



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

International Brotherhood of Police Officers, Local 314, for Somersworth Police Employees	*	
	*	
	*	
Complainant	*	
	*	
v.	*	Case No. P-0705-13
	*	
City of Somersworth	*	Decision No. 2002-148
	*	
Respondent	*	
	*	

APPEARANCES

Representing International Brotherhood of Police Officers:

Peter Phillips, Esq.

Representing City of Somersworth:

Elizabeth Bailey, Esq.

Also appearing:

- Officer William M. Lemoi, International Brotherhood of Police Officers
- Police Chief Dean Crombie, City of Somersworth
- Captain David Kretschmar, City of Somersworth
- Lieutenant Russ Timmons
- David Gage, City of Somersworth

BACKGROUND

The International Brotherhood of Police Officers, Local 314 (Union) filed unfair labor practice (ULP) charges on behalf of the Somersworth Police Employees, and Officer William Lemoi in particular, against the City of Somersworth, Police Department (City) on August 27, 2002 alleging violations of RSA 273-A:5 I (a), (e), (g) and (h) resulting from the transfer of the local union president and police prosecutor (Lemoi) to a school resource officer (SRO)

assignment, both assignments having been traditionally treated as bargaining unit positions, and the filling of the vacated police prosecutor's position by an employee outside the bargaining unit, namely, a police lieutenant within the department. The City filed its answer on September 10, 2002 after which the parties participated in a pre-hearing conference on October 9, 2002, the results of which are memorialized in a pre-hearing order dated October 10, 2002 and denominated Decision No. 2002-123. In accordance with that order, this matter was heard by the PELRB on December 5, 2002, at the conclusion of which the record was closed.

FINDINGS OF FACT

1. The City of Somersworth, by virtue of its operation of the Somersworth Police Department and direction of the employees therein, is a "public employer" within the meaning of RSA 273-A:1 X.
2. International Brotherhood of Police Officers (IBPO), Local 314, (Union) is the certified bargaining agent for all full time police officers, through the rank of sergeant, and certain other employees employed at the Somersworth Police Department.
3. The City and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 2000 to June 30, 2003. The CBA contains a recognition clause at Article II consistent with Finding No. 2, above, and a wage scale, found at "Appendix A." The wage scale provides wage rates for employees in the job categories of "sergeant," "detective," "police officer," "special police officer, chief's secretary," "secretary II, dispatcher," and "parking enforcement officer." Notwithstanding this, Article 17.3 of the CBA identifies other positions or designators when it provides, "A clothing allowance of \$300 per year will be provided to employees holding the assigned positions of *prosecutor, school resource officer and detective.*" (Emphasis added.)
4. The job description for "police prosecutor," last dated May 31, 1991, provides that, "while in this assigned position, the *officer* will maintain a working relationship with the courts..." (Emphasis added) It also requires that the prosecutor "must be certified as a *police officer* as described in RSA 105-A..." (Emphasis added.)
5. There is no specific reference to the job categories of "school resource officer" (SRO) or "police prosecutor" in the CBA's recognition clause, although there was uncontradicted testimony that when bargaining unit employees have been transferred into those positions, laterally or otherwise, they have suffered no diminution in compensation or benefits and have never been considered to have left the bargaining unit for having been so transferred. Because neither salary nor benefits of

bargaining unit members has changed when these employees have been assigned as SRO or as police prosecutor, we find that those designators are merely refinements to assigned job duties rather than stand-alone job descriptions which have been omitted, intentionally or inadvertently, from the CBA. Incumbents assigned to either the SRO or prosecutorial duties from within the bargaining unit have first qualified for that assignment by being a police officer or sergeant employed by the Somersworth Police Department.

6. Michael Lemoi has been employed as a police officer in Somersworth since 1990. Joint Exhibit No. 5 lists him as a "master patrolman," not a term referenced in the recognition clause. He has been president of IBPO Local 314 since 1996 and has been on the negotiating team for the last two contracts. He served as the departmental "prosecutor" from October of 1999 until February of 2002 when he was transferred to SRO. He was the sole applicant for the prosecutor assignment after the vacancy was posted in 1999. This earned him detective's pay (Grade 22) versus police officer or patrolman's pay (Grade 20). This pay enhancement for the prosecutor has been in place since he has been employed in Somersworth, dating to 1990.
7. On February 25, 2002, Lemoi was called to a meeting at the Chief's office along with Captain Kretschmar and was told of his pending, temporary transfer to the SRO position. At the same time, he learned that Lt. Timmons, a non-bargaining unit employee, would be transferred to the prosecutor's job. This prompted him to send an e-mail to the Chief in an attempt to reach informal resolution under CBA Article 5.1. Because the time was running to file a grievance pending a reply from the Chief, he presented Kretschmar with a grievance on March 6, 2002 which also reserved the Union's right to pursue its statutory claims before the PELRB. (Joint Exhibit No. 2.) Kretschmar responded to and denied that grievance on March 7, 2002. (Joint Exhibit No. 3.) On March 8, 2002, Lemoi filed a grievance with City Manager Doug Elliott. (Joint Exhibit No. 4.) On March 19, 2002, Lemoi sent a memo to Elliott saying, in part, "As of this writing, I have not received an answer to the grievance and the Union will be seeking arbitration in accordance with the contract." (Joint Exhibit No. 6.) Lemoi testified that, to date, the Union has not pursued arbitration as suggested in Joint Exhibit No. 6. Lemoi said his SRO duties mean less time at the police department and less time to have contact with other police officers in his role as local president. He offered no direct examples as to how or the extent to which his duties as local president were impaired, lacking or ineffective as the result of the SRO assignment. He continues to be compensated at pay grade 22.

8. David Kretschmar was hired in 1983 and is currently a police captain. He has been a former union member and negotiator. Kretschmar explained that the prior SRO, Ed Korrea, gave notice of his intent to leave the SRO position and the department in December of 2001, to be effective on or about February 15, 2002. The department had policy reasons to keep the SRO "position" filled because it was grant funded and because there was a departmental desire to maintain presence, continuity and reliance on a SRO officer at the high school. As soon as Korrea announced his intent to leave, the department posted this SRO vacancy internally with a prerequisite of one year's status as a Somersworth police officer. There were no applicants. The department then advertised in both "Fosters Daily Democrat" and "The Union Leader" and received two inquiries, neither of which materialized. Kretschmar said it was not until the newspaper advertisement produced no viable candidates that the decision was made, through consultation with the chief, to transfer Lemoi to the SRO vacancy. The circumstances, according to Kretschmar, justified this selection because it did not involve taking any patrol officers off the street (Lemoi was then prosecutor) and Lemoi had proved himself very competent and very capable of working on his own without direct supervision. Once this decision was made, Lt. Timmons was represented as being the only other person in the department with prosecutorial experience, dating back to when he was a juvenile detective. Since Lt. Timmons was assigned prosecutorial duties, Sgt. Duval, a bargaining unit member, has been to prosecutor's school. In spite of some historical assignments from the officer ranks, the past four prosecutors, dating approximately to Lemoi's date of hire in 1990, have been from the bargaining unit, namely, Sgt. Donovan, Mark Hebert, Dean Winter and Michael Lemoi.

DECISION AND ORDER

This case is one of personnel assignments, not one of which jobs are in the bargaining unit. The jobs in the bargaining unit have been defined in the recognition clause, Article II, and by the PELRB certification dated December 7, 1976, most recently amended April 9, 2001. See Decision No. 2001-021.¹ What we are concerned with here are police officers and police sergeants, both bargaining unit positions, and not school resource officers or police prosecutors, neither of which are bargaining unit "positions," but rather duties or special assignments made to bargaining unit members. Our review of the CBA, recognition clause and certification documents leads us to conclude that the use of the word "positions" in the clothing allowance provisions of Article 17.3 was either a misnomer or "word of convenience," not to be confused with the composition of the bargaining unit. This is best cleared up by the parties themselves in

¹ It should be noted that most recent PELRB certification for this bargaining unit diverges from and controls over the CBA's recognition clause in that it excludes a "full time secretary" who is the "Police Chiefs' Secretary."

future negotiations by reference to personnel assigned to certain special duties or functions in lieu of the continued, and apparently inappropriate, use of the word "positions."

The transfer of Lemoi to the SRO vacancy appears to have been one of necessity for the mission and purposes of the department. Finding No. 8. We are not convinced that there is any contractual provision which limits, restrains or prohibits the public employer from making this reassignment. Likewise, this transfer is within the statutory authority reserved to the public employer to determine its "organizational structure, and the selection, direction and number of its personnel so as to continue public control of governmental functions." RSA 273-A:1 XI. There is no ULP here.

The last area of concern is the assignment of a lieutenant to the duties of police prosecutor, inasmuch as the lieutenant is not a bargaining unit member, and the consequences, if any, of making this change without consultation or responding to the Union's efforts to bargain the impact of that assignment. Our examination of the record and, in particular CBA Article 17.3, leads us to conclude that the parties have negotiated a stipend for bargaining unit members serving as prosecutor, SRO or detective. Lemoi testified that enhanced pay grades and the clothing allowance applied to unit personnel in "specialty positions." It follows that if the City is willing to pay bargaining unit members a stipend for performing specialty functions or assignments, then it must also expect those specialty functions or assignments to be "unit work," within the scope of the duties it expects to assign to its personnel.

We understand the circumstances to have dictated why Lt. Timmons was transferred to prosecutorial duties commensurate with Lemoi's transfer to SRO. It was a matter of matching urgent and existing needs with an immediately available resource. This should have been a temporary solution, until the situation could remedy itself and the non-unit employee returned to his permanent duty assignment.² Likewise, if it was the bargaining unit practice or policy to post the vacancy in the SRO assignment, as was done with the Korrea resignation, the same practice or policy should have been followed for the prosecutor's vacancy created by Lemoi's transfer. From the record presented to us, it was not.

On balance, when we consider, first, that the employer described Lemoi's transfer to SRO to be "temporary," second, that contract provisions extend benefits in the form of stipends for unit personnel performing SRO or prosecutorial duties or assignments, and, third, that the way is now clear to reinstate a bargaining unit member to bargaining unit work, yet it has not yet been done, we conclude that the City violated RSA 273-A:5 I (e) by failing to reinstate bargaining unit employees to bargaining unit work when it was able to do so, by failing to follow the same procedures for posting and filling the prosecutor's assignment as it did for the SRO's assignment and by failing to adhere to the provisions of the police prosecutor's job description which describes the incumbent as being a "police officer." The police prosecutor's assignment shall be posted as a vacancy forthwith and filled by a qualified, or "recruited-to-be-qualified," bargaining unit member. All other claims, asserted violations or requests for relief are denied.

² According to Finding No. 8, we understand Sgt. Duval has completed the prosecutor's course after Lt. Timmons was transferred to prosecutorial duties, thus making it possible to return a bargaining unit employee to unit work.

So ordered

Signed this 16th day of January, 2003.


BRUCE K. JOHNSON
Alternate Chairman

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