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-0012-19
Decision No. 2015-160

Appearances:

Anna R. Shapell, Esq., AFSCME, Boston, Massachusetts, for the Complainant

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

Background:

On November 6, 2014, the AFSCME Local 3657, Hillsborough County Sheriff's Office (Union) filed an unfair labor practice complaint alleging that the Hillsborough County Sheriff's Office (County) violated RSA 273-A:5, I (a), (e), (g), and (i) when, among other things, it unilaterally changed an established past practice of allowing bargaining unit employees who reside outside the County to take assigned county vehicles home. The Union requests, among other things, that the PELRB order the County to bargain in good faith, to cease and desist from violating RSA 273-A, to publicly post the findings of the PELRB for thirty days, and to make the Union whole for all costs and expenses incurred in pursuit of this charge.

The County denies the charges and asserts that there is no valid past practice of allowing employees residing outside the County to take assigned vehicles home; and that there has been

no change in employees' working conditions. The County requests that the PELRB dismiss the complaint.

An adjudicatory hearing was conducted on January 15, 2015 at the Public Employee Labor Relations Board (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 on March 2, 2015; and the decision is as follows.

Findings of Fact

1. The County is a public employer within the meaning of RSA 273-A:1, IX.

2. The Union is the exclusive representative for the following bargaining unit: "All full time employees and permanent part-time employees in the following job classifications: 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. In July of 2014, several Deputies who reside outside the County, including Timothy Connell and Christopher Follomon, were informed by their supervisors that they are not allowed to take their assigned county vehicles home.

4. The Union and the County were parties to a collective bargaining agreement (CBA) that expired on June 30, 2015. The CBA does not address whether employees can take their assigned county vehicles home and under what circumstances.

5. James Hardy is the County High Sheriff. The Sheriff has always had discretion to assign county vehicles and decide where they go. The Sheriff assigns vehicles to Sheriff's Office employees based on the needs of the Department, such as prisoner transport, service of process, or apprehension of fugitives. The Sheriff decides whether an assigned vehicle can be taken home. Before deciding whether to allow a Deputy to take an assigned county vehicle home, the Sheriff or his designee determines whether it will benefit the Sheriff's Office.

6. Sheriff's Office employees residing within the County have been and are still allowed to take their assigned county vehicles home.

7. When an employee takes an assigned county vehicle home, the County pays for gasoline, including the travel between the employee's residence and work. When an employee drives a personal vehicle to work, the employee pays for gasoline.

8. In the past, Sheriff's Office employees residing outside the County have been informed several times that they were not allowed to take their assigned county vehicles home. For example, in 2008, Chief Deputy Durette told Dep. Timothy Connell, who resided in Belknap County, that he was not authorized to take his assigned vehicle home. Connell obeyed that order. Prior to 2014, Capt. Estey told Connell several times that he was not allowed to take his assigned vehicle home outside the County. In 2006, Estey told Roger Matte, when he moved to Belknap County, that he was not allowed to take his assigned vehicle home. Sheriff Hardy told Dep. Jamie Huertes that he was not allowed to take his assigned county vehicle home to Massachusetts. Dep. Joseph Wallent, who was employed by the Sheriff's Office before 2010 and resided outside the County, was prohibited from taking his assigned county vehicle home. Dep. Scott Knox was also informed that he was not permitted to take his assigned vehicle home if he lived outside the County.

9. In the past, some employees who resided outside the County were intermittently allowed to take their assigned county vehicles home. Prior to taking their assigned vehicles home, most employees who resided outside the County requested authorization from the immediate supervisor, the Sheriff or his designee. The authorizations were given based on the department needs, including prisoner transport on the way to work, cleaning the assigned county vehicle, taking an assigned dog home for training purposes, apprehending fugitives after regular working hours, providing emergency tech support services, and preserving the chain of custody for the evidence. For example, when Timothy Connell had to pick up prisoners, he asked Capt.

Estey to allow him to take the assigned vehicle home outside the County. Also, former Deputy Jay McDonough was allowed to take his assigned vehicle home outside the County as his home was close to the NH State Prison and he often picked up prisoners on his way to work. When McDonough worked for the fugitive division and was responsible for apprehension of fugitives, he was allowed to take his assigned vehicle home because he frequently had to work after regular working hours. Similarly, Arthur Durette was authorized to take his assigned county vehicle home because he was the first responder when technological issues arose and, in that capacity, he often had to work after regular working hours and on weekends and travel to six or seven locations, including the County Nursing Home, the County Jail, and the Registry of Deeds in Nashua, Goffstown, and Manchester. Taking home the assigned vehicle allowed Mr. Durette to respond in a timely manner. When he served as a Deputy in charge of evidence, he was allowed to take the vehicle home because only he could open an evidence locker, including after normal working hours. Likewise, Lt. Auciello granted Dep. Knox permission to take an assigned vehicle home outside the County on several occasions, usually to clean it over the weekend or when Knox had to go on extradition assignments out of state, or if there was an inclement weather. Lieutenant Thomas Kalantzis, who resided outside the county, was allowed to take the assigned vehicle home because he was the evidence officer and needed his assigned vehicle to preserve the chain of custody for the evidence.

10. When Sgt. Connell moved to Belknap County in 2007, he did not complete or submit to the County an official change-of-address form. According to Mr. Connell, he was permitted to take the assigned vehicle home to Laconia between 2007 and at least 2008, except for several occasions when Captain Estey prohibited him from taking the vehicle home, but later, this permission was revoked by Chief Deputy Durette who told him that he was not allowed to take the vehicle home because of the distance and because of his impending transfer to the different division. In March of 2014, he moved to Rockingham County. He continued to take the

assigned county vehicle home. He did not notify the Sheriff's Office of the change of address until August of 2014. The management did not know where Mr. Connell resided.

11. In February of 2014, Dep. Follomon moved from Hillsborough County to Rockingham County. Before moving out of Hillsborough County, he had a conversation with Capt. Estey about taking the assigned county vehicle home. He knew that he was not allowed to take his assigned vehicle home if he moved to Rockingham County; and he asked Capt. Estey if he would permit him to continue taking his assigned county vehicle home. Capt. Estey allowed it based on the operational needs of the Department but told him that his decision can be overruled. From February to July, 2014, Dep. Follomon was allowed to take his assigned vehicle home to Rockingham County. Dep. Follomon would frequently get phone calls instructing him to pick up someone (prisoner or co-worker) on his way from home to the jail or work.

12. Sheriff's Office employees, who resided outside the County, knew that they were not supposed to take their assigned county vehicles home without prior authorization by a superior officer.

13. As supervisor, Estey did not give blanket orders/permission regarding taking assigned county vehicles home. He decided on a case by case basis. For example, a Deputy was allowed to take an assigned vehicles home to transport prisoners from Rockingham and/or Strafford County jails or, if a Deputy was a canine handler, he/she was allowed to take the vehicle with the dog home at night for training purposes.

14. According to Capt. Estey, Deputies residing outside the County requested his permission to take their assigned county vehicle home and he found most of the employees' requests to be justified by the operational needs of the Department. Capt. Estey did not usually inform the Chief Deputy or the Sheriff that he had given permission to a Deputy to take his/her assigned vehicle home.

15. Prior to July, 2014, Capt. Estey had discretion to allow employees to take assigned county vehicles home. At the July. 2014 departmental staff meeting, the Sheriff asked for an explanation of why vehicles were going out of the County and Capt. Estey told him that he authorized it. The Sheriff overruled this decision and reiterated that there has been no change in this policy and that taking assigned county vehicles home out of the County was not allowed. It was Capt. Estey's decision to inform employees and, after July, 2014, Capt. Estey no longer had discretion to authorize employees who resided outside the County to take their assigned vehicle home.

16. The permission to take an assigned county vehicle home has never been given for a personal benefit of an employee, but, instead, has always been duty-driven; and whether an employee can take an assigned vehicle home has always depended on operations of the Department. Driving home is not a duty-related activity.

Decision and Order

Decision Summary:

The evidence is insufficient to establish the existence of a binding past practice requiring the County to allow its employees who reside outside the County to take their assigned county vehicles home. The Union's request for relief is denied and the complaint is dismissed.

Jurisdiction:

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

Discussion:

The Union claims that the County violated RSA 273-A:5, I (a), (e), (g), and (i) when it unilaterally changed an established past practice of allowing bargaining unit employees who reside outside the County to take assigned county vehicles home. The County counters that there has been no change in terms and/or conditions of employment because employees were never

allowed to take their assigned county vehicles home outside the County without prior authorization and that giving such authorization has always been within the management's discretion and has always been based on the needs of the Department, and not of individual employees.

RSA 273-A:5, I provides in relevant part that:

> It shall be a prohibited practice for any public employer: (a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;.. (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; ... (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). A term and/or condition of employment can be established through a binding past practice and the employer cannot unilaterally change a term and condition of employment established by a binding past practice. See *Appeal of New Hampshire Department of Corrections*, 164 N.H. 307, 309 (2012). The Supreme Court has previously held that:

> An employer's practices, even if not required by a collective-bargaining agreement, which are regular and long standing, rather than random or intermittent, become terms and conditions of [union] employees' employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change. A practice need not be universal to constitute a term or condition of employment, as long as it is regular and longstanding.

Id. (citation and internal quotation marks omitted).

To establish a past practice, a party alleging it must prove that the alleged practice "occurred with such regularity and frequency that employees could reasonably expect it to continue or reoccur on a regular or consistent basis. In addition, it is implicit in establishing a

past practice that the party which is being asked to honor it ... be aware of its existence." *Id.* (Citation and internal quotation marks omitted.) A party alleging the existence of a past practice must prove that both parties had knowledge that the practice existed and by their respective actions over the protracted period of time demonstrated acceptance of it. See *Appeal of N.H. Dep't of Safety*, 155 N.H. 201, 210 (2007). See also *Hampton Police Assoc. Inc. et al v. Town of Hampton,* PELRB Decision No. 2010-029. Past practice "is not mere prior conduct but is something of sufficient duration that is a consistent, repeated, mutually understood and accepted practice which is binding upon the parties even though not contained within the parties' written collective bargaining agreement." *New England Police Benevolent Association, Local 250 v. State of New Hampshire, Department of Corrections*, PELRB Decision No. 2011-114 (internal quotation marks omitted). See also *Exeter Police Association v Town of Exeter,* Case No. P-0753-17, Decision No. 2009-183.

In the present case, the parties' CBA is silent on the issue of whether employees who reside outside the County are allowed to take their assigned county vehicles home and the evidence is insufficient to establish the existence of a binding past practice. The evidence shows that, in the instances when employees took assigned vehicles home (e.g. McDonough, Connell, Follomon), they did that at the discretion and with permission of a superior officer and the permission was justified by the need, among other things, to pick up prisoners on the way to work, to clean the assigned vehicle, to train a police dog, to preserve the chain of custody for the evidence, or to be available 24/7 for technological support or apprehension of fugitives. Although some employees residing outside the County occasionally took assigned vehicles home without explicit permission, the evidence is insufficient to prove that this practice occurred with such regularity and frequency that employees could reasonably expect it to continue or reoccur on a regular or consistent basis or that the employer was aware of it. Moreover, the record shows that taking the assigned county vehicle home has never been an additional employee benefit, and

that over a protracted period of time, employees residing outside the County were explicitly told by superior officers not to take their assigned county vehicles home and that the employees knew that they were not allowed to take their assigned vehicles home without prior authorization. There is insufficient evidence to prove the existence of a "consistent, repeated, mutually understood and accepted" past practice that would obligate the County to allow bargaining unit employees who reside outside the County to take assigned county vehicles home, and therefore, the Union failed to prove that there has been a change in the terms and/or conditions of bargaining unit employees' employment.

Based on the forgoing, the County did not commit an unfair labor practice when it did not allow bargaining unit employees who reside outside the County to take their assigned county vehicles home. Accordingly, the Union's claims that the County violated RSA 273-A:5, I (a), (e), (g), and/or (i) are dismissed and its requests for relief are denied.

So ordered.

July 14, 2015

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

Distribution: Anna R. Shapell, Esq.
Carolyn M. Kirby, Esq.