



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Local 3657 Hillsborough County Sheriff's Office

v.

Hillsborough County Sheriff's Office

Case No. G-0012-17

Decision No. 2012-203

Appearances:

Karen E. Clemens, Esq., Associate General Counsel, AFSCME, Boston, Massachusetts for the Complainant

Carolyn M. Kirby, Esq., Legal Counsel, Hillsborough County, Goffstown, New Hampshire for the Respondent

Background:

The AFSCME Local 3657, Hillsborough County Sheriff's Office (Union) filed a complaint on January 24, 2012 claiming that the Hillsborough County Sheriff's Office (County) committed an unfair labor practice in violation of RSA 273-A:5, I (b), (e), (g), (h), and (i) when it unilaterally reduced working hours of a bargaining unit employee from 40 to 35 hours per week. The Union requests that the PELRB find that the County failed to bargain in good faith and order the County to cease and desist from dominating and interfering with the employee organization, to return all affected employees to a 40-hour week, to bargain in good faith, and to make the Union whole for all costs and expenses incurred to pursue this charge.

The County denies the charges and claims, among other things, that, following the reduction in the Sheriff's Department salary budget, the employer negotiated with the Union

regarding the reduction of working hours in an attempt to avoid permanent layoffs but the parties failed to reach an agreement. The employer then reorganized the department to accommodate the reduction in the budget by laying off one of the employees in a 40-hour position and creating a new 35-hour position. The County requests that the PELRB dismiss the complaint.

The undersigned hearing officer conducted a hearing on March 15, 2012 at the Public Employee Labor Relations Board offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses.

Findings of Fact

1. The County is the public employer within the meaning of RSA 273-A:1, X.
2. The Union is the certified exclusive representative of all full time and permanent part time employees of the County Sheriff's Office in the following positions: Clerk Typist I, Clerk Typist II, Secretary I, Secretary II, Account Clerk I, Certified Deputy Sheriff, Telecommunications Specialist, Data Processing Clerk, and Lead Dispatcher/Computer & NCIC Technician. See PELRB Decision No. 2004-143 (September 20, 2004.)
3. The Union and the County are parties to a collective bargaining agreement (CBA) which provides in Article 22.1 that it "shall remain in full force through June 30, 2012 and shall continue from year to year thereafter unless written notice of desire to modify, cancel or terminate this Agreement is served by either party upon the other at least one hundred twenty (12) days prior to the date of expiration, in which event this Agreement shall terminate on June 30, 2012." See Joint Exhibit 1.
4. Article I of the CBA, titled Recognition, provides as follows:
 - 1.1 The Sheriff hereby recognizes the Union as the exclusive bargaining representative pursuant to the provisions of NH RSA 273-A for all full-time employees and regular permanent part-time employees as defined in 1.3 below of the Hillsborough County Sheriff's Office in the following positions:

Clerk Typist I, Clerk Typist II, Secretary I, Permanent Part-time Deputy Sheriff, Secretary II, Account Clerk I, Certified Deputy Sheriff, Telecommunications Specialist, Data Processing Clerk, and Lead Dispatcher/Computer & NCIC Technician.

See Joint Exhibit 1.

5. Article 5.1 of the CBA provides as follows:

The normal work week shall be forty (40) hours of actual work per week and the normal work day shall be eight (8) consecutive hours or [sic] work per day in any one day, provided however, that nothing in this provision shall in any way limit or restrict the right or ability of the Sheriff to in any change the starting and dismissal time for any employee or group of employees.

See Joint Exhibit 1.

6. Article 6 of the CBA provides in part as follows:

6.3 Preference shall be given to employees in the order of their job seniority:

a) To work opportunities in the event of lay off or reduction of personnel within their job classification of five (5) working days of [sic] less, provided, however, that any such layoff or reduction of personnel must be for at least one full work day, and

b) In recall to work after layoff or reduction of personnel within their job classification of five (5) working days or less, such layoff or reduction of personnel must be for at least one full work day, and

c) In recall to work after layoff or reduction of personnel within their job classification of five (5) working day or less ...

6.4 In the event of layoff or reduction in work force for at least one full work day, probationary employees in the job classification affected will be laid off first. Next, employees with the least job seniority will be laid off according to their job seniority within the affected job classification ...

...

6.7 In the event of a recall to work after layoff or reduction in Office personnel, notice of recall shall be sent to the laid off employee's last known address as shown on the Office's records.

The recall notice shall state the time and date on which the employee is to return back to work. A recalled employee shall be given at least seven (7) calendar days' notice to report to work. In the event a recall is necessary on less than seven (7) calendar days' notice, the Office shall call upon the laid off employee in the order of their seniority. In [sic] accordance with the provisions set forth above either personally or by telephone until an

employee who is able to return to work immediately is located. In such case, the employee is [sic] able to return to work immediately will be given a temporary assignment not to exceed seven (7) calendar days and employees who are otherwise qualified to perform the work but were passed over because of their inability to return to work immediately will be given notice to report to work at the end of said seven (7) calendar day period. Qualified employees who have been given notice to report to work must, unless confined due to proven illness or injury, make themselves available for such work assignment no later than said seven (7) calendar day period after the notice has been given or they shall retain his [sic] seniority status and shall be entitled to another notice of recall. ...

See Joint Exhibit 1.

7. Article 7 of the CBA provides in part as follows:

7.1 If a permanent job opening or permanent vacancy occurs in a job classification set forth in Article I ... and the Office determines to fill such openings, the open job will be posted for a period of five (5) administrative work days... The notice of the open job shall contain a brief description of the job and its rate of pay. Permanent full-time employees covered by this agreement who desire such open jobs may submit their application [sic] for such job to the Sheriff or his authorized representative in writing within the five (5) day posting period.

...

7.4 An applicant who has been selected for the open job will be given a period of sixty (60) days within which to qualify for the job. ...

See Joint Exhibit 1.

8. Article 16 of the CBA contains a grievance procedure which provides for the following steps: immediate supervisor, the Sheriff, pre-arbitration hearing, and final and binding arbitration. The grievance is defined as "a complaint or claim by any employee or group of employees in the bargaining unit or the Union specifying the names of the bargaining unit employees involved, the date(s) of the alleged offenses(s) and the specific contract provision(s) involved which arise under the [sic] during the terms of this Agreement. Grievances are limited to matters of interpretation and/or application of specific provision of this Agreement." See Joint Exhibit 1, CBA Article 16.1.

9. The parties started to negotiate on a successor agreement in December of 2009.

The parties have not negotiated on a successor CBA since April, 2010. The parties have not gone through impasse procedures, including mediation and find finding.

10. On June 23, 2011, the County delegation voted to pass the budget. The Sheriff's Department's salary lines were reduces by 6%. Part-time salary line was reduced by 17.5%.

11. Beginning around June of 2011, Sheriff Hardy met with Union Steward Scott DiGaetano and Union Chairman Wayne Shields several times to discuss budget cuts. The Sheriff did not meet with Union President Ernest Castle. The Sheriff informed the Union representatives that the reduction in hours of bargaining unit employees may be necessary. Initially, the Sheriff proposed to change the 40-hour Secretary II position into 32-hour position, later – into 35-hour position. A 32-hour position would include medical benefits but not retirement. A 35-hour position would allow for continuation of retirement benefits, health and dental insurance, seniority, and other benefits. Leave and holiday time would be pro-rated.

12. The parties discussed a possibility of a side bar agreement regarding reduction of hours but failed to agree on the terms. According to Sheriff Hardy, a version of a side bar agreement proposed by the Union was too limiting because it would have constrained his right to lay off employees. The Sheriff told the Union representatives that the management would not agree to the Union's proposal. The discussions continued. The Union representatives informed the Sheriff that any reduction in hours would be challenged.

13. According to Sheriff Hardy, Mr. DiGaetano told the Sheriff that he had to utilize a reduction in force (RIF) procedure to accomplish a reduction in hours. The Sheriff believed that they had consensus that he needed to utilize the RIF. Mr. DiGaetano denies that he told the Sheriff to lay off a Secretary II. According to Mr. DiGaetano, he informed the Sheriff that, apart from reaching a side bar agreement, the only other option open to the employer was to follow the CBA, which allows for layoffs.

14. On September 16, 2011, Sheriff Hardy sent a letter to the Board of Commissioners describing the following restructuring plan:

Following the adoption of the Fiscal Year 2012 operating budget, I have carefully reviewed options related to operations within the Hillsborough County Sheriff's Office. As a result of the reduced appropriation adopted by the county delegation, and the desire we all share to streamline and provide more efficient operations, I am submitting the following staff adjustment for your review.

Chief Deputy Sheriff: downgrade position from forty hours to thirty two hours per week.

Captain: upgrade position from thirty two hours per week to forty hours per week.

Lieutenant: eliminate one lieutenant grade rank.

Support Services Assistant: eliminate position; thirty two hours per week.

Budget Assistant: downgrade position from forty hours per week to thirty five hours per week.

Secretary II: downgrade one position from forty hours per week to thirty five hours per week...

(Emphasis added). Among the positions listed in the Sheriff's letter, only the Secretary II position is within the bargaining unit represented by the Union. The projected 2012 and 2013 savings resulting from reducing the hours of the Secretary II position from 40 to 35 are \$3,410.50 and \$4,667.00, respectively. See County Exhibits 1 & 2.

15. According to Sheriff Hardy, in planning the restructuring, he intended to minimize the impact of the budget cuts and his main goal was to maintain line deputy positions.

16. The Sheriff's restructuring plan was implemented in the fall of 2011. As part of the restructuring, a 40-hour Chief Deputy position was eliminated and the Sheriff hired a Chief Deputy for a 32-hour a week position with the same rate of pay as the eliminated position but without retirement benefits. A Captain position's hours were increased. Neither the Chief Deputy position nor the Captain position are bargaining unit positions.

17. The Union did not agree to the reduction in hours of the Secretary II position and did not waive its right to bargain the reduction in hours. During its discussions with the Sheriff

regarding the reduction in hours of the Secretary II position, the Union did not dispute that the Sheriff had a right to lay off bargaining unit employees but it did not agree that a layoff and recall procedure can be utilized to reduce the Secretary II position's hours from 40 to 35.

18. The Secretary II position at issue in this case is a 40-hour bargaining unit position. There are four employees in the Secretary II position. Only one employee, Alexandra Cristea, was affected by the County's decision to reduce hours. Ms. Cristea was employed by the County Sheriff's Office in a full time 40-hour Secretary II position. She worked for the County for at least 9 years.

19. A letter from Sheriff Hardy to Ms. Cristea, dated November 10, 2011, provides as follows:

This letter is to advise you of changes taking place within the Sheriff's Office that directly impact your current employment. As you may be aware, the budget approved by the County Delegation on June 23, 2011 included significant reductions in the Sheriff's Office. In order to address that budget reduction, a restructuring plan was presented to the Board of Commissioners and ultimately approved by the Executive Committee on Friday, September 23, 2011. That restructuring plan included a reduction in hours for several positions, including the position you currently hold.

The position you currently hold will no longer exist as a 40 hour week position. It has been recreated as a 35 hour week position. This action is being taken in order to meet the county's obligation within the approved budget appropriation.

Therefore, it is with regret that I inform you that you will be laid off from your current 40 hours week position as a Secretary II on November 20, 2011. The new position will be reposted at 35 hours per week. You will be recalled to that new position consistent with discussions I have had with your bargaining unit representatives. Upon recall to the revised position of 35 hours per week, your benefits will be prorated and otherwise adjusted so as to comply with county policies and the Collective Bargaining Agreement.

I wish to assure you that *the reduction in hours related to your position is not related to your job performance.*

See Joint Exhibit 2 (emphasis added).

20. A Notice of Job Vacancy was posted by the Sheriff's Office on November 10, 2011 for a Secretary II position designated as full time 7-hour a day, 35 hour per week position. See Union Exhibit 1. The duties and responsibilities of the 35-hour Secretary II position were the same as duties and responsibilities of the 40-hour Secretary II position previously occupied by Ms. Cristea.

21. Thereafter, the Sheriff met with Ms. Cristea in the presence of Mr. DiGaetano. During the meeting, she did not indicate to him that she intended to reject the recall or that she was not planning to come back to work.

22. A letter from Sheriff Hardy to Ms. Cristea, dated November 16, 2011, provides as follows:

This letter is a follow up to my letter of November 10, 2011 and the conversation we had this afternoon with your bargaining unit representatives, Chairman Wayne Shields and Steward Scott DiGaetano, about the above referenced matter.

After further consideration and review, I have amended the effective date of this change from November 20, 2011 to December 4, 2011. This will provide you with more opportunity to transition from the eliminated forty hour per week position to the recreated new thirty five hour per week position, previously referenced in my letter of November 10, 2011.

Further, consistent with discussions I have had with your bargaining unit representatives, at their request, after you are recalled to the new 35 hours a week position on December 6, 2011, I am authorizing you to work (four) eight hour shifts, on December 6, 7, 8 and 9, 2011, for the initial first week. Commencing the week of December 11, 2011, your schedule will consist of (five) seven hour shifts, unless otherwise assigned.

See Joint Exhibit 3.

23. A letter from the County Human Resources Department to Ms. Cristea, dated November 28, 2011, provides in part:

Your full-time employment with Hillsborough County Sheriff's Department ends effective December 4, 2011. You have a number of options available to you concerning your retirement benefits.

You may request the return of the contributions you made to the NH Retirement System. The amount returned to you would be the amount that was deducted from you pay during your employment, plus interest. In order to apply for a return or a rollover of your contributions you must complete the attached "Application of Member for Return of Accumulated Contributions" form. There are other options that may apply, so please read the enclosed brochure and call the NH Retirement System with any questions. ...

See Union Exhibit 2.

24. A letter from Union President Ernest Castle to Sheriff Hardy, dated December 1, 2011, provides in part:

The Executive Board of Local 3657, which represents the Sheriff's Office Chapter, has reviewed the layoff notice provided to Alex Cristea, dated November 10, 2011 and an additional letter dated November 16, 2011. We are also in receipt of the posting of a full time position of the same job classification at 35 hours per week.

Although your letter to Ms. Cristea indicates that her position has been eliminated, and that her position had been "recreated" as a 35 hour per week position, it appears, based on the information in the posting, that the position was not eliminated or substantially changed, other than with regard to a reduction in hours for the position.

As I am sure you are aware, Article 5.1 of the Collective Bargaining Agreement (CBA) between AFSCME and the Sheriff's Office establishes that "The normal work week shall be forty (40) hours of actual work per week and the normal work day shall be eight (8) consecutive hours of work per day in any one day."

As the conditions for full-time employment are clearly established in the CBA and change in the hours of a full time position would be subject to impact bargaining, or negotiated through the normal contract negotiating process. As indicated above, the position created is not a new position, but merely the same position with reduced hours.

The Local views this action as unilateral change in working conditions, a violation of the CBA, and a willful attempt to subvert the CBA and the Collective bargaining process.

We are asking that the layoff notice and job posting be rescinded, and that management cease and desist all actions and attempts to violate the CBA, or action and attempts to subvert the collective bargaining process.

Sheriff Hardy did not respond to Mr. Castle's letter. See Union Exhibit 3.

25. The layoff was affected December 4, 2011. Ms. Cristea surrendered her gun and other equipment.

26. Ms. Cristea was recalled to a 35-hour Secretary II position. There was a 24-hour period between a layoff and a recall.

27. After being laid off and accepting a recall, Ms. Cristea left for Romania. She did not appear for work.

28. The Secretary II position, previously filled by Ms. Cristea, is currently vacant.

29. The Union grieved the reduction in hours of the Secretary II position. The Sheriff denied the grievance. As of the date of the hearing, the Union decided not to pursue its grievance claim to arbitration.

Decision and Order

Decision Summary:

The District committed an unfair labor practice when it unilaterally reduced hours for a bargaining unit position from 40 to 35. The District is obligated to bargain the change in hours of Secretary II position because this position is in the bargaining unit and the reduction in hours constitutes a change in terms and conditions of employment, as defined by the RSA 273-A:1, XI, and, therefore, is a mandatory subject of bargaining.

Jurisdiction:

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

Discussion:

In its complaint the Union claims that the District violated RSA 273-A:5, I (b), (e), (g), (h), and (i) when it unilaterally reduced working hours of a bargaining unit employee in

full-time Secretary II position from 40 to 35 hours per week. RSA 273-A:5, I provides in relevant part:

It shall be a prohibited practice for any public employer ... (b) To dominate or to interfere in the formation or administration of any employee organization ... (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 any 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:

[W]ages, *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.

(Emphasis added.) The language of RSA 273-A:1, XI is clear and unambiguous and specifically includes “hours” in definition of “terms and conditions of employment.” Therefore, a change in working hours is a mandatory subject of bargaining and the parties are obligated to bargain such change. See *Appeal of City of Nashua Board of Education*, 141 N.H. 768, 773 (1997).

In the present case, the latest CBA defines a full time position as a 40-hour position. The employer unilaterally reduced the working hours of a bargaining unit employee in the Secretary II position from 40 to 35 hours. By definition, such a reduction in working hours is a mandatory subject of bargaining and, under RSA 273-A:1, XI and 273-A:5, I, the County is obligated to bargain with the Union not just the impact of its decision to reduce hours but the decision itself. Here, after attempting to negotiate the reduction in hours with the Union and failing to come to an agreement, the County decided to utilize a reduction in force/lay off procedure to accomplish the reduction in hours. The evidence shows that the "layoff" in this case was not a true "layoff" but an attempt by the County to circumvent its statutory obligation to bargain in good faith the reduction in hours of the Secretary II position. First, the County decided to utilize the layoff procedure only after its attempts to get the Union to agree to a reduction have failed. Second, the Sheriff testified that he understood the Union to suggest that the only way to achieve a reduction in hours was by utilizing a layoff procedure. Whether his understanding here was correct (the assertion denied by the Union) is irrelevant as it does not prove the Union's acquiescence to the reduction in hours but it does demonstrate that the true goal of the layoff was a reduction in hours. Finally, the duties and responsibilities of the Secretary II position have not changed. The evidence demonstrates that the employee was recalled to the same position from which she was "laid off", except for the reduction in hours, and not to a position newly created by the County.

For the foregoing reasons, the County committed an unfair labor practice in violation of RSA 273-A: 5, I (e), (g), and (i) when it unilaterally reduced working hours of the Secretary II position at issue from 40 to 35 hours. The County shall cease and desist from unilaterally changing hours of bargaining unit positions. The position at issue is currently vacant. If the County wished to fill this position, the County shall treat this position as a 40-hour Secretary II position.

The Union's evidence is insufficient to prove that the County dominated or interfered in the formation or administration of the Union in violation of RSA 273-A:5, I (b) and this claim is, therefore, denied. The Union's breach of contract claim is dismissed because the reduction-in-hours dispute is covered by the CBA and the Union failed to exhaust the contractual grievance procedure which provides for final and binding arbitration. See *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006).

So ordered.

August 31, 2012


Karina A. Mozgovaya, Esq.
Staff Counsel/Hearing Officer

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