terminated the contract, in accordance with the Article 9.1 of the CBA in order to enable the parties to start negotiations on a successor agreement. The negotiation on a successor CBA would allow the parties to bargain the impact of the reorganization on bargaining unit employees.

Accordingly, the Union's claims that the District violated RSA 273-A:5, I (e), (g), and (i) are denied. Notwithstanding the foregoing, since the filing of the Union's complaint, the District has been put on notice that the Union is demanding to bargain the impact of the reorganization and, therefore, the District is expected to engage in impact bargaining in good faith. Because the parties' contract contains a grievance procedure providing for final and binding arbitration and

because the parties' dispute is arbitrable, as discussed above, the Union's breach of contract claim should be determined by the arbitrator, and is therefore, dismissed.

So ordered.

November 10, 2011

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