Affirms PELRB Decision No. 2000-020.

THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board

APPEAL OF NASHUA POLICE COMMISSION

No. 2000-342 July 18, 2003

James M. McNamee, of Nashua, by brief and orally, for the petitioner.

Donchess & Notinger, P.C., of Nashua (James W. Donchess on the brief and orally), for the respondent.

BRODERICK, J. The petitioner, the Police Commission of the City of Nashua (Commission), appeals a New Hampshire Public Employee Labor Relations Board (PELRB) ruling upholding the unfair labor practice charges of the respondent, the Police Patrolman's Association of the City of Nashua (Association). See RSA 273-A:5, I(e), (h), (i) (1999). We affirm.

The record supports the following facts. In September 1999, the City of Nashua Police Department (Department) issued and implemented a new standard operating procedure (SOP) for notifying Nashua police officers of court appearances. The new SOP provided, in pertinent part, as follows:

> I. COURT/ALS APPEARANCE - NOTIFICATIONS & CANCELLATIONS:
>
> C. An enclosed bulletin board is designated near the rear employee's entrance for all court scheduling and ALS Hearings. The time of day members/employees are required to appear for court or an ALS hearing will be noted on the schedule[ ] or if an appearance has been cancelled. The date and time the information was posted or canceled will be listed on the form.
>
> D. It is the responsibility of all members/employees to check the bulletin board regularly to become aware of court cases and ALS Hearings and to maintain an awareness of any changes to status of cases scheduled.
>
> E. Occasionally, members/employees may be notified via telephone of cases/ALS Hearings or cancellations.
>
> F. Responsibilities of Members/employees:

> 1. If not posted/canceled prior to the members'/employees' last time in the Department, it is the responsibility of all members/employees to check the status of their case or ALS Hearing. Members/employees may telephone between the hours of 0700 to 0900 on the day prior to the scheduled case. Members/employees should place calls in a timely manner to check the status of their cases.

The Association filed a grievance, alleging that the new SOP violated article 26 of the collective bargaining agreement between the city and the Association (CBA). Article 26 states that the Department

> will notify an employee of the need to appear in Nashua District Court at least twenty-four (24) hours in advance. The Department shall notify an employee of the cancellation of a Nashua District Court appearance at least twenty-four (24) hours in advance. If the Department does not give twenty-four (24) hours notice of a Nashua District Court appearance or cancellation, the Department shall pay the employee for (1) hour of overtime compensation in addition to any other amounts due.

The Commission denied the grievance, and the Association thereafter filed unfair labor practice charges with the PELRB. The Commission moved to dismiss the charges on the ground that the CBA required the Association to arbitrate the dispute. The PELRB denied the Commission's motion and ruled that the new SOP violated both the Commission's obligation to bargain with the Association and article 26 of the CBA. See RSA 273-A:5, I(e), (h), (i).

"When reviewing a decision of the PELRB, we defer to its findings of fact, and, absent an erroneous ruling of law, we will not set aside its decision unless the appealing party demonstrates by a clear preponderance of the evidence that the order is unjust or unreasonable." Appeal of State of N.H., 147 N.H. 106, 108 (2001) (quotation omitted); see also RSA 541:13 (1997).

I

The Commission first argues that because the Association failed to arbitrate the dispute, the PELRB lacked jurisdiction to interpret the CBA in the context of unfair labor practice charges. The Association counters that the CBA did not require it to arbitrate before submitting its grievance to the PELRB through an unfair labor practice charge.

Resolution of this dispute requires that we interpret article 10 of the CBA. We begin by focusing upon the language of the CBA, as it reflects the parties' intent. Appeal of Town of Bedford, 142 N.H. 637, 641 (1998). "This intent is determined from the agreement taken as a whole, and by

construing its terms according to the common meaning of their words and phrases." Id. (quotation omitted). The interpretation of a collective bargaining agreement, including whether a provision or clause is ambiguous, is "ultimately a question of law for this court to decide." Appeal of City of Manchester, 144 N.H. 386, 388-89 (1999) (quotation omitted). "A clause is ambiguous when the contracting parties reasonably differ as to its meaning." Id. at 389 (quotation omitted).

Article 10 of the CBA sets forth a multi-step process for resolving grievances. For grievances initiated by the Association or an employee, the steps include, in sequence, review by the grievant's bureau commander (step 1), the deputy chief of operations (step 2), the chief (step 3), and the Commission (step 4). Step 5 of the process provides as follows:

> Failing a settlement at STEP 4, the grievant may present the grievance in writing to the [Association] . . . . If the [Association] feels that the grievance has merit and that submitting it to arbitration is in the best interest of the department, the [Association] may submit the grievance to the American Arbitration Association, Public Employee Labor Relations Board, or the Hillsborough County Superior Court . . . .

The Commission argues that the phrase "[i]f the [Association] feels that . . . submitting [the grievance] to arbitration" modifies the references to the three forums mentioned in step 5 (the American Arbitration Association, the PELRB and the superior court). The Commission contends that because all three forums may appoint arbitrators to resolve grievances, step 5 allows the Association to submit a grievance to the PELRB only for arbitration; it does not permit the Association to appeal the Commission's step 4 determination by filing an unfair labor practice charge.

The Commission is mistaken, and, thus, we hold that its interpretation of article 10 is not reasonable. See id. By statute, the PELRB may appoint an arbitrator only in the context of contract negotiations, not in the context of a grievance. See RSA 273-A:2, V (1999); RSA 273-A:12 (1999). Read as a whole, RSA 273-A:2, V, which requires the PELRB to maintain a list of neutral third parties, and RSA 273-A:12, which governs the circumstances under which the PELRB may appoint a neutral party to resolve a labor dispute, pertain only to contract negotiation disputes, not to grievances. Both statutes refer to parties who have bargained to an impasse, a term which has meaning only in the context of contract negotiations. See RSA 273-A:2, V; RSA 273-A:12, I, IV, V. RSA 273-A:12, I, provides, in pertinent part,

> Whenever the parties request the board's assistance or have bargained to impasse, or if the parties have not reached agreement on a contract within 60 days, . . . a neutral party

> chosen by the parties, or failing agreement, appointed by the board, shall undertake to mediate the issues remaining in dispute.

See also RSA 273-A:12, IV ("If the impasse is not resolved following the action of the legislative body, negotiations shall be reopened."); RSA 273-A:12, V ("Nothing in this chapter shall be construed to prohibit the parties from providing for such lawful procedures for resolving impasses as the parties may agree upon."). The PELRB's regulations upon which the Commission relies are in accord. See N.H. Admin. Rules, Pub 305.01-305.03. Accordingly, we hold that step 5 of the CBA expressly authorized the Association to appeal the Commission's step 4 determination by filing an unfair labor practice charge.

II

The Commission next argues that the PELRB erroneously ruled that the Commission had a duty to negotiate the new SOP. See RSA 273-A:5, I(e). The Commission argues that the means of notifying police officers of court attendance dates falls within the managerial policy exception to the obligation to bargain. See Appeal of State of N.H., 138 N.H. 716, 721-23 (1994).
In Appeal of State of N.H., we adopted the following three-part test to determine the applicability of the managerial policy exception:

> 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.

Id. at 722. A proposal that fails the first part of the test is a prohibited subject of bargaining. See Appeal of City of Nashua Bd. of Educ., 141 N.H. 768, 774 (1997). 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. See id.

The Commission asserts that adopting and implementing a new procedure for notifying officers of court appearances is a prohibited bargaining subject because the Nashua city charter reserves to the Commission the authority to "control the scheduling of sworn police officers." The only mention in the charter of scheduling police officers concerns determining the "time and manner" of relieving officers of their duties, without loss of pay, for two days in each seven. The charter is otherwise silent with respect to scheduling officers. The charter is also silent with respect to notifying police officers for court appearances. Accordingly, we hold that the new SOP satisfies part one of the test and was not a prohibited subject of bargaining.

With respect to the second part of the test, we agree with the Association that notifying officers of court appearances primarily concerns the terms and conditions of employment, not broad managerial policy. Notifying employees promptly of court appearances and cancellations directly affects their wages and hours. For instance, pursuant to article 26 of the CBA, the Department must pay the employee one hour of overtime in addition to any other amounts due if the Department fails to provide at least twenty-four hour notice that a court appearance was canceled. "[O]ur cases have consistently recognized proposals and actions that primarily affect wages or hours as mandatory subjects of bargaining." Id. at 775.

Concerning the third part of the test, we are not persuaded by the Commission's unsupported allegation that there is a "significant danger that allowing the [CBA] or the Association to dictate the means of giving notice of court appearances would significantly interfere with the public control of government functions." We conclude, therefore, that negotiating the new SOP was a mandatory subject of bargaining. Accordingly, the Department committed an unfair labor practice by adopting the new SOP unilaterally. See Appeal of Hillsboro-Deering School Dist., 144 N.H. 27, 33 (1999).

Finally, the Commission argues that the PELRB's decision is erroneous because it incorrectly found that the new SOP violated the parties' past practice of notifying officers about court appearances. Because as the PELRB's decision states, it did not rest in whole or in part upon this finding, we decline to address the Commission's argument.

Affirmed.

BROCK, C.J., and NADEAU, DALIANIS and DUGGAN, JJ., concurred.

NH Supreme Court affirmed this Decision on 7-18-2003, Slip Op. No. 2000-342 (NH Supreme Court Case No. 2000-342).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NASHUA POLICE PATROLMAN'S ASSOCIATION Complainant v. CITY OF NASHUA, POLICE DEPARTMENT Respondent	CASE NO. P-0740:11 DECISION NO. 2000-020

APPEARANCES

Representing Nashua Police Patrolman Association:

James Donchess, Esq.

Representing City of Nashua:

James McNamee, Esq.

Also appearing:

James E. Mulligan, Nashua Police
Donald J. Gross, Nashua Police Department
Thomas Felch, Nashua Police Department
Dona D. Conley, Nashua Police Department
Thomas McLeod, Nashua Police Department
Richard Bailey, Nashua Police Department
John Fisher, Nashua Police Patrolman Association
Chris Peach, Nashua Police Patrolman Association

BACKGROUND

The Nashua Police Patrolman's Association (Union) filed unfair labor practice (ULP) charges on December 3, 1999 against the City of Nashua Police Department (City) alleging violations of RSA 273-A:5 I (e), (h) and (i) resulting from breach of contract and failure to

bargain when a standard operating procedure (SOP) was unilaterally implemented by the City, contrary to negotiations and to Article 26 of the collective bargaining agreement (CBA). The City filed its answer and a motion to dismiss on December 20, 1999 after which this matter was heard by the PELRB on January 11, 2000. The record was closed after receipt of post-hearing briefs from the Union on January 24, 2000 and from the City on January 26, 2000.

FINDINGS OF FACT

1. The City of Nashua, by and through the Nashua Police Commission, operates a police department and, in so doing, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Nashua Police Patrolman's Association is the duly certified bargaining agent for sworn full-time, non-probationary officers of the Nashua Police Department below the rank of sergeant.

3. The City and the Union are parties to a collective bargaining agreement for the period July 1, 1998 through June 30, 2002, notwithstanding that that agreement was not signed until on or about September 15, 1999. Article 10 of the CBA provides a comprehensive grievance procedure, which, if settlement is not achieved after a grievance is processed by the Nashua Police Commission, permits the Union to submit the grievance to the American Arbitration Association, the Public Employee Labor Relations Board or the Hillsborough County Superior Court. The 1998-2002 CBA also contains provisions pertaining to "Court Time" at Article 26. It reads:

> For time in court, employees shall be paid time and one-half the regular rate of pay. All court overtime shall be for a minimum of three (3) hours, provided that if the three (3) hour minimum overlaps with regular duty time, overtime may shall be paid based upon hours worked. The Department will notify an employee of the need to appear in Nashua District Court at least twenty-four (24) hours in advance. The Department shall notify an employee of the cancellation of a Nashua District Court appearance at least twenty-four (24) hours in advance. If the Department does not give twenty-four (24) hours notice of a Nashua District Court appearance or cancellation, the Department shall pay the employee one (1) hour of overtime compensation in addition

to any other amounts due.

4. The subject of "court time" is not new to the on-going negotiations between these parties. On June 1, 1999, the Union filed a ULP (Case No. P-0740:9) about the former contract language which pertained to court time, to wit:

> For time in court, employees shall be paid time and one-half the regular rate of pay, less court witness fees. All court overtime shall be for a minimum of three (3) hours, provided that if the three (3) hour minimum overlaps with regular duty time, over-time pay shall be only for hours in court in excess of the regular duty schedule. No district court cases are to be scheduled on the department-wide shift change date. (Union Exhibit No. 8.)

That ULP claimed that on or about January 29, 1999, the Nashua Police Department (NPD) promulgated a policy (Exhibit E to City Answer, Case P-0740:9) limiting unit members to only one three (3) hour minimum even in instances where multiple court appearances were involved. Before this matter went to hearing as scheduled for July 15, 1999, the parties requested, by joint stipulation, that this matter be continued on the PELRB's docket until they shall have reviewed, ratified or rejected their tentative agreement for the 1999-2002 CBA, with the caveat that joint ratification would dispose of the ULP charges in Case No. 0740:9. Decision No. 1999-065 (July 9, 1999). The tentative agreement was ratified and the ULP was dismissed. Decision No. 1999-102 (October 13, 1999) with the result that Article 26 was amended to read as shown in Finding No. 3, above.

5. The foregoing ratification of new contract language was verified in testimony from Det. Thomas MacLeod, current Union president, who confirmed that the unit members had ratified the tentative agreement. Notification provisions were an important part of that new language and were part of a *quid pro quo* for the Union's agreeing to the new interpretation of the "three hour minimum" as opposed to its former position that each separate appearance was a distinct event with an entitlement for its own three hour minimum. MacLeod explained how the Union originally sought a 72 hour notice period because last minute notices were regularly impacting days off (Union Exhibit

No. 9), how the City sought language limiting three hour minimums to only one "per calendar day" (Union Exhibit No. 10) and how the ultimate language settled on a 24 hour notice provision (Union Exhibit No. 11.) with the burden of giving that notice being on the NPD, i.e., "the Department shall notify an employee of the cancellation..." and "If the Department does not give twenty-four (24) hours notice...." MacLeod said that without the compromise to a 24 hour notice, the Union would not have agreed to the provisions which ultimately led to the dismissal referenced in Decision No. 1999-065 and to the language currently appearing at Article 26.

6. Officer Christopher Peach is the Union vice president and has six years of experience on the executive board. He has been involved in four of the last five contract negotiations, including the 1999 negotiations. His experience up to and through those negotiations was that court cancellation notices would be by "court slips" (e.g., City Exhibit No. 3 and Union Exhibit No. 1), phone calls or pagers. He testified that as of July of 1999, "notice" meant being contacted by a supervisor of the legal bureau about his appearance in or cancellation of court.

7. Officer John Fisher is a community relations officer and union treasurer. He testified that prior to September of 1999, notices of appearances or cancellations were in writing. Before and as of July of 1999, "notice" meant in writing and "occasionally to be telephonically."

8. Notwithstanding the foregoing bargaining history and testimony, after negotiations were concluded and ratification occurred, the NPD issued a new SOP pertaining to "Court/ALS Appearance - Notifications and Cancellations." The Union found two provisions thereof to be contrary to its understanding of the contract and past practice, to wit:

> C. An enclosed bulletin board is designated near the rear employee's entrance for all court scheduling and ALS Hearings. The time of day members/employees are required to appear for court or an ALS hearing will be noted on the scheduled [sic] or if an appearance has been cancelled. The date and time the information was posted or canceled will be listed on the

form.

D. It is the responsibility of all members/ employees to check the bulletin board regularly to become aware of court cases and ALS Hearings and to maintain an awareness of any changes to status of cases scheduled. (Union Exhibit No. 12)

MacLeod testified that, during the negotiations process, neither side suggested that the notice provisions of the "new" Article 26 were intended to change the responsibilities for notifying officers about court and ALS appearances or cancellations. Likewise, Deputy Chief Donald Gross, a member of the City negotiation team, said that there were no demands or requests from the Union during negotiations to clarify the need for or methodology involving either phone-in or in-person notification. The foregoing SOP carried an effective date of October 15, 1999. (Union Exhibit No. 12) The Union filed a grievance on September 22, 1999. (Union Exhibit No. 13.) That grievance was denied by the Nashua Police Commission by letter of October 28, 1999 (Union Exhibit No. 14.) This ULP then followed, allegedly a cause for this matter to be dismissed, according to the City's Motion to Dismiss, because the Union did not pursue the matter through the last step of the grievance process, presumably arbiration though the American Arbitration Association.

9. Richard Bailey, a 24 year veteran of the department, was a captain in charge of the legal bureau, the prosecutorial branch of the police department, from 1986 to 1996. The bureau is responsible for managing upwards of 25 to 40 criminal matters a day, an equal number of arraignments and juvenile cases. It is also responsible for police officer attendance at those proceedings. He explained the historical progression of announcing cancellations in hearings at roll call (or phoning or making a radio call to officers not at roll call) which was followed by a slip notification system. Officers scheduled to be on vacation were required to notify the bureau of their status. If a hearing was scheduled during an officer's vacation, the bureau would seek a continuance, attempt to arrange a plea or *nol pros* the complaint. He said court notices have appeared on a bulletin board from 1976 to the current time and that it is a "rare

exception" when officers are ordered to be present in Superior Court by the county attorney. On cross examination, he said it has been "a constant" from 1976 to 1999 that officers have been given a radio or telephone call, a slip or have had personal contact from the department when it has been necessary to notify them of a canceled hearing. He acknowledged that the new SOP (Union Exhibit No. 12) shifts the burden to the police officer to be informed about changes in scheduled court proceedings.

10. James Mulligan, a captain in the department, headed the legal bureau from 1996 to 1998. He testified that the three-part notification slips worked until they were abandoned when the new SOP (Union Exhibit No. 12) became effective. He thought the three-part notification slips worked better than any notification methodology which preceded them. In the case of last minute hearing cancellations during his tenure as head of the legal bureau, Mulligan would call the officer involved. There is no evidence that such calls are outside the scope of or prohibited by the new SOP.

11. Donald Conley, the captain responsible for the legal bureau since September of 1998, designed the new SOP and described it as working "very well." Cancellations made a "couple of days in advance" are posted and phone calls are "not usually" made to the officer involved. Short-term, pre-weekend cancellations are given (City Exhibit No. 9) to the desk sergeant who then handles inquiries. Both the bulletin board and the computer docket (City Exhibit No. 8) are supposed to be updated daily. He acknowledged the practice of trying to notify officers of cancellations by telephone but said there are problems when there is no answer. When asked it this issue ever rose to the level of discussions or proposals in the negotiations process, Conley said that he had never brought it up formally.

DECISION AND ORDER

The City's Motion to Dismiss is denied. By pursuing this matter to the PELRB, the Union has done no more and no less than to utilize the process agreed to by the parties in Article 10 of the CBA. (Finding No. 3.) If it had been the intent of the parties to restrict the choices available to the Union after Step 4 of the grievance procedure, then the language of Step 5 would need to be more

restrictive than the current provisions which contemplate further proceedings in any one of these forums, the American Arbitration Association, the Public Employee Labor Relations Board or the Hillsborough County Superior Court.

Our review of the record, especially as recited in Finding Nos. 3, 4 and 5, is cause to conclude that the parties, either directly or indirectly, have negotiated over the over the issue of notice, certainly to the extent the "Court Time" language of the current CBA (Finding No. 3) reads differently and more specifically than the earlier "Court Time" language (Finding No. 4). Union testimony (Finding No. 5) explains a cause or reason for that change. Departmental testimony, on the other hand, suggests that the issue of the manner of notification was not raised in negotiations by management (Gross, Finding No. 8 and Conley, Finding No. 11). Taking the testimony about the negotiations process as a whole, as it was presented to us, we find that there was a *quid pro quo* for the "new" contract language referenced in Finding No. 3, inclusive of The "Department shall notify ..." provisions.

It is also apparent that there developed, over at least thirteen years, a protocol for notifying officers of cancellations. Regardless of the reiteration of that protocol at any time prior to the implementation of the "new SOP," in each instance the initiative or responsibility for notification has been on the Department (Finding Nos. 6, 7, 8, 9 and 10). If, then, there is a desire by a party, i.e., the City, to change a practice of long duration, it is the responsibility of that party to initiate talks to implement such a change. The record shows that the City did not make such a proposal (Finding Nos. 8 and 11). To the contrary, the City agreed to the language now found at Article 26 (Finding No. 3). Bypassing for a moment the "clear language" implications of Article 26 as it is now written, without express provisions or understandings as to changes in a past practice, whether memorialized by contract, side bar or another mutually acceptable means, the past practice will prevail and continue as a *status quo* working condition.

This case need not, however, be decided solely or in part by the strength of past practice. The "clear language" of Article 26, as discussed in Finding Nos. 3 and 5, places the burden for notification clearly on the shoulders of the Department, e.g., "The Department shall notify..." and "If the Department does not give 24 hours notice....." Obligations this explicit appearing in the CBA, a bilateral instrument, cannot be voided by the unilateral imposition of a contrary SOP by one of the parties. The City is not protected by "managerial policy exclusions" of RSA 273-A 1:XI because it is not the scheduling and manpower issues which are controlling in this case. While scheduling and manpower issues may be protected as being within the exclusive managerial authority of the public employer, the issue

of notice and the methodology used in giving that notice are not protected because they "primarily affect terms and conditions of employment, rather than matters of road managerial policy." Appeal of State of New Hampshire, 138 NH 716, 722 (1994). Notwithstanding what the parties have already negotiated, the issue of giving notice does not intrude into the functions, programs and methods of the public employer, such as to permit the public employer to be able to make unilateral changes in the manner of giving notice or to avoid contractually negotiated language.

The actions of the City, through its administrative and managerial control of the Nashua Police Department (1) are violative of the obligation to bargain found at RSA 273-0A:5 I (e) which was triggered when the SOP was implemented without negotiations and displaced an exiting past practice, (2) constitute a breach of contract relative to Article 26 and is violative of RSA 273-A:5 I (h) and (3) violate the proscription found at RSA 273-A:5 I (h) against adopting 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 City is directed to CEASE and DESIST from these practices and to return forthwith the *status quo* as it existed prior to the implementation of the "new SOP".

So ordered

Signed this 8th day of a March, 2000.

JACK BUCKLEY

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting

NH Supreme Court affirmed Decision No. 2000-020 on 7-18-2003, Slip Op. No. 2000-342
(NH Supreme Court Case No. 2000-342)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NASHUA POLICE PATROLMAN'S ASSOCIATION Complainant	:	
v.	:	CASE NO. P-0740:11
CITY OF NASHUA, POLICE COMMISSION Respondent	:	DECISION NO. 2000-037

MOTION FOR RECONSIDERATION

The Board, meeting at its offices in Concord, New Hampshire, on April 20, 2000, took the following actions:

1. It reviewed the City's Motion for Reconsideration filed April 6, 2000 and the Union's objections thereto filed April 17, 2000.

2. It examined the unfair labor practice (ULP) complaint filed by the Union on December 3, 1999, an answer and Motion to Dismiss filed by the City on December 20, and an objection to the Motion to Dismiss filed by the Union on December 22, 1999.

3. It reviewed its decision (Decision No. 2000-020) in this matter dated March 8, 2000.

4. It DENIED the Motion for Reconsideration.

So Ordered.
Signed this 1st day of MAY, 2000.

JACK BUCKLEY
Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.