



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Hillsborough County Sheriff		*
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Complainant		*
v.		*
	Case No: G-0012-7	*
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AFSCME Local 3657, Hillsborough County		*
Sheriff's Department Employees		*
	Decision No. 2006-107	*
		*
Respondent		*
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APPEARANCES

Representing the County:
Carolyn M. Kirby, Esq., Legal Counsel

Representing the Union:
Jamie DiPaola, Esq., Associate Counsel, AFSCME Council 93

BACKGROUND

The Hillsborough County Sheriff, James Hardy (hereinafter referred to as "County") filed an improper practice complaint on July 22, 2005 alleging that AFSCME Local 3657, Hillsborough County Sheriff Employees (hereinafter referred to as "Union") violated RSA 273-A:5 II (a), (f) and (g), as well as RSA 273-A:4, by failing to follow the grievance procedure, wrongfully filing for arbitration, and unilaterally bypassing the negotiated provisions of the parties' grievance procedure, in its' pursuit of four (4) grievances. On August 18, 2005, the Union timely filed its answer denying the County's charges. The County's original complaint consisted of four separate counts, three of which were resolved during the pre-hearing conference.

The remaining allegations, set forth in Count IV of the original complaint, claim that the Union filed a class action grievance on January 28, 2005 alleging a violation of Article VII of the parties' collective bargaining agreement ("CBA") when the Sheriff hired an individual for a temporary federally funded grant position. The County asserts that the job position complained of is temporary in nature and therefore not governed by the CBA. In addition, the County states that if the position is deemed by the PELRB to be grievable, the County contends that the Union

has not followed the grievance procedure because the Union by-passed a required pre-arbitration step.

In response, the Union denies that the position in question is "temporary." The Union further states that in accordance with RSA 273-A:1, IX, an employee shall not be determined to be in a temporary status solely by reason of the source of funding for the position in which he or she is employed. Where the County argues that the position is temporary because it is a grant-funded position, the law provides that it cannot be excluded from coverage under the CBA merely on that basis.

Regarding the issue of the Union's alleged failure to comply with the grievance procedure, the Union states that the grievance was presented at Step 2 of the written procedure, that is, the request for pre-arbitration, on or about February 1, 2005 and that the Sheriff denied this request on or about February 9, 2005. The Union therefore maintains that it has fully complied with the parties' grievance procedure.

At the pre-hearing conference on November 16, 2005 the issues were examined by the hearing officer and discussed with the parties resulted in the reduction of the number issues to be considered at the hearing on the merits to those raised in Count IV of the original complaint, as described above. (See PELRB Decision #2005-147). A hearing on the merits, originally scheduled for February 14, 2006 and continued on the motion of the County, was conducted on April 18, 2006. At this hearing both parties were represented by counsel, presented exhibits and witnesses and conducted cross-examination. The parties also agreed to several joint findings of fact that appear below as Findings of Fact #'s 1-5. At the conclusion of evidence, brief closings were offered. The record was closed after a ruling by the Chairman that supplemental legal briefs were not necessary to the Board's deliberations unless the Board later felt a need to request the parties to submit them to assist its deliberations. The Board considered the issues raised in this matter and found the following:

FINDINGS OF FACT

1. AFSCME Local 3657 (hereinafter the "Union") is the certified exclusive representative of certain employees at the Hillsborough County Sheriff.
2. The Hillsborough County Sheriff (hereinafter the "County") is a public employer within the meaning of RSA 237-A.
3. The Union and the County are parties to a Collective Bargaining Agreement (hereinafter "CBA") dated July 1, 2003 through June 30, 2005. (See Union Exhibit #8).
4. On or about January 28, 2005, the Union filed a grievance alleging a violation of Article VII of the CBA after the Sheriff had hired an individual for a federally funded position. A copy of the grievance appears as Union Exhibits #1 and #9.
5. "Project Safe Neighborhoods" is a federally funded grant program offered through the United

States Department of Justice.

6. The Hillsborough County Sheriff's Department entered into the grant program award agreement on or about 12/03/04 acknowledging that the grant start date was 11/01/04 and the original end date was 9/30/2005. (County Exhibit #2). This grant has been extended in effect since that time and presently is due to expire in September of 2006 (County Exhibit #3) although it could again be extended.
7. The parties are in disagreement as to their interpretations of whether or not this position meets the criteria expressed in the parties' mutual language as appears in their CBA to qualify this position as one subject to the terms and conditions of their CBA.
8. The parties' CBA recognizes the positions of all full-time and regular part-time employees in the positions of "Certified Deputy Sheriff" and "Special Deputy Sheriffs." The recognition clause further defines permanent part-time employees as "only those employees who, as of January 1 of each year, have worked during the preceding year on a regular and permanent basis and have worked at least 1,200 hours of the entire year immediately preceding January 1." (Union Exhibit #8, Article I).
9. Section 1.3 of the RECOGNITION PROVISION in the parties CBA references job status related to status as full-time or permanent part-time status, but does not refer to job position titles.
10. Although posted as a "Temporary Investigator," this position meets the definitional requirements as a permanent part-time position as expressed in the parties' collective bargaining agreement.
11. The person holding this position is referred to as "Deputy Sheriff" by other personnel although the position was posted as "Temporary Investigator" and the stated primary responsibilities of the position is to perform investigative and other duties related to illegal firearms purchases and violations of the provisions of the so-called "Brady Bill," a federal statute.
12. This position, and all Deputy Sheriff positions, require the incumbent to be a certified state law enforcement officer, imbued with certain authority and consequent obligations regarding fugitive apprehension, security and civil process.
13. The incumbent holding this position does not receive the fringe benefits received by full-time Deputy Sheriffs, and presently does not receive certain benefits that other permanent part-time employees do such as prorated sick leave and annual leave and eligibility for detail roster and seniority roster.
14. This position is subject to the rules, regulations, and requirements of a particular federal grant program entitled "Project Safe Neighborhoods." (County Exhibit #1) to which no other Deputy Sheriff is subject.

15. This position was described in the posting as reporting to the same supervising lieutenant in the Warrants Division as other positions of Deputy Sheriff.
16. Additional testimony was provided by Sheriff Hardy stating that this employee also "works under the supervision of [the United States Department of Justice] and under later cross-examination that he "doesn't know if anyone directs [the employee's] work schedule."
17. This position works a schedule that is not the same as other full time Deputy Sheriffs.
18. On or about August 5, 2004 Sheriff Hardy caused a "Notice of Job Vacancy" posted for the position of "Temporary Investigator" indicating that it was contingent on federal funding through September of 2005 and was to be a salaried position with the individual working 40 hours per week. The posting also provided a "General Statement of Duties" as follows:

Investigator will aggressively investigate illegal attempts to purchase firearms in NH as well as prohibited possession. Reports to the Criminal Division supervisor and works closely with a multi agency task force. (County Exhibit #4)

19. Extensions of employment were dependent upon additional funding through the federal grant program. The County's executive committee involved in budgetary decision-making indicated that no county funds would be provided to this position.
20. Subsequent to the original posting, the Sheriff arranged for it to be "pulled" and substituted a similar posting on or about September 22, 2004. (See County Exhibit #5). The postings differed in that the second posting reduced the number of hours required from forty (40) hours to thirty-two (32) hours. The second posting did not indicate that it was a corrected version of the first or that it had been modified.
21. The initial job posting had been done as in the case of other previous Deputy Sheriff positions however, the Sheriff testified at hearing that he had the job vacancy posted "as a courtesy" despite his belief that he did not consider the job to be included in the bargaining unit and therefore no posting was required.
22. The position is characterized by the county as a salaried position, whereas other deputy positions within the department are characterized as hourly. However, the position is not entitled to overtime and the stated hours are 32hrs./week.
23. Following the second posting, only one applicant applied and was interviewed. That sole applicant, a former Goffstown police officer who was receiving state retirement benefits at the time, was hired. Multiple candidates had applied to the first posting, including existing members of the Sheriff's Department. None of these others were given an interview or informed they had been rejected from consideration until the hiring of the retired officer, Mr.

Tuttle, in January of 2005.

24. The clause within the parties' CBA that addresses the posting of job openings is Article VII – Promotions and Transfers. The relevant sections of that clause are as follows:

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 Office determines to fill such openings, the open job will be posted for a period of five (5) administrative work days (Monday through Friday, excluding Saturdays, Sundays, and holidays). 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 jobs may submit their application for such job to the Sheriff or his authorized representative in writing within the five (5) days posting period.

7.2 In the event no applicants have, in the Sheriff's opinion, the necessary ability and/or qualifications, the open job will be re-posted for an additional five (5) administrative work days as defined below. During the second posting period, the Office shall consider applications received first from permanent part-time employees and then fill the open job regardless of whether or not they are full-time employees covered by the terms of this Agreement or employed by Hillsborough County. Full-time employees who submitted applications for the open job during the original posting period will be considered during the second posting period on the basis of their original application...

Any such job opening may be filled temporarily by the Sheriff or until there has been a permanent assignment to the job...

A full-time employee who has applied for the open job in accordance with the provisions of this Article shall have the right to grieve the Sheriff's decision in accordance with the provisions of Article XBI entitled "Grievance Procedure", but only if the Sheriff's decision was arbitrary, unjust or without any basis in fact.

25. On January 17, 2005 a completed written grievance form was presented by the Union representative to Chief Deputy Sheriff Arthur Durette, in the absence of the Sheriff, making a so-called "class action" grievance. (See Union Exhibits #1 and #9)

26. Chief Deputy Durette responded, on behalf of the Sheriff, by letter addressed to the Union Steward on January 24, 2005 denying the grievance. (Union Exhibit #3)

27. On February 1, 2005, Chief Deputy Durette, on behalf of the Sheriff, received a letter of transmittal (Union Exhibit #2) and a "Step 2 Official Grievance Form" (Union Exhibit #1), both dated January 28, 2005. In the letter the Union Chapter Chairman, Ernest L. Castle IV, acknowledges receipt of the Sheriff's "denial of the Step 1 grievances," and goes on to state that "we have filed these grievances as 'Step 2 Grievances' and are requesting hearings on the merits." (Union Exhibit #2)
28. The Union's letter and grievance form dated January 28, 2005 constituted a Step 2 Grievance submission in accordance with the grievance procedure. (See CBA Article XVI – GRIEVANCE PROCEDURE Union Exhibit #8)
29. On February 9, 2005, Sheriff Hardy wrote a letter to Deputy Castle informing him that he was "upholding the denial of the grievance" by which he was relating to Chief Deputy Durette's denial of the February 1, 2005 denial of the January Step 2 Grievance.
30. Following the Sheriff's denial, the parties agreed to meet and did so for the purpose of discussing the parties' respective differences of opinion. The parties did not resolve their differences or otherwise settle this matter as a result of this meeting. After this meeting, the Union filed for arbitration with the PELRB on or about February 25, 2005.
31. The parties' collective bargaining agreement ,(Union Exhibit #8), contains a grievance procedure as provided in Article XVI – GRIEVANCE PROCEDURE. The relevant provisions of which are:

16.1 For the purpose of this contract, a grievance is defined as a complaint or claim by an employee or group of employees in the bargaining unit or the Union specifying the names of the bargaining unit employees involved, the date(s) of the alleged offense(s) and the specific contract provision(s) involved which arise under the [sic] during the term of this Agreement. Grievances are limited to matters of interpretation and/or application of specific provisions of this Agreement. It is expressly understood that NH RSA 104.27 shall apply to all Certified Deputy Sheriff's/or Special Deputy Sheriff [sic] and their hiring or termination is not subject to this grievance procedure. The following procedure shall be utilized in the handling of a grievance:

- a. The employee involved and the Union's shop steward shall first discuss the grievance with the grievant's immediate supervisor who shall render a decision concerning the grievance within five (5) work days.
- b. If the grievant is not satisfied with the disposition of his grievance, or if no decision has been reached within five (5) work days after

discussing the matter with the grievant's supervisor, the grievant and Union's shop steward shall present the grievance in writing, stating the date of the alleged offense and the nature of the grievance (including the contract provision involved) to the Sheriff who shall render a decision within ten (10) work days from the date the written grievance was presented. A grievance must be reduced to writing in the form set forth above and presented to the Sheriff within fifteen (15) work days of the date of the event which gives rise to the alleged grievance or the grievance shall be deemed waived.

- c. Following the Sheriff's decision on a grievance, the Union will request from the Sheriff a meeting to determine if the grievance can be settled without arbitration. Such meeting shall include the grievant, chairperson, AFSCME Staff Representative, the person who will present the grievance for the Union and Representatives from the Sheriff's Office, and the person who would be representing the County in arbitration. This meeting will be held within twenty (20) working days of the date the Sheriff rendered his decision. After making full use of the pre-arbitration procedures and failing to reach a satisfactory solution, the grievance must be submitted to the NH PELRB by the Union within twenty (20) working days following the pre-arbitration hearing. Failure to do so will result in the grievance being deemed waived.

DECISION AND ORDER

JURISDICTION

Unless otherwise agreed by the parties to submit such questions to an arbitrator, it is well-settled that the PELRB has exclusive original jurisdiction to determine arbitrability issues. *School District #42 v. Murray*, 128 N.H. 417 (1986). Here, in view of the fact that the parties have not reserved the determination of arbitrability to be specifically decided by an arbitrator, it is appropriate for the Board to decide the matter. It is also well-settled that a wrongful demand for arbitration constitutes an unfair labor practice. *Keene School District v. Keene Education Association/NEA-New Hampshire*, PELRB Decision No. 2003-146 (December 3, 2003), *aff'd mem.*, Case No. 2004-0108 (N.H. April 14, 2004). The PELRB has primary jurisdiction over all improper practices alleged to be violations of RSA 273-A:5 (see RSA 273-A:6, I) and where, as here, the District has alleged violations of RSA 273-A:5 II (a), (f) and (g) by the Association, Board jurisdiction is specifically appropriate.

DISCUSSION

This case presented by the County raises two issues for the Board's consideration. The first issue is whether the position in question is covered by the terms and conditions of the parties' collective bargaining agreement (CBA). The second issue is whether the Union complied with the parties' grievance procedures and is therefore entitled to arbitration of their grievance. We need only to address the second question if our answer to the first is in the affirmative.

The County alleges that the job position at issue is not a permanent position and therefore a grievance based upon CBA Article VII – "Promotions and Transfers" is not validly applied to this job position. The County characterized the job position as "Temporary Investigator" in its job posting notice. We believe that characterization is a misnomer. It is more a label or partial description of duties than an accurate job position classification. The terms appearing in Article VII incorporate the definition of "permanent" as defined elsewhere in the parties' CBA. The parties' agreed definition of part-time employees appears in Article I – Recognition as "those employees who, as of January 1 of each year, have worked during the preceding year on a regular and permanent basis and have worked at least 1,200 hours of the entire year immediately preceding January 1." (Union Exhibit #8, Article I). There was substantial testimony offered by both parties at the hearing relating to the actions of the County in posting the position first as a forty (40) hour, full-time position and then apparently, under what we found to be confusing testimony, taking down that posting and putting up another posting stating that, although a salaried position, the employee would be limited to thirty-two (32) hours weekly. The second posting did not indicate that it was intended to be a corrected version of the first posting or that it had been modified. However, much of that testimony, although perhaps bearing on some other rationale on the part of the County in its hiring of the employee, is not relevant to the narrow issues presented by the parties to the Board for consideration. Notwithstanding that the County used the position title of "Temporary Investigator," we do not find that the job position qualifies, in fact, as a temporary position under the agreed terms of the parties as expressed in their CBA.

Instead, we find that this individual is a permanent part-time employee. The employee was hired by the County prior to January 1, 2005 and we believe worked over the twelve month period concluding on December 31, 2005 on a regular basis. Further, notwithstanding that the funds for this position are made available to the County through a federal grant program, we do not consider the source of funding as determinative of the temporary or permanent status of an employee. In this instance, the Board computes that the employee working 32 hours weekly for fifty-two weeks would exceed the minimum 1,200 hours required to obtain the status of permanent part-time as stated in the recognition clause of the parties' CBA. Indeed, working even forty (40) weeks, the employee would exceed the qualifying amount of hours. Additionally, testimony convinces us that there is insufficient evidence of a date when this position would be terminated. Although funding may presently be supplied through a federal grant program, we understand that in 2004 the Executive Committee of the County Delegation indicated that it would not fund this position from county sources after the expiration of the federal funds. However, there is no known end of the grant program. In fact, the federal program entitled "Project Safe Neighborhoods" has been in existence since 2001 and the County's funding was renewed for another year since the original filing of the Union's grievance.

Having thus examined the "temporary" aspect of this position we find it to be an inaccurate characterization of the actual job characteristics that otherwise place this position within the coverage of the parties' CBA. Furthermore, we find from the evidence that the person holding this position is referred to as "Deputy" by both management and his co-employees. This Deputy, as are others within the bargaining unit, is required to be a certified state law enforcement officer, imbued with certain authority regarding fugitive apprehension, security and civil process. Also, the person within this job position is organizationally assigned, also as are some other Deputies within the Sheriff's Department, to report to the supervising lieutenant of the Warrants Division. Notwithstanding that the position is referred to as a "salaried" position by the County, the person is limited to working thirty-two (32) hours each week. Again we find this characterization as a misnomer because, again in fact, there is no real distinction in this instance between Deputies whose weekly wage is calculated as a multiple of hours worked and this position's hourly wage calculated from the division of a set number of hours worked into an annual "salary." The fact that this particular position performs other specific tasks called for in a federal grant program is not sufficient to segregate it from inclusion within the bargaining unit and from other Deputies; nor is it sufficient to prevent the Union from utilizing the grievance procedure to resolve a dispute between the parties that gave rise to the County's complaint before us. In this particular set of circumstances, we believe that other distinguishing terms and conditions of employment, *e.g.* leave provisions and overtime provisions, set by management for this position flow from its original characterization of the position as a temporary position and not, as defined in the CBA, the permanent part-time position it is.

The second issue raised by the County's complaint is that the Union did not properly comply with the agreed procedure to pursue a grievance. The parties' grievance procedure does contain an arbitration clause. The Union filed its grievance on or about January 17, 2005. In doing so it is obligated to follow the procedures required by Article XVI of the parties' CBA entitled GRIEVANCE PROCEDURE. (See Finding of Fact # 27; Union Exhibit #8). On January 17, 2005 a completed written grievance form was presented to Chief Deputy Sheriff Arthur Durette, in the absence of the Sheriff, making a so-called "class action" grievance. Chief Deputy Durette responded, on behalf of the Sheriff, by letter addressed to the Union Steward on January 24, 2005 denying the grievance. On February 1, 2005, Chief Deputy Durette, on behalf of the Sheriff, received a letter of transmittal and a "Step 2 Official Grievance Form", both of which were dated January 28, 2005. In the letter, the Union Chapter Chairman, Ernest L. Castle IV, acknowledges receipt of the Sheriff's "denial of the Step 1 grievances", and goes on then to express the Union's intent to advance the grievance by stating in this second writing that "we have filed these grievances as 'Step 2 Grievances' and are requesting hearings on the merits." On February 9, 2005, Sheriff Hardy responded that he was "upholding the denial of the grievance" which had been presented on February 1, 2005.

Following this second denial of the grievance, the parties met to discuss the merits of the grievance on or about February 25, 2005. We find that this meeting fulfilled the requirement for a pre-arbitration meeting as called for by their agreed procedures, notwithstanding the absence of a representative of the County Attorney's Office or other legal counsel for either the County or the Union. The parties did not reach a satisfactory solution of their differences and the Union subsequently filed a request for arbitration in a timely manner. In accordance with Article 16.1.c., if the parties fail to "reach a satisfactory solution" following a "meeting to determine if

the grievance can be settled without arbitration” then it proceeds through the PELRB for assignment to a third party arbitrator.

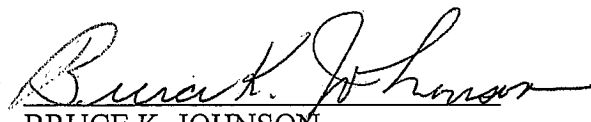
The County points to the following language, contained in Article 16.1, as constituting an express provision excluding the Association's grievances from arbitration: “It is expressly understood that NH RSA 104:27 shall apply to all Certified Deputy Sheriff’s/or Special Deputy Sheriff [*sic*] and their hiring or termination is not subject to this grievance procedure.” We do not read this statutory reference as applicable to this matter as it relates to the formalities of how a discharge of a deputy is served and recorded. Further, we do not read the reference to “their hiring” not being subject to this grievance procedure as prohibiting Union “class” grievances calling into question issues related to Article VII – PROMOTIONS AND TRANSFERS which is at issue here.

In conclusion we have determined that the position qualifies as a permanent part-time position subject to the terms of the CBA. We have also determined that the Union did comply with the provisions of the parties’ agreed upon grievance procedure. We acknowledge that it is well settled “that arbitration should be ordered unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *Appeal of Westmoreland School Board*, 132 N.H. 103, 105 (1989)(quoting *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582-583 (1960)). Further, we do not find that the County has produced evidence that reaches the high standard as expressed as the “most forceful evidence” of a purpose to exclude the Union’s claim from arbitration. *Id.* at 105, 106 (citations omitted). We determine that the Union, on behalf of its membership, is entitled to seek such recourse, but here we need not and do not, examine the merits of its grievance.

Therefore, after examining all of the evidence, both documentary and testimonial, and giving appropriate degrees of credibility to the several witnesses presenting that testimony, the Board orders that the County's improper labor practice is DISMISSED; the parties are directed to proceed forthwith with the arbitration of the dispute raised by the Union’s grievance. Further, the parties shall immediately pursue the selection or appointment of an arbitrator and cooperate in good faith to finally resolve this dispute without delay.

So ordered.

Signed this 31st day of July, 2006.


BRUCE K. JOHNSON
Alternate Chairman

By unanimous vote. Alternate Chairman Bruce Johnson presiding with Board Members Carol Granfield and Richard E. Molan also voting.

Distribution:

Carolyn M. Kirby, Esq.

Jamie DiPaola, Esq.