State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 3657 FOR HILLSBOROUGH COUNTY CORRECTIONS EMPLOYEES	:	
Complainant	:	
v.	:	CASE NO. A-0428:190
HILLSBOROUGH COUNTY, DEPARTMENT OF CORRECTIONS	:	DECISION NO. 1999-076
Respondent	:	

APPEARANCES

Representing AFSCME, Local 3657:

James C. Anderson, Staff Representative

Representing Hillsborough County:

Carolyn Kirby, Esq.

Also appearing:

Janet S. Piacenza, AFSCME
Rita Brady, AFSCME
Michael Paul, AFSCME
James O'Mara, Superintendent
Thomas Ryan, AFSCME

BACKGROUND

The American Federation of State, County and Municipal Employees ("AFSCME" or "Union"), Local 3657, filed unfair labor

practice (ULP) charges on behalf of organized correctional employees at Hillsborough County on May 27, 1999 against Hillsborough County Department of Corrections (County) alleging violations of RSA 273-A:5 I (a), (c), (e), (h) and (i) resulting from breach of contract, unilateral changes in working conditions, and direct dealing by altering shift and requiring certain nurses to change shifts in order to work alternate weekends. The County filed its answer on June 11, 1999 after which this matter was heard by the PELRB on July 20, 1999.

FINDINGS OF FACT

1. Hillsborough County employs personnel for the operation of its jail and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The American Federation of State, County and Municipal Employees, Local 3657, is the duly certified bargaining agent for organized, non-supervisory full time and regular part-time employees of the Hillsborough County Department of Corrections.

3. The County and the union are parties to a collective bargaining agreement (CBA) for the period July 1, 1990 through June 30, 1995, and continuing thereafter under *status quo* provisions. The following provisions may be found in the contract:

> ARTICLE V
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> Hours of Work and Overtime
>
> 5.1 - The normal work week shall be forty (40) hours of actual work per week and their normal work day shall be eight (8) consecutive hours of work per day in any one day, provided however, that nothing in this provision shall in any way limit or restrict the right or ability of the Correctional Superintendent to in any way change the starting and dismissal times for any employee of group of employees providing that such change shall not be longer than one (1) hour earlier or later than the present schedule which consists of three (3) shifts commencing at 7:00 am, 3:00 pm, and 11:00 pm.
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> * * * * *

5.3 - It shall be the duty of all able-bodied employees to make themselves available during the course of emergencies.

ARTICLE VI

Seniority

6.1 - There shall be two types of seniority:

(a) Division seniority, which shall be determined by an employee's total time of continuous employment within the Hillsborough County Correctional Division.

(b) Job seniority, which shall be determined by an employee's continuous length of service in a specific job classification.

[The contract continues by stating that "division seniority" is used for vacation selection and that "job seniority" is used for preferences in work opportunities in the event of layoff or recall.]

ARTICLE VII

Promotions and Transfers

7.1 - If a permanent job opening or permanent vacancy occurs in a job classification set forth in Article I attached hereto and covered by this agreement, and the Division determines to fill such openings, the open job will be posted for a period of ten (10) days (Monday through Sunday). The notice of the open job shall contain a brief description of the job and its rate of pay. Permanent full time employees covered by this agreement who desire such open job may submit their application for such job to the Corrections Superintendent or his authorized representative in writing within the ten (10) day posting period.

* * * * *

7.4 - If there are not qualified applicants for any open and posted jobs, the Correctional Superintendent shall have the right to fill such jobs in his or her discretion.

7.5 - An employee covered by this Agreement may be temporarily assigned to the work of any position of the same of [sic] lower job classification pay grade without any change in pay. Upon the termin-

ation of such temporary assignment, such employee shall be returned to his or her original classification

* * * * *

17.5 - In accordance with Article 5.6 of the current Collective Bargaining Agreement, the following has been agreed to as an addendum to the Collective Bargaining Agreement between Hillsborough County Department of Corrections and AFSCME, Council 93, Local 3657, effective March 22, 1988 through December 31, 1988,

1. There shall be no qualifying period for those employees choosing the weekend shift.

2. Holiday pay shall be paid, providing the employee works his scheduled day in the week that the holiday occurs.

* * * * *

8. A weekend shift employee shall be considered a full time employee under all conditions of the Collective Bargaining Agreement.

9. - First shift shall work Monday through Friday 7:00 AM to 3:00 PM.
- Second shift shall work Monday through Friday 3:00 PM to 11:00 PM.

- Third shift shall remain the same.
- Weekend shift shall work Saturday and Sunday 7:00 AM to 11:00 P.M.

4. Janet Piacenza, a LPN with 7 years in the medical department, testified that she works a weekend shift, as reported in CBA Article 17.5, para. 9, consisting of two sixteen (16) hour days and, as a weekend premium, is compensated for a full 40 hours week as contemplated in Article 5.1. She complained that in May the County's medical services contractor changed her shift from the "weekend shift" to a requirement that she work Monday-Friday and every other weekend. This continued for about two weeks, after which the contractor's medical services administrator, Lisa Brachman, reverted her to the 32-hour weekend schedule which she traditionally worked.

5. Rita Brady, a registered nurse employed by the County with 9 years of service, testified that she had worked the "day shift," either 6:45 to 2:45 or 7:00 to 3:00, for the past eight years. During a meeting which she and other nurses attended with Superintendent O'Mara and Brachman this past May, she was told that it was the medical services contractor's "policy" for nurses to work every other weekend. She believes that the filing of this ULP stalled the implementation of the alternating weekend schedule; however, since then Brachman wrote a memo to O'Mara, with copies to Brady and Jill Muscarella, on July 6, 1999, saying, in pertinent part, that on or about July 20, 1999 Muscarella would be taking Brady's day shift and Brady would be taking the 3:00 to 11:00 shift. (Union Exhibit No. 1.) Brady complained at being assigned to a shift she did not want, noting that she has had opportunities to bid the 3:00 to 11:00 shift and had declined to do so. Muscarella was identified as a "graduate nurse" who has not yet become board certified as a Registered Nurse; she is not a county employee.

6. Thomas Ryan is a correctional officer and chair of the local bargaining unit. He testified that the Union had not been contacted by the County about changes to the schedules of bargaining unit nurses nor was it invited to the meeting described by Brady (Finding No. 5.) He also stated that any attempt to address the scheduling issue with the County's medical services contractor were rejected, allegedly at the direction of O'Mara. The shifts recited in Article 17.5 of the CBA (Finding No. 3) are considered by the Union to be "permanent" once applied for and assigned to a given bargaining unit employee.

7. The County's answer affirms that O'Mara, three nurses employed at the facility and the County's "medical services vendor" met on May 14, 1999.

8. Superintendent James O'Mara testified, in rebuttal to the Union's position that it could not prosecute grievances precipitated by the County's medical services contractor, that the normal course of processing grievances involving nurses was, first,

to the "medical coordinator" who is an employee of the medical services contractor and then, second, to O'Mara, followed by commissioner review, if necessary. Testifying about the May 14, 1999 meeting, O'Mara indicated that the three nurses had been told "You're going to have to give us some weekends" and that the medical services contractor had requested permission from him to mandate certain schedule changes. He said he responded by saying, "You need to do what you need to do to deliver medical services to these inmates."

9. Article 5.3 of the CBA addresses employee obligations during staffing emergencies (Finding No. 3). There is no evidence that a staffing emergency was declared during the course of the conduct complained of by the Union in this case.

DECISION AND ORDER

The Union presented its case relative to alleged violations of RSA 273-A:5 based on the consequences or impact on two employees, Piacenza and Brady, resulting from unilateral changes in working conditions (namely, shift changes) and direct dealing. We dismiss the charges resulting from the alleged misconduct to Piacenza for two reasons. First, they have been mooted because her schedule reverted to what it previously had been, the 32-hour weekend schedule. Second, given that Piacenza was disadvantaged by the schedule change for approximately two weeks, (Finding No. 4), this appears to us to fall within the "temporary assignment" provisions of Article 7.5 of the CBA (Finding No. 3).

The situation with Brady is more serious. First, there is no showing that her unilaterally imposed schedule change is or was "temporary" within the meaning of Article 7.5. Second, it is uncontroverted that she was subjected to the one-on-one "direct dealing" meeting with management in the form of the representative of the medical services contractor and the Superintendent. Third, actual changes to Brady's schedule resulted from that meeting, changes which she complained about because they involved different work shift opportunities which she had had an opportunity to seek in the past and elected not to do so. Having indicated that she never sought or bid the 3:00 to 11:00 shift, Brady testified that she "planned my life around my shift." For the employer to be able to move Brady, or any

employee with considerable seniority, from one job to another or from one shift to another, absent a provision in the CBA or an overwhelming emergency situation impacting public health and safety, simply creates too much temptation and too much unbridled authority in an organized workplace. An unscrupulous employer could use such authority or opportunity to assign a senior employee to a shift that he or she was incapable of filling because of other on-going obligations. Or, such an assignment could be used as a covert punishment without access to the grievance process or to precipitate a resignation in order to hire a less-senior replacement or a non-bargaining unit replacement. While we do not go the extra step to find that any such improper motivations existed in this case, we do find that bargaining unit employees must be protected from such a work environment.

In this case the record is clear that Brady was "hired in" to the first shift as described in Article 17.5 of the CBA; she has worked in the 6:45 to 2:45 or 7:00 to 3:00 versions of that shift for her last eight years of employment with the County. If the County needed an employee with her qualifications for the 3:00 to 11:00 shift now or formerly staffed by Muscarella, then the County should have hired an employee with the requisite credentials, once it received no bids (see Article VII of the CBA) for the open position from existing and qualified employees. There is no indication that either the job requirements or job description for Brady's position has changed; Brady should not be displaced from it. The remedy, for other than a temporary situation, is a new qualified employee, not the involuntary transfer of Brady.

The CBA recognizes the concept of seniority in Article VI (Finding No. 3); however, job seniority, such as Brady had, only clearly addresses preferences in the event of the layoff or recall. While this "job seniority" may not be clearly dispositive of Brady's complaint, it is, under the circumstances of this case, inappropriate to displace Brady from her first shift job and replace her with a non-bargaining-unit employee, inasmuch as Muscarella was described as not being a "county employee" and, thus, not one covered by the CBA.

By imposing a unilateral shift change on Brady, the County breached the CBA relative to her stated work shift and violated RSA 273-A:5 I (h). Whether intentional or not, it also violated RSA 273-A:5 I (c) because the inappropriate unilateral

reassignment also converted, or attempted to convert, Brady's first shift job to a non-bargaining-unit job inasmuch as it was to be/is being filled by a non-county employee. Finally, by the foregoing conduct, the County has been remiss in its duty to deal with and keep the Union informed of changes it is seeking relative to the administration of the bargaining unit, contrary to its obligations imposed under RSA 273-A:3 and 273-A:5 I (e). By way of remedy, we direct the County to revert to the *status quo* relative to Brady's working conditions, to make her whole for any lost wages, benefits or out-of-pocket expenses she has incurred as the result of being changed to another shift and work assignment, and to negotiate the impact of any such future changes with the duly certified bargaining agent.

So ordered.

Signed this 30th day of August, 1999.

Bruce K. Johnson

BRUCE K. JOHNSON
Alternate Chairman

By unanimous decision. Alternate Chairman Bruce K. Johnson presiding. Members Richard Roulx and Richard Molan present and voting.