Appeal to NH Supreme Court withdrawn on 01-13-2014. (NH Supreme Court Case No. 2013-0246

STATE OF NEW HAMPSHIRE

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Teamsters Local 633 of New Hampshire,
Manchester Police Department Support Staff

v.

City of Manchester

Case No. G-0187-3
Decision No. 2013-018

Appearances:

William R. Cahill, Jr., Esq.,
Dumont, Morris and Burke, P.C.,
Boston, Massachusetts for the Complainant

Thomas I. Arnold, III, Esq.,
Deputy City Solicitor,
City of Manchester, New Hampshire for the Respondent

Background:

The Union filed an unfair labor practice complaint on June 27, 2012 alleging that the City violated RSA 273-A:5, I (c), (e), (h) and (i). According to the Union the City unilaterally changed the terms and conditions of employment for three mechanics following their assignment to a new work location and the newly formed Central Fleet Management Department (CFMD). The Union contends that the mechanics have continued to perform the same work and are still covered by the July 1, 2010 to June 30, 2013 collective bargaining agreement (2010-13 CBA). The Union claims the City has improperly treated these employees as "non-affiliated" or non-bargaining unit employees whose positions are no longer covered by the 2010-13 CBA and has improperly made changes in the area of health insurance benefits and the amount of the night

shift premium. The Union requests that the PELRB order the City to make the affected employees whole and order the City to comply with the collective bargaining agreement.

The City denies the charges. According to the City, it has properly reorganized a portion of its workforce and its actions represent a legitimate exercise of managerial policy[1] within its exclusive prerogative pursuant to RSA 273-A:1, XI. The City also moves to dismiss, asserting that the PELRB lacks jurisdiction because the Union's claim is a contract dispute subject to grievance arbitration.

A hearing was held on August 21, 2012 at the offices of the PELRB in Concord. Thereafter both parties submitted post-hearing briefs, and the decision in this case is as follows.[2]

Findings of Fact

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

2. The Teamsters Local 633 of NH, Manchester Police Department Support Staff (Union) is the exclusive representative of certain employees of the Manchester Police Department including Police Equipment Mechanic I.

3. The City and the Union are parties to a collective bargaining agreement effective from July 1, 2010 to June 30, 2013 (2010-13 CBA).

4. On or about August 3, 2010 the Board of Mayor and Aldermen (BMA) of the City passed a bond resolution authorizing bonds in the amount of $43,500,000.00 for the construction of a new public safety complex.

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[1] The managerial policy exception is set forth in RSA 273-A:1, XI:

> "Terms and conditions of employment" means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase *"managerial policy within the exclusive prerogative of the public employer"* shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions. (emphasis added)

[2] The parties' stipulations are reflected in the Findings of Fact.

5. On January 4, 2011 the BMA approved a construction contract for the new municipal complex in the amount of $38,692,625.00.

6. The new public safety complex, also known as the municipal complex included a new 36,050 square foot central fleet maintenance facility (CFMF) and a new 79,709 square foot police station.

7. The CFMF cost approximately $6,919,718.00 and the new police station cost approximately $13,007,906.00, which amounts were part of the construction (funding) for the new municipal complex.

8. The CFMF consists of 19 service bays and one secure service bay and is a significant upgrade in facility conditions and equipment from the City's prior maintenance facilities.

9. Prior to the construction of the CFMF the City had several service facilities with associated mechanics located at various City departments such as the Police Department, the Fire Department, the Highway Department, the Parks, Recreation and Cemetery Department, the Manchester Water Works as well as at the Manchester Airport.

10. The new police station will not have any vehicle maintenance or repair facilities and such maintenance will take place at the CFMF.

11. As the City wished to consolidate its various facilities for vehicle maintenance into one new central fleet maintenance facility, the highway department retained Matrix Consulting Group to study the City's then existing departmental vehicle maintenance facilities and to make recommendations as to the feasibility of consolidating vehicle maintenance into a single location and organization and if feasible how to best centralize vehicle maintenance into a single location and organization.

12. Matrix Consulting Group is a national group that has provided consulting services to local governments for more than 30 years. Matrix Consulting Group has conducted hundreds of fleet maintenance and management studies.

13. On November 23, 2011 Matrix Consulting Group issued its report and recommendations.

14. The Matrix Consulting Group's recommendations included the following:

- The City consolidate fleet management operations and establish the function under a newly formed CFMD that is unaffiliated with any existing department providing fleet maintenance and management services.
- The City hire a Fleet Manager for the new CFMD.
- The City establish the CFMD as an internal service fund to provide fleet maintenance and repair services on a cost-neutral basis to all City Departments.
- The City begin operations of the CFMD with 28 staff members of which 24 would be mechanics.
- The CFMD should minimize the need for specialization in the consolidated shop. Shop supervisors should require the cross training of mechanic staff on all types of units in the fleet.

15. At the time of consolidation the City had 28 mechanics working in the Highway Department, Police Department, Fire Department and Parks, Recreation and Cemetery Department.

16. On January 3, 2012 Matrix Consulting Group presented its report and recommendations to the BMA.

17. At the January 3, 2012 BMA meeting there was a wide ranging discussion over whether the CFMD should be a new and separate department or a division of an existing department; discussion over the organization and operation of the CFMD; discussion of the possibility of outsourcing the City's vehicle maintenance functions; and discussion of the importance of a unified command at the CFMD.

18. At the conclusion of the BMA meeting on January 3, 2012 the BMA voted to refer the Central Fleet Management Study to a joint meeting of the BMA Committee on Administration/Information Systems and the BMA Committee on Human Resources/Insurance.

19. At a January 18, 2012 joint meeting of the BMA Committee on Administration/Information Systems and the BMA Committee on Human Resources/insurance there was again wide ranging discussion over whether the CFMD should be a new department or a division of an existing department; the number of employees, including mechanics at the CFMD; how to best organize and operate the CFMD in order to maximize efficiencies; whether to transfer existing employees to the CFMD or to lay off all existing mechanics and have the CFMD rehire the mechanics needed for the CFMD. At the end of the meeting the joint committee voted to direct the Human Resources Director to initiate the search for a department head (Central Fleet Manager) of the proposed CFMD. Implicit in the joint committee vote was a determination that the CFMD should be a separate City department.

20. At a meeting on February 21, 2012 the BMA, after discussion over whether CFMD should be a new department or a division of an existing department, voted to accept a report of the Committee on Human Resources/Insurance that a class specification (job description) for a Central Fleet Services Director be approved. Implicit in the BMA vote was that the CFMD would be a new City department and not a division of an existing department.

21. At a meeting on March 6, 2012 the BMA passed to be ordained an ordinance establishing a new classification of Central Fleet Services Director; establishing the compensation of the new Central Fleet Services Director and establishing a new class specification, Central Fleet Services Director.

22. At a meeting on April 17, 2012 the BMA passed to be ordained an ordinance establishing the CFMD.

23. At present there is no bargaining unit at the CFMD.

24. On June 18, 2012 the three Union mechanics were transferred to the CFMD and began working out of the CFMD later that week.

25. The City did not bargain with the Union regarding the transfer of the three Union mechanics to the CFMD as the City, in its view, was exercising "managerial policy within the exclusive prerogative of the public employer" pursuant to RSA 273-A:1 XI.

26. There is no "CFMD" bargaining unit and the City has treated the three mechanics as non-affiliated employees, that is as employees not affiliated with any union or bargaining unit.

27. The three mechanics currently receive the same base rate of pay as they received under the 2010-13 CBA.

28. The City currently requires the three mechanics to pay a higher health insurance premium and higher health insurance co-pays than they would pay pursuant to the 2010-13 CBA.

29. The City currently provides to the three mechanics a night shift premium of one step higher than his/her normal rate (3%) when half or more of the shift is scheduled after 6:00 PM or before 8:00 AM. This is less than is provided for under the 2010-13 CBA, which calls for a night shift premium of 7% higher than his/her normal rate when half or more of the shift is scheduled after 6:00 PM or before 8:00 AM.

30. As the City has established and funded the CFMD, has transferred police vehicle servicing, repair and maintenance to the CFMD, and has transferred the police mechanics to the CFMD, funds for Police Department vehicle, servicing, repair and maintenance and funds for the compensation of the former Police Department mechanics have been removed from the Police Department budget.

31. The three mechanics continue to perform the same maintenance work on police department vehicles at the CFMD as they performed at their prior work location. They may

receive additional training which will qualify them to work on non-police department vehicles. The record does not reveal whether such additional training has in fact been scheduled, conducted or completed.

Decision and Order

Decision Summary:

The City's motion to dismiss is denied since the PELRB has jurisdiction to determine whether the three mechanics are still covered by the existing bargaining unit certification and 2010-13 CBA. The City's unilateral changes in the terms and conditions of employment (change in health care benefit and night shift differential) of the three mechanics constitute an unfair labor practice because the three mechanics are still covered by the existing Police Department PELRB bargaining unit certification and therefore the 2010-13 CBA, and these terms and conditions of employment are mandatory subjects of bargaining which cannot be changed except through negotiation.

Jurisdiction and City's Motion to Dismiss:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6. The PELRB's jurisdiction includes the authority to determine the composition of bargaining units and resolve any requests to modify the composition of existing bargaining units. *See* RSA 273-A:8 and N.H. Admin. Rule Pub 302. The City requests dismissal, arguing that the PELRB lacks jurisdiction because the dispute between the parties is covered by the parties' collective bargaining agreement which provides for final and binding arbitration. The City contends the Union should have grieved the dispute under the grievance procedure and it is a dispute subject to final and binding arbitration. In general, the PELRB lacks jurisdiction to interpret a collective bargaining agreement and adjudicate disputes arising under the agreement when the parties have agreed to submit such matters to a grievance process which contains a

provision for a final and binding resolution, such as arbitration. *See, e.g., Appeal of Silverstein,* 163 N.H. 192, 196 (2012) and *Appeal of the City of Manchester,* 153 N.H. 289, 293 (2006). However, the crux of the complaint in this case relates to the scope and composition of an existing bargaining unit, matters that are not contractual but are subject to PELRB determination under RSA 273-A:8 and Pub 302. The PELRB has jurisdiction over the Union's complaint alleging violations of RSA 273-A:5, I (c), (e), (h), and (i) and the City's motion to dismiss is denied.

Discussion:

This case involves a conflict between the Union's right to represent employees performing bargaining unit work and have changes in the terms and conditions of employment addressed through the collective bargaining process and the City's management right to assign, direct and generally manage its workforce. We conclude that the terms and conditions of employment for the three mechanics remain a mandatory subject of bargaining under the three part test set forth in *Appeal of State,* 138 N.H. 716, 722 (1994), notwithstanding the change in their physical work location and their assignment to the CFMD.

Under *Appeal of State,* bargaining proposals or subjects fall into one of three categories: mandatory topics of bargaining, permissive topics of bargaining, and prohibited topics of bargaining. The nature and extent of a party's obligation to bargain a particular proposal presented to it, the corresponding right of the party making a particular proposal to pursue it, and the related right of a public employer to make unilateral changes in working conditions all depend on whether the underlying subject matter concerns a mandatory, permissive, or prohibited subject of bargaining:

> 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.

In re Appeal of Nashua Police Commission, 149 N.H. 688, 691-92 (2003)(citing *Appeal of State*, 138 N.H. at 721-723).

The distinctions that must be made between various subjects of bargaining means, for example, that a public employer subject to RSA 273-A collective bargaining may not make unilateral changes to terms and conditions of employment, like wages, that are mandatory subjects of bargaining. *See, e.g., Appeal of City of Nashua Board of Educ.*, 141 N.H. 768, 772-73 (1997). In contrast, unilateral employer changes in areas which constitute permissive subjects of bargaining, like a just cause discipline proposal, are allowed, but parties may also agree to bargain such matters. *Id. at 773; Appeal of State*, 138 N.H. at 724 (union discipline proposal not subject to mandatory bargaining, but the state may choose to bargain the proposal); *Appeal of International Association of Firefighters*, 123 N.H. 404, 408 (1983)(fire department platoon size was a permissive subject of bargaining and city could have properly refused to bargain the union's proposal).

The three part test has been considered by the court in a number of different contexts. In *Appeal of Kennedy*, 162 N.H. 109 (2011), the court affirmed the PELRB's dismissal of a charge that the public employer had engaged in impermissible subcontracting and violated its reduction-in-force policy, and in its ruling placed particular emphasis on the fact that job duties had not been transferred:

> Of significance is the fact that (the employee's) job duties were not simply transferred to an outside contractor. Thus, this case is distinguishable from *Appeal of City of Nashua*, in which we held that a school board's dismissal of unionized custodial workers and subsequent hiring of part-time employees to perform the same duties at reduced wages and

> benefits constituted an unfair labor practice. *In so holding, we recognized that, because the actual job duties to be performed remained the same, the action was one that primarily affected wages and hours.* On the record before us, we agree with the PELRB's conclusion that the elimination of the Hinsdale band program was part of a reorganization within the district's managerial prerogative.

Appeal of Kennedy at 113 (emphasis added)(internal citations omitted). In another case the public employer attempted to privatize the work of bargaining unit employees during the term of the collective bargaining agreement, and justified its actions as a legitimate exercise of its management rights. *See Appeal of Hillsboro-Deering*, 144 N.H. 27, 29-30 (1999). The court found the public employer had unilaterally and unlawfully changed the terms and conditions of employment, and the purported reorganization did not qualify as "managerial policy within the exclusive prerogative of the public employer," where the purported reorganization did not involve a change in the amount and nature of the work. *Id. See also Appeal of City of Nashua Bd. Of Educ.* (public employer's management rights did not include the power to replace full time employees with part time employees who were to perform the same duties for lower wages and benefits.)

A number of additional points relating to management-labor dynamics in public sector labor relations are also instructive in this case. First, it is a fundamental principal 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 City of Nashua Bd. Of Educ*., 141 N.H. at 772. Second, the City's assertion that it carried out a reorganization consistent with its managerial prerogative is the beginning, and not the end, of the analysis, because "[a] public employer's greater power to create or eliminate a position or program does not necessarily include the lesser power to unilaterally determine wages and hours for the position or program." *Id.* at 775. It is therefore generally appropriate to scrutinize a public employer's exercise of its "managerial prerogative"

to assess whether the "lesser power" is necessarily included within the public employer's "greater power." Third, we will consider the extent of the City's authority under its management prerogative with due consideration for the principal that "[a] true layoff or reorganization is within managerial policy and is not subject to an unfair labor practice claim." *Appeal of Hillsboro-Deering*, 144 N.H. at 30. However, as already noted, there is no "true layoff or reorganization" for the purposes of a RSA 273-A:5, I unfair labor practice charge where the amount and nature of the work does not change. *Id.* Finally, we observe that the "prerogatives afforded to management …. do not include the right to substitute subcontracted work for bargaining unit work." *See Appeal of Kennedy*, 162 N.H. at 113. Although this case does not involve an attempt to subcontract the bargaining unit work[3] of the three mechanics, the ultimate result under the City's preferred scenario is the functional equivalent. Such employer action undermines the purposes of collective bargaining and bargaining units and renders nugatory the statutory right of exclusive representatives and bargaining unit employees to bargain collectively.

Turning to the first part of the three part test, there is "no independent statute, or any constitutional provision or valid regulation, that reserves to the city the exclusive authority" to unilaterally establish the terms and conditions of employment for employees performing bargaining unit work who have been assigned to a new work location and department. *See Appeal of City of Nashua Bd. Of Educ.*, 141 N.H. at 774-775 (the provisions of RSA 273-A cannot serve as the basis for the independent authority required under the first part of the test).

As to the second part of the test, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy, in order to satisfy or pass this step. Matters of managerial policy include, at least, "the functions, programs and

[3] The term "bargaining unit work" means the job duties and responsibilities of the positions the PELRB has included in a certified bargaining unit.

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." RSA 273-A:1, XI. This part of the test "cannot be resolved through simple labels offered by management, such as 'restructuring' or 'personnel reorganization,' or through conclusory descriptions urged by employees, such as 'inherently destructive' conduct. *Appeal of City of Nashua Bd. Of Educ.*, 141 N.H. at 774. Often, both the public employer and the employees will have significant interests affected by a proposal, and determining the primary effect of the proposal requires an evaluation of the strength and focus of the competing interests. *Id.* For example, although a school district's decision about whether or not to offer extracurricular programs is part of broad managerial policy, staff wages, hours, and other specifics of staff obligations and remuneration associated with these programs primarily affect the terms and conditions of employment. *See, e.g., Berlin Educ. Ass'n*, 125 N.H. at 783-84; *Appeal of State*, 138 N.H. 716, 722 (1994).

In this case, the record reflects that the three mechanics continue to perform bargaining unit work, notwithstanding the fact that they now work in a brand new facility and have been assigned to a new department. There is a possibility that they may receive training in the future and become qualified to work on non-police department vehicles, but the record reflects that the three mechanics continue to work exclusively on police department vehicles and they have not received any additional training, nor are they scheduled to receive any additional training. Therefore, we give little weight to the possibility of a change in the work load of the three mechanics to include work on non-police department vehicles in our analysis, and for purposes of our decision find that the three mechanics continue to perform the same work.

The greater power of the City to construct new maintenance facilities and assign the three mechanics to a new work location as part of the CFMD does not necessarily mean the City also has the authority to unilaterally set wages and other terms and conditions of employment for the

three mechanics. There is a lack of evidence suggesting that having the authority to do so is crucial or necessary to the other changes the City has made, and there is nothing to show that allowing these employees to continue to have the terms and conditions of employment determined through the collective bargaining process inappropriately restricts or limits the City's managerial rights. On the other hand, the interests of the employees in continuing to have the terms and conditions of their employment determined through negotiation is obvious, and these interests have already been adversely affected on account of the City's actions (changes in health insurance and shift differential). In weighing the respective interests of the parties, and given that the three mechanics continue to perform bargaining unit work, we find that as to the three mechanics the City's reorganization primarily "effects the wages and hours of [these] employees, rather than issues of broad managerial policy" under the second part of the three part test.

The Union's position in this case also satisfies the third part of the three part test, since the continued access of the three mechanics to the RSA 273-A collective bargaining does not interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI. We therefore find that the City was not entitled to make the unilateral changes complained about, as the matters in dispute remain mandatory subjects of bargaining which cannot be altered except through negotiation. More generally, the City was not entitled to unilaterally determine that the three mechanics are no longer covered by the existing bargaining unit certification, are no longer represented by the Union, and are no longer subject to the 2010-13 CBA. The kinds of changes that have taken place in this case (different work location and assignment to a different department) are insufficient to divest the Union of its right to represent the three mechanics when these employees continue to perform bargaining unit work. These changes are also insufficient to eliminate the City's obligation to negotiate changes in the terms

and conditions of employment of the three mechanics or to legitimately classify the City's conduct as "managerial policy within the exclusive prerogative of the public employer."

This decision does not limit the City's right to assign and direct its personnel, as under this order the three mechanics will continue to work at the new facility but subject to the terms and conditions established under the existing contract. This decision is also without prejudice to the City's right to file a petition seeking a modification[4] of the existing bargaining unit to remove the mechanic positions.

In accordance with the foregoing we find that the City has committed an unfair labor practice in violation of RSA 273-A:5, I (e)(refusal to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations). This violation stems from the City's refusal to recognize the three mechanics as bargaining unit employees represented by the Union and whose terms and conditions of employment can only be changed through the negotiation process. Because the City has refused to recognize the bargaining unit status of the three mechanics and has established new terms and conditions of employment for the three mechanics we find that City has failed to recognize and follow the 2010-13 CBA as to provisions concerning health insurance and shift differential. This is a violation of RSA 273-A:5, I (h)(to breach a collective bargaining agreement). The Union's charge that the City violated RSA 273-A:5, I (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); and (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 making or

[4] See N.H. Admin. Rule Pub 302.05.

adopting such law, regulation or rule) are dismissed as there is insufficient evidence to establish violations of these provisions.

The City is ordered to cease and desist from making any further unilateral changes in the terms and conditions of employment for the three mechanics, restore the terms and conditions of employment for the three mechanics consistent with the collective bargaining agreement, pursue any desired changes in the terms and conditions of employment through the collective bargaining process, and make the three mechanics whole through reimbursement as to losses in wages and benefits which they have suffered as a result of the City's action. The City shall post this decision in places where the employees affected by this decision work for a period of 30 days.

So ordered.

January 18, 2013.

/s/ David J.T. Burns
David J.T. Burns, Esq., Chair

By unanimous vote of Alternate Board Member David J.T. Burns, Esq. and Board Members Kevin E. Cash and James M. O'Mara, Jr.

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