



**State of New Hampshire**  
Public Employee Labor Relations Board

**United Steelworkers of America**

v.

**Manchester Water Works**

**Case No. G-0058-27**  
**Decision No. 2016-018**

**Appearances:**

Vincent A. Weners, Esq., Manchester, New Hampshire, for the United Steelworkers of America

Thomas Arnold, III, Esq., Deputy City Solicitor, Manchester, New Hampshire, for the Manchester Water Works

**Background:**

On November 3, 2015, the United Steelworkers of America (Union) filed an unfair labor practice complaint alleging that the City of Manchester Water Works (City) violated RSA 273-A:5, I (a), (b), (c), (e), (g), and (h) when it refused to provide information the Union requested in connection with the prosecution of a grievance. The Union filed a grievance concerning the City's denial of promotion on the basis of a bargaining unit employee's absentee record and requested, among other things, the attendance records for every employee who was promoted or denied promotion within the last five years. The Union claims that it needs this information in order to complete its investigation of the matter prior to requesting grievance arbitration; but the City has refused to provide the requested information. The Union requests that the PELRB order the City to provide to the Union the information it requested.

The City denies the charges and asserts, among other things, that the Union's request for information is overly broad and burdensome; and that the PELRB lacks jurisdiction over the complaint because the dispute in this case is subject to the contractual grievance procedure culminating in final and binding arbitration. The City requests that the PELRB deny and dismiss the complaint.

The adjudicatory hearing was conducted on December 17, 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. At the commencement of the hearing, the parties informed the undersigned hearing officer that the City provided some of the information the Union requested (the qualifications and absentee record for the successful candidate). Also, the City withdrew its relevancy and jurisdiction-based objections and indicated that it was willing and able to provide the outstanding requested information if the Union agreed to compensate the City for the hours it took the City employees to compile the information. The parties' factual stipulations are incorporated into the Findings of Facts below; and the decision is as follows.

#### **Findings of Fact**

1. The Manchester Water Works is a department of the City of Manchester and is a public employer within the meaning of RSA 273-A:1, X. The Water Works department has approximately 70 employees.

2. Pursuant to the PELRB certification, the Union is the certified exclusive representative for certain employees of the Manchester Water Works department. See PELRB Certification of Representative and Order to Negotiate, Case No. M-0545 (January 8, 1992).

3. The City and the Union are parties to a collective bargaining agreement (CBA) effective from October 15, 2013 through June 30, 2015. See Agreed Statement of Uncontested

Facts at c.

4. The parties' CBA contains a 4-step grievance procedure: step 1 – immediate supervisor; step 2 – division head; step 3 – department head; and step 4 – pre-arbitration meeting/final and binding arbitration.

5. Article 29.3 of the CBA, titled Step 4 – Pre-Arbitration Meeting, provides in part as follows:

If the Union is not satisfied with the disposition of the grievance in Step 3, then the grieving party shall have five (5) working days to request a pre-arbitration meeting... Representatives of Management and the Union will meet with the Chief Negotiator/Contract Administrator to determine if the grievance can be settled without arbitration... If no settlement is reached as a result of the pre-arbitration meeting, a written answer as to the disposition shall be given to the Union within ten (10) working days of the meeting. The Union must submit the grievance to arbitration within ten (10) working days after receiving the written answer, or the grievance shall be null and void.

See Joint Exhibit 1.

6. Kevin MacArthur and Dana Filip, both bargaining unit employees, applied for promotion to the position of Water Shed Patrol I. The City promoted Dana Filip.

7. Kevin MacArthur received a promotion denial letter, a copy of which was placed in his personnel file.

8. On September 2, 2015, the Union filed a grievance on behalf of bargaining unit member and Union Vice President Kevin MacArthur, asserting a violation of the CBA Promotions Article, among other things. See Joint Exhibit 2.

9. Article 11 of the CBA, titled Promotions, provides in part as follows:

The Management reserves and shall have the right to make promotions primarily on the basis of qualifications, ability to perform the work, absentee record, performance of duty and related factors, but shall consider departmental seniority where all other factors are relatively equal.

See Joint Exhibit 1.

10. On September 4, 2015, Director Philip Croasdale denied MacArthur's grievance stating as follows:

Promotion of Dana Filip to the position of Watershed Patrol Office I was accomplished in strict accordance with Article 11 of the Union Contract. Dana Filip and Grievant were considered equal on the basis of qualifications, ability to perform the work, performance of duty and related factors. However, Grievant's absentee record was considered problematic and overriding factor in decision [sic].

See Joint Exhibit 3.

11. On September 4, 2015, Mr. MacArthur sent to Mr. Croasdale the following email message:

Can you please supply the union with all Dana Filip's qualifications considered for the Watershed Patrol I job and also a list of employees that have been denied a job promotion in the last 5 years with the sole reason of sick leave?

12. In response to the September 4, 2015 request for information, Director Croasdale wrote as follows:

Please respect the Preamble.

We've had a meeting at your request to discuss the selection of the WPO I position and outlined to you the reasons for the decision made by the selection committee and supported by me.

I have responded to your grievance (07-2015). Per the contract, I'd appreciate it if we keep to the Grievance procedure (Article 29).

See Joint Exhibit 4.

13. On September 29, 2015, Union Staff Representative Mary Fusco sent the following message to Director Croasdale:

In order to proceed to 3rd Step with Grievance 07-2015 (Kevin MacArthur) the Union on three occasions has requested information from the City, to date we have not yet received this information. I am now requesting for the fourth time, if we do not receive this information within 7 business days we will be forced to file a ULP with the PELRB. The information we are requesting is as follows

- Attendance records for every person that has been promoted in the last five

years.

- Attendance records for every person that has been denied a promotion in the last five years.
- Dana Filip's qualifications for the position awarded (Watershed Patrol Officer)

See Joint Exhibit 5.

14. The Union requested this information in order to assess and determine whether it should proceed to arbitration and whether there is factual support for its claim that, in the past, the City did not base its promotional decisions on candidates' absentee record.

15. In response to the Union's September 29, 2015 request, Director Croasdale wrote on October 7, 2015:

Your request is overbroad and arbitrary. I feel the majority of the information you have requested really has no bearing on this particular grievance. Awarding the position being questioned was done comparing the three candidates and their qualifications. As was stated, the determining factor in the award was based on the two final candidates and their absentee records. The sick leave records of past candidates for the position in question or for other positions have no bearing on this particular hiring. It came down to Kevin and Dana and based on the information available, Dana was the candidate of choice based on the factors set forth in the CBA.

The contract clearly states that absentee record is a primary basis of qualification and departmental seniority shall be considered where other factors (absentee record) are relatively equal. The selection committee determined that the absentee records of both candidates were not equal and as stated above, that was the overlying [sic] factor in making the award.

I will certainly provide the attendance records for Kevin and Dana Filip along with the record of Dana's qualifications upon your request.

See Joint Exhibit 5.

16. On December 9, 2015, the counsel for the City sent the following communication to the Union's counsel:

... Phil Groasdale will be providing Dana Filip's qualifications along with Dana Philips and Kevin MacArthur's attendance records shortly...

With regards to the requests for “Attendance records for every person that has been promoted in the last five years” and “Attendance records for every person ... that has been denied a promotion in the last five years” the City has argued that these records are irrelevant and burdensome to produce. The City, however, does not want to appear or create the impression that it is attempting to hide or obfuscate the information the Union seeks. Consequently, the City is willing to waive its relevance arguments. This information will still be burdensome to produce as it will require, at this point, an indeterminate number of staff hours to identify the individuals involved and gather the records. The City, however, will do its best to produce these records provided the Union pays the direct costs of doing so. By direct costs I mean the hourly rate of each of the staff necessary to produce the records for the time they spend doing so without upcharge for benefits or administrative overhead. I believe that this is in accord with NLRB precedent which provides that it is the union’s burden to pay the cost of producing records that it requests.

See Joint Exhibit 6. The Union refused to pay “direct costs” for the information it requested.

17. Prior to the date of hearing, more than three month after the Union’s original request, the City provided to the Union Dana Filip’s qualifications and attendance records and attendance records for unsuccessful candidates. The City failed to provide the following information the Union requested: (1) a list of employees who were promoted in the Water Works department in the last five years and their attendance records; and (2) the list of employees who were denied promotion in the Water Works department in the last five years and their attendance records.

18. The City admits that the information the Union requested exists but argues that compiling this information is burdensome. The City is willing to provide the information if the Union pays for the time it would take the Human Resources (HR) employees to compile it at the employees’ hourly rate of pay.

19. Every six months, the City provides to the Union a list of all employees containing their seniority status and classification. This list reflects the changes in employees’ classifications/pay grades, including the changes resulting from promotions.

20. According to Director Croasdale, to compile a list of all employees promoted in the Water Works department in the last five years, a City's employee would have to look through two boxes: a box containing employee cards of retired employees and a box containing employee cards of current employees. An employee card contains all payroll information, including changes in an employee's pay grade but does not contain any information as to whether an employee was denied promotion. Employee cards are kept at the Water Works department.

21. It would take approximately 3 hours to compile a list of employees promoted in the department within the last five years and find their attendance records. According to Director Croasdale, the work would be done by the Administrative Services Manager whose pay rate is \$26 per hour.

22. The City of Manchester HR department handles payroll and employee benefits for all City departments. The HR maintains recruitment files by year by a position requisition number, and not by department. There are approximately 100 to 150 recruitment records per year. According to HR Director Jane Gile, to compile a list of employees who were denied promotion, it would be necessary to search through all Water Works recruitment files. There are approximately 50 recruitment files and approximately 150 applications for promotions for the Water Works for the five year period as an individual employee may have applied for more than one position.

23. The HR Director estimates that to create a list, it would take approximately three hours to find Water Works recruitment files for the last five years and additional two to three hours to go through individual files to ensure that a position requisition was for a promotion and not for hiring from outside the department. This work would be delegated to the HR Analyst whose pay rate is \$29.15 per hour. The Administrative Services Manager (\$30.99 per hour) would assist the HR Analyst.

## Decision and Order

### Decision Summary:

The City violated RSA 273-A:5, I (a), (b), (e), (g), and (h) when it refused to provide the information the Union requested unless the Union agreed to pay for the work hours it would take the City to compile the information.

### 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 City violated RSA 273-A:5, I (a), (b), (c), (e), (g), and (h) when it refused to provide the information the Union requested in connection with the prosecution of a grievance.

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

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; (b) To dominate or to interfere in the formation or administration of any employee organization; (c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in 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 ...

In adopting the Public Employee Labor Relations Act, RSA 273-A, the New Hampshire legislature has recognized the “‘right of public employees to organize and to be represented for the purpose of bargaining collectively with the state or any political subdivision thereof ...’ Laws 1975, 490:1.” See *Appeal of International Brotherhood of Police Officers*, 148 N.H. 194, 196 (2002). “The legislative purpose behind RSA chapter 273-A is to foster harmonious and cooperative relations between public employers and their employees ...” *Appeal of the City of*



*Manchester*, 153 N.H. 289, 295-96 (2006). A union’s statutory right to represent bargaining unit employees is set forth in RSA 273-A:11, I (a)<sup>1</sup> and includes the specific right to represent employees in the “settlement of grievances.” See *AFSCME Local 3657, Weare Police Employees v. Town of Weare*, PELRB Decision No. 2014-006 (January 8, 2014). Similarly, a bargaining unit employee has a right under RSA 273-A to be represented by the union. *Id.* A union’s and a bargaining unit employee’s rights also include meaningful and timely access to the contractual grievance procedure. *Id.* In the context of settlement of grievances, a union clearly has an interest in having access to the information that would allow the union to exercise its legal and contractual rights to evaluate and develop a grievance. *Id.* When an employer denies the union an access to the information relevant to the prosecution of a grievance, the employer undermines the goal of fostering “harmonious and cooperative relations” between an employer and its employees. *Id.*

The federal law on the issue of union’s access to information in the context of grievance prosecution is well settled and instructive. In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the United States Supreme Court “established that an employer’s statutory duty to turn over to a union ‘information that is needed by the bargaining representative for the proper performance of its duties,’ *id.* at 435-36, extends to requests for information needed by the union to determine whether to take a grievance to arbitration.” *Chesapeake and Potomac Telephone Company v. NLRB*, 687 F.2d 633, 635 (2d Cir. 1982). Further, in *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979), the United State Supreme Court stated:

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<sup>1</sup> RSA 273-A:11, I (a) provides in part as follows:

Public employers shall extend the following rights to the exclusive representative of a bargaining unit certified under RSA 273-A:8:

(a) The right to represent employees in collective bargaining negotiations and in the settlement of grievances...

The duty to bargain collectively, imposed upon an employer by § 8 (a)(5) of the National Labor Relations Act, includes a duty to provide relevant formation needed by a labor union for the proper performance of its duties as the employees' bargaining representative.

Section 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C.S. § 158(a)(5)<sup>2</sup>, just like RSA 273-A:5, I (e),<sup>3</sup> imposes on employers the duty to bargain in good faith with the unions. See *Detroit Edison Co. v. NLRB*, supra, 440 U.S. at 303. See also *NLRB v. USPS*, 660 F.3d 65 (1st Cir. 2011). Similarly, in *NLRB v. Davol*, 597 F.2d 782, 786-87 (1st Cir. 1979), the court held that the union was "entitled to the requested information in order to determine whether it should bring appropriate grievance procedures to enforce the contractual provisions." *Id.* at 788. The court explained:

By requiring disclosure, the [National Labor Relations Board (NLRB)] makes it possible for the Union to evaluate its grievance, or potential grievance, before it incurs the expense of arbitration, rather than discover at arbitration that its grievance was unfounded.

*Id.* at 789.

Further, under the federal law, an employer's argument that the request is unduly burdensome does not justify the refusal to provide the information requested by a union. In *Food Employer Council, Inc.*, 197 NLRB 651 (1972), the NLRB held that "[i]f there are *substantial* costs involved in compiling the information in the precise form and at the intervals requested by the Union, the parties must bargain in good faith as to who shall bear such costs, and, if no agreement can be reached, the Union is entitled in any event to access to records from which it can reasonably compile the information." *Id.* (Emphasis added.) Similarly, in *Oil, Chemical & Atomic Workers Local Union No. 6-148 v. NLRB*, 229 U.S. App. D.C. 70 (1983), the court

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<sup>2</sup> 29 U.S.C. § 158 (a)(5) provides that "[i]t shall be an unfair labor practice for an employer ... (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 U.S.C.S. § 159(a)]."

<sup>3</sup> RSA 273-A:5, I (e) provides that [i]t shall be a prohibited practice for any public employer ... [t]o refuse to negotiate in good faith with the exclusive representative of a bargaining unit..."

rejected the employer's argument that the union's requests for information were unduly burdensome. The court held, among other things, that the cost and burden of compliance with the requests did not justify a refusal to supply the relevant<sup>4</sup> information. *Id.* Furthermore, in *Queen Anne Record Sales, dba Tower Books*, 273 NLRB 671 (1984), the NLRB distinguished the two cases in which the union was ordered to pay for the information it requested stating that in *United Aircraft Corp.*, 192 NLRB 382 (1971), the union was obligated to pay because "the information request there was extensive and the expenses amounted to over \$50,000"; and that in *American Telephone and Telegraph Co.*, 250 NLRB 47 (1980), "the union itself requested to pay the photocopying costs." See *Queen Anne Record Sales*, supra, 273 NLRB at 671-72. In *Queen Anne*, the NLRB held, among other things, that the cost and burden of compliance did "not justify an initial, categorical refusal to supply relevant data"; that the burden was on the employer to show that production of the information would be unduly burdensome; and that the employer's refusal to supply the information was unreasonable. *Id.*

In this case, the Union first requested the information on September 4, 2015, two days after it filed a grievance concerning the denial of promotion to a bargaining unit employee on the basis of his absentee record.<sup>5</sup> The parties' contractual grievance procedure provides for a final and binding arbitration and a pre-arbitration meeting during which the parties are supposed to try to resolve the dispute. The Union initially requested the qualifications for the successful

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<sup>4</sup> "[R]equested information is relevant if it seems probable that the information will be of legitimate use to the union in carrying out its duties and responsibilities qua bargaining agent... [R]equested information should be deemed relevant if it is likely to be of material assistance in evaluating strategies that may be open to the union as part of its struggle to minimize the adverse effects of the employer's decisionmaking process on persons within the bargaining unit... [T]he relevancy threshold is low and ... the standard is neither onerous in nature nor stringent in application." *Providence Hospital and Mercy Hospital v. NLRB*, 93 F.3d 1012, 1017 (1st Cir. 1996) (citations omitted). See also *NLRB v. Acme Indus. Co.*, supra, 385 U.S. at 437.

<sup>5</sup> "...Grievant's absentee record was considered problematic and overriding factor in decision." Findings of Fact at 10. See also Findings of Fact at 15 ("The contract clearly states that absentee record is a primary basis of qualification and departmental seniority shall be considered where other factors (absentee record) are relatively equal.")

candidate and “a list of employees that have been denied a job promotion in the last 5 years with the sole reason of sick leave.” See Finding of Fact at 11. The City did not provide the requested information. The Union later added a request for attendance records for every person that has been promoted in the last five years and attendance records for every person that has been denied promotion in the last five years. See Finding of Fact at 13. The information was requested in order to determine whether to arbitrate, settle, or withdraw the grievance. The City continued to refuse to provide the requested information claiming that it was irrelevant and unduly burdensome. On November 3, 2015, the Union filed the present unfair labor practice (ULP) complaint. Only after the filing of the ULP complaint, the City partially satisfied the Union’s request for information: it provided qualifications and absentee record for the successful candidate. By the date of the hearing (December 17, 2015), the City withdrew its relevancy-based objections but continued to refuse to provide the outstanding information on the ground that the requested information was unduly burdensome. The City stated that it was willing and able to provide the information if the Union agreed to pay for the so-called “direct costs,” i.e. costs of the work hours, at the hourly rate, the City employees would expend on compiling the information.

It is clear from the record, that the information the Union requested not only relevant but is essential and integral to the Union’s ability to represent the grievant in the contractual grievance proceedings. It is also clear that the Union’s ability to access complete information and its ability to evaluate Mr. MacArthur’s case and determine what level of representation is appropriate and justified has been frustrated, interfered with, and delayed by the City’s continuing refusal to provide the requested information. As a result, like in *Weare Police*, the Union here has been unable to develop and advance a grievance and utilize the statutorily required grievance procedure. See *AFSCME Local 3657, Weare Police Employees v. Town of*

*Weare*, PELRB Decision No. 2014-006 (January 8, 2014).<sup>6</sup> Consequently, by refusing to provide the requested information and by delaying for three months the information it did finally provide to the Union, the City interfered with the Union's statutory right to represent bargaining unit employees and a bargaining unit employee's statutory right to be represented by the Union in the settlement of grievances; breached its statutory duty to bargain in good faith which includes a duty to provide relevant formation needed by a labor union for the proper performance of its duties as the employees' bargaining representative; and breached the parties' CBA. See *id.* See also *Detroit Edison Co. v. NLRB*, supra, 440 U.S. at 303.

Furthermore, the costs and burden of compliance with the Union's request do not justify the City's refusal to supply the information requested. At the very least, the City should have provided the Union an access to the records<sup>7</sup> from which it could reasonably compile the information. See *Food Employer Council, Inc.*, 197 NLRB 651 (1972). By failing to do so the City committed an unfair labor practice.

As to the costs, nothing in RSA 273-A, prior PELRB decisions or New Hampshire Supreme Court decisions requires the Union to pay any of the costs of production as the City has demanded. Further, assuming arguendo that NLRB precedent applies, I find that the City did not satisfy its burden of demonstrating that the costs and burden of compliance with the Union's request were substantial. Director Croasdale testified that to compile a list of all employees promoted in the Water Works department in the last five years, a City employee would have to look through two boxes kept within the department; and that complying with the Union's request to provide a list of all employees promoted in the last five years and their attendance records

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<sup>6</sup> In *Weare Police* case, the PELRB granted the Union's motion to for an immediate cease and desist order requiring the public employer to provide information requested by the Union in connection with the prosecution of a grievance. *Id.*

<sup>7</sup> The City does not claim that the information the Union requested is confidential.

would take approximately three hours. Furthermore, the list of promoted employees can also be compiled from the information that the City routinely provides to the Union: a list of department employees with their classifications.<sup>8</sup> Therefore, the costs and burden of compliance with the Union's request to provide a list of employee promoted within the department in the last five years are not substantial. Further, although it appears that the information concerning the employees who were denied promotion within the department in the last five years is kept in the City's HR department and not in the Water Works department, I similarly find that the costs and burden of complying with the Union's request concerning employees who were denied promotion<sup>9</sup> are not substantial.

For the foregoing reasons, the City violated RSA 273-A:5, I (a), (b), (g), (e), and (h). The evidence is insufficient to prove that the City violated RSA 273-A:5, I (c) and this claim is, therefore, denied.

Accordingly, the City shall cease and desist from refusing to provide to the Union the information it requested. The City shall provide to the Union as expeditiously as possible (1) a list of employees who were promoted in the Water Works department in the last five years and their attendance records; and (2) the list of employees who were denied promotion in the Water Works department in the last five years and their attendance records.

So ordered.

Date: 2/10/16

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

Distribution: Vincent A. Wenners, Esq.  
Thomas Arnold, III, Esq.

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<sup>8</sup> Additionally, although compiling such information does not appear to require any special skills beyond the ability to read and write, the City failed to explain why the only department employee who could perform this work is the employee whose rate of pay is \$26 an hour.

<sup>9</sup> The HR Director estimated that to create a list for employees who were denied promotion would take approximately between five and six hours. See Findings of Fact at 23.