



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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| AFSCME Local 365, Nashua Custodial Employees | * | |
| | * | |
| Complainant | * | |
| | * | |
| v. | * | Case No: A-0424-40 |
| | * | |
| Nashua School District | * | Decision No. 2005-137 |
| | * | |
| Respondent | * | |
| | * | |

APPEARANCES

Representing AFSCME Council 93, Local 365:

Erin L. Goodwin, Esq.
AFSCME Council 93, Associate General Counsel

Representing the Nashua School District:

Stephen M. Bennett, Esq.
City of Nashua, Deputy Corporation Counsel

BACKGROUND

AFSCME Local 365, Nashua Custodial Employees (hereinafter "the Union") filed an unfair labor practice complaint on May 18, 2005 alleging that the Nashua School District (hereinafter "the District") committed an unfair labor practice in violation of RSA 273-A:5 I, (a), (b), (c), (e), (g), (h) as well as RSA 273-A:4, when it gave notice of its intent to implement a change in the custodial shift hours effective May 3, 2005. Moreover, the Union claims that the District's actions in this regard constitute a further violation of RSA 273-A:5 I (a), (c), (e), (g), (h) and (i), and RSA 273-A:4, by rendering the parties' grievance procedure unworkable. The District filed its answer denying the Union's charge on June 2, 2005. The District states that the parties' collective bargaining agreement ("CBA") and amendments not only do not establish work hours or schedules for Union members, but also specify that the District has the right to establish "a normal

work schedule to suit the requirements of specific jobs,” as well as “the right to determine the hours and schedules of work.”

A hearing was held before the Public Employee Labor Relations Board (“PELRB” or “Board”) at its offices in Concord, New Hampshire on August 11, 2005. Both parties were represented by counsel and had the opportunity to present witnesses for examination, to undertake cross-examination, and to offer exhibits into evidence. The parties’ signed “Stipulated Facts” were entered into the record at that time and are referenced as findings of fact in paragraphs 1 through 7, below. At the conclusion of testimony, the record was closed subject to the filing of post-hearing briefs by the parties, both of which were received at the Board on August 22, 2005. Upon review of all filings submitted by the parties and consideration of all relevant evidence, the Board determines the following:

FINDINGS OF FACT

1. AFSCME is the certified representative for the Nashua School District custodial/janitorial staff under Certification Case No. A-0424 issued by the Public Employee Labor Relations Board. (Joint Exhibit 1).
2. The Nashua School District is a public employer within the meaning of RSA 273-A:1, X.
3. AFSCME and Nashua are parties to a collective bargaining agreement effective July 1, 2003 through June 30, 2006. (Joint Exhibit 1).
4. AFSCME and Nashua participated in impact bargaining regarding the staffing of the new Nashua High School – North and reached agreement.
5. Nashua sent notice to AFSCME on February 23, 2005 of its intent to change the custodial shift hours effective May 3, 2005. The change in custodial shift hours would effect elementary and middle schools in Nashua. There would be no changes to the high school custodial shift hours. (Joint Exhibit 5).
6. The proposed change in custodial shift hours neither reduces nor increases the number of hours worked per shift by employees. (Joint Exhibit 5).
7. The proposed change in custodial hours does not increase or decrease the wages of the effected employees. (Joint Exhibit 5).
8. Currently all afternoon custodial shifts in the District begin at 2:30 PM, while middle and elementary school students are dismissed between 2:35 PM and 3:30 PM. The proposed change would establish a 3:00 PM or 3:30 PM start time for middle and elementary school custodians depending upon the dismissal time of their school. (Joint Exhibits 5, 11A, 11B, 11C).

9. Article X (Wages & Hours), Section 10.4 of the parties' CBA provides as follows: "The normal work schedule shall consist of five (5) consecutive eight (8) hour work days. The District will establish a normal schedule to suit the requirements of specific jobs." (Joint Exhibit 2, p. 9).

10. Article XXVII (Management Rights), Section 27.1, of the parties' CBA provides as follows:

Except as otherwise expressly and specifically provided in this Agreement, the Union recognizes that the direction of the District operations; the determination of the methods and means by which such operations are to be conducted; the supervision, management and control of the District work force; the right to hire, promote, transfer, and layoff employees; the right, lawfully and for just cause, to demote, discipline, suspend or discharge employees; the right to determine the hours and schedules of work and the work tasks and standards of performance for employees and all other rights and responsibilities not specifically provided in this agreement, shall remain the function of Management, all in accordance with RSA 273-A. It shall be the right of the Union, however, to present and process grievances of its members whose wages, working conditions or other rights expressly and specifically provided in this Agreement are violated by Management.

(Joint Exhibit 2, p. 17).

11. The agreement reached by the parties on October 28, 2002 (as a result of the opening of Nashua High School – North), and later incorporated into the parties' CBA, did not alter or amend the District's rights or authority with respect to employee scheduling. (Joint Exhibit No. 7).

12. The Union has filed grievances in the past regarding changes in work hours for employees. In 1994, two 1st shift (7:00 AM to 3:00 PM) employees were moved to the 2nd shift (2:30 PM to 10:30 PM) and a union grievance was filed (Joint Exhibit 3A). Before the matter was heard in arbitration, the employees were returned to their original schedule. In 2002, another union grievance arose concerning the posted work hours of a position. In a March 18, 2002 posting, the hours were 6:30 AM to 2:30 PM, and then on April 8, 2002 the hours were referenced as 1:00 PM to 9:00 PM. In management's Step 1 grievance response, the union's grievance was upheld and the position was re-posted. However, it was still re-posted with hours different than those originally posted, specifically 6:00 AM to 2:00 PM. (Joint Exhibit 4A).

13. In other instances, employee work schedules have been changed and union grievances have not been pursued.

14. The District regularly establishes the normal work schedule for each bargaining unit position and these work schedules have not been the subject of collective bargaining negotiations.
15. The proposed change in custodial hours has been delayed by the District pending the PELRB's review of the instant unfair labor practice charge. (Joint Exhibit 6).

DECISION AND ORDER

JURISDICTION

Pursuant to RSA 273-A:6 I, the PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. We acknowledge that the District has delayed its implementation of the proposed change in custodial hours pending PELRB review of the instant unfair labor practice charge (see Finding of Fact No. 15, above). Notwithstanding this apparent deference to our jurisdiction, we find that jurisdiction is appropriate under the circumstances given that the Union's complaint alleges a violation of multiple subsections of RSA 273-A:5 I as a result of the District's attempt to adjust the work schedules for certain bargaining unit members.

DECISION SUMMARY

The Union's complaint is denied. The District has retained the right to set hours of work within the terms of the CBA negotiated with the Union. As a result, the District may unilaterally change the custodial shift hours for bargaining unit members in the elementary and middle schools without committing an unfair labor practice.

DISCUSSION

We decide the instant matter by applying the facts at hand to the express language of the parties' CBA. While there is no dispute that the District wishes to adjust the work schedules for bargaining unit employees working in the middle and elementary schools, the disagreement lies in whether or not this change must be collectively bargained. We note that hours of work and work schedules have been determined to constitute mandatory subjects of bargaining. *State Employees Association of New Hampshire v. Board of Trustees of New Hampshire State Prison*, 118 N.H. 466 (1978). *International Brotherhood of Police Officers, Local 314 v. City of Somersworth*, PELRB Decision No. 2001-067 (July 25, 2001). However, an employer may unilaterally implement changes in hours, or other terms and conditions of employment, if authorized to do so under the terms of a collective bargaining agreement. *New Hampshire Troopers Association v. New Hampshire Department of Safety, Division of State Police*, PELRB Decision No. 2004-014 (March 15, 2004); *International Brotherhood of Police Officers, Local 466 v. City of Dover*, PELRB Decision No. 95-072 (August 31, 1995). See also *Nazareth*

Literary & Benevolent Inst. dba Saints Mary & Elizabeth Hospital, 282 NLRB 73, 123 LRRM 1297 (1986). We find in the present case that the District has such authority.

The parties have specifically agreed within Article X (Wages & Hours), Section 10.4 of their CBA that "...[t]he District will establish a normal schedule to suit the requirements of specific jobs." (Joint Exhibit 2, p. 9). In addition, the parties stipulate under Article XXVII (Management Rights), Section 27.1, that "[e]xcept as otherwise expressly and specifically provided in this Agreement...the Union recognizes...the right to determine the hours and schedules of work...and all other rights and responsibilities not specifically provided in this agreement, shall remain the function of Management, all in accordance with RSA 273-A." (Joint Exhibit 2, p. 17). When called upon to interpret contract language, the Board shall focus "on the language of the CBA, as it reflects the parties intent...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." *Appeal of Town of Bedford*, 142 N.H. 637, 641 (1998). In doing so, we can only conclude that by use of the phrases "the right to determine the hours and schedules of work" and "establish a normal schedule to suit the requirements of specific jobs," the parties have agreed that the District shall retain within the terms of the CBA the right to change or adjust custodial shift hours.

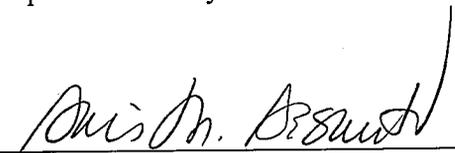
We understand that there has been a long history between these parties on the issue of scheduling. Indeed, the Union has filed grievances against the District regarding schedule changes that have been resolved in its' favor. In 1994 the Union was successful in restoring the work schedule for two positions and in 2002, when a vacant position was posted with different hours, the position was reposted following a union grievance, albeit with hours slightly differing from those that the position originally worked. However, this record is insufficient for us to conclude that the District has otherwise waived the express right under contract to set or adjust employee work schedules. On the contrary, the District established through its' witnesses that it has continued to unilaterally establish employee work schedules and thereafter has adjusted individual schedules at various times. In 2002, the parties participated in "impact bargaining" over the opening of Nashua High School - North, that included discussions over employee work schedules. The resulting agreement that did not alter or amend the District's rights or authority with respect to employee scheduling under the CBA. In the end, we look to the parties' contract and distinguish the instant school wide scheduling adjustments from those involving particular employees or positions in the past when discussions, as opposed to collective bargaining, occurred.

The District is required under Article 10.4 to establish a normal work schedule consisting of five (5) consecutive eight (8) hour workdays. It also shall "establish a normal schedule to suit the requirements of specific jobs." Reading this language in conjunction with the expressed management right "to determine the hours and schedules of work," as set forth in Article 27.1, preserves for the District the unilateral discretion to adjust employee work schedules during the term of the contract, as it in fact proposed to do in May of this year. (Joint Exhibit No. 5). The District may therefore change the

custodial shift hours for bargaining unit members in the elementary and middle schools without committing an unfair labor practice.

The Union's improper labor practice complaint is hereby DISMISSED.

Signed this 31st day of October, 2005.



Doris M. Desautel, Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Members Richard E. Molan and James M. O'Mara also voting.

Distribution:

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