



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Local 3657, Hillsborough County Sheriff's Office

v.

Hillsborough County

Case No. G-0012-15
Decision No. 2012-117

Appearances:

Karen E. Clemens, Esq., Associate General Counsel, AFSCME, Boston, Massachusetts for the Complainant

Carolyn M. Kirby, Esq., Legal Counsel, Hillsborough County, Goffstown, New Hampshire for the Respondent

Background:

The AFSCME Local 3657, Hillsborough County Sheriff's Office (Union) filed an unfair labor practice complaint on October 19, 2011 claiming that the County violated RSA 273-A:5, I (a), (e), and (g) when it unilaterally changed a past practice of issuing payment for compensatory time earned by bargaining unit employees. The Union requests that the PELRB find the County in violation of RSA 273-A:5, I (a), (e), and (g) and order the County to return to the status quo ante regarding the payment of compensatory time, to process employees' requests for accrued compensatory time pay-out, to cease and desist from violating RSA 273-A:5, I, to post the findings of the PELRB for 30 days, and to make the Union whole for any and all costs and expenses incurred to pursue the unfair labor practice charge. The County denies the charges and requests that the PELRB dismiss the Union's complaint.

The Board conducted an adjudicatory hearing on December 21, 2011 at the Public Employee Labor Relations Board offices in Concord. The parties had a full opportunity to be

heard, to offer documentary evidence, and to examine and cross-examine witnesses. The parties filed post-hearing briefs and the decision is as follows.

Findings of Fact

1. The County is a public employer within the meaning of RSA 273-A:1, X.
2. The Union is the certified exclusive representative for certain employees of the Hillsborough County Sheriff's Office.
3. The Union and the County are parties to a collective bargaining agreement (CBA) that expired on June 30, 2010. The CBA contains an extension clause, which provides that the agreement "shall continue from year to year thereafter unless written notice of desire to modify, cancel or terminate this Agreement is served by either party upon the other . . ." See Joint Exhibit 1.
4. In 1995, due to the budget problems, the Sheriff's Office began offering compensatory time in lieu of overtime. Sheriff Walter Morse informed employees that if they did not agree to accept compensatory time in lieu of overtime pay, they would not be allowed to work overtime. At first, the Union objected to this change and filed a grievance. The parties arbitrated this grievance in 1994. The Arbitrator found that the County "did not violate the collective bargaining agreement when it instituted compensatory time off." See Arbitration Opinion & Award, Case No. A-0428:66, issued March 16, 1994.
5. On January 19, 1996, the Union and the County reached an agreement, which provided as follows:

The Union and the Sheriff agree that employees have the option of requesting compensatory time or overtime pay when an overtime opportunity arises.

The Union and the Sheriff further agree that compensatory time requires an employees immediate supervisors [sic] preapproval for accrual and usage.

All other provisions of the collective bargaining agreement pertaining to Article V continue to apply.

During the negotiations on this agreement, the parties did not discuss the issue of compensatory time pay-out. There was no other negotiation or agreement concerning compensatory time. See County Exhibit 7.

6. The parties' 1996 agreement was incorporated into the CBA, Article 5.10. Article 5.10 of the most recent CBA provides as follows:

Employees have the option of requesting compensatory time or overtime pay when an overtime opportunity arises. Compensatory time requires the pre approval of the employee's immediate supervisor for accrual and usage.

Joint Exhibit 1.

7. The County's practice is to pay out all accrued time, including compensatory time, sick time, and vacation time, when an employee's job classification within the County changes (e.g. due to a promotion). The County also pays out all accrued compensatory time at the time of an employee's separation from employment. These arrangements are not memorialized in the parties' CBA.

8. In 2001, the County unilaterally elected to pay out all compensatory time accrued to the County's employees. There was one objection to this pay-out: a Sheriff's Office employee refused to accept the pay-out of his accrued compensatory time. He returned the pay-out check and his compensatory time was reinstated. There was no formal vote by the Union to authorize management to pay out all accrued compensatory time.

9. In January, 2009, Daniel Grant, a Sheriff's Office employee, asked his supervisor Lt. William Barry whether he could cash out his accrued compensatory time (75 hours). Lt. Barry responded that he should direct his request to management. Mr. Grant informed management that he needed money to fix the furnace at his residence. Mr. Grant's request for pay-out was processed by the Sheriff's Deputy, who was authorized to process it. The request was granted and Mr. Grant was paid his accrued compensatory time. See Union Exhibit 7.

10. In January, 2011, Jonathan Nightingale, a Sheriff's Office employee, requested to cash out his accrued compensatory time (34.25 hours). He submitted his request to the payroll department employee, Chad Monier, who informed Mr. Nightingale that his request must be approved by the Sheriff. Mr. Nightingale explained to the Sheriff that the heating system at his residence needed to be replaced urgently because he had two children at home and it was winter. The Sheriff approved his request and his compensatory time was paid out in the next pay check. See Union Exhibit 8.

11. According to Sheriff James Hardy, he granted Mr. Nightingale's request because Mr. Nightingale demonstrated hardship and because the amount of pay-out involved was modest and could be supported by the department's budget. Sheriff Hardy did not inform the County Commissioners that he granted Mr. Nightingale's request.

12. Ernest Castle, a Sheriff's Office employee, claims that he requested and was paid his compensatory time in March, 2006. According to Mr. Castle, his request was approved by his immediate supervisor, Lt. Roger Matte. Mr. Castle does not know whether the Sheriff and/or the Commissioners' Office were aware of his request for the compensatory time pay-out. The County disputes that management had any knowledge of Mr. Castle's request.

13. Lt. William Barry requested to cash out his accrued compensatory time in February, 2011. Sheriff Hardy forwarded his request to County Administrator Gregory Wenger. Mr. Wenger denied Lt. Barry's request stating that the County cannot pay out compensatory time unless an employee retires or his employment is terminated.

14. In June, 2011, Marie Carmen requested to cash out all of the compensatory time accrued over 14 years of her employment with the Sheriff's Office. Ms. Carmen did not state the reasons for her request.

15. Sheriff Hardy forwarded Ms. Carmen's request to Mr. Wenger with the letter stating in part as follows:

. . . I am forwarding this request to you for the Board of Commissioners to review.

After receiving the request, I did speak to Marie last week, the gist of the conversation with her was that I would forward her request along, but generally speaking unless her job classification changed, further authorization would be needed prior to paying out accrued compensatory time.

County Exhibit 1.

16. In his response to Sheriff Hardy, dated July 8, 2011, Mr. Wenger stated:

. . . As you are aware this request is similar to others that have been considered by the Board in recent months and as with those requests the Board cannot agree to payment at this time. Consistent with its previously stated position accrued compensatory time is paid out upon an employee's separation from the County. Separation in this instance includes an employee's change in job classification within the County, for instance from an affiliated position to a non-affiliated position. The Board is not aware that either of these circumstances is in play with Ms. Carmen's request.

As the Commissioners have expressed they have concerns regarding the use of compensatory time and the liability, primarily found in your operation that the County carries for the accrued time. They encourage you to consider refraining from continuing to pre-approve the accrual and usage of compensatory time. As we look forward to the next budget process we may wish to explore opportunities to address the ongoing and future liabilities. . .

County Exhibit 2.

17. Neither Sheriff Hardy nor Mr. Wenger asked Ms. Carmen to state the reasons for her request. Mr. Wenger denied Ms. Carmen's request.

18. In June, 2011, Union President Earnest Castle sent a letter to Sheriff Hardy requesting that the County pay Ms. Carmen all accrued compensatory time. The County has not complied with this request. See Union Exhibit 2.

19. When Ms. Carmen first started her employment 14 years ago, she was told by her supervisors that there was no money in the budget to pay for overtime hours and that she had

to take compensatory time instead of overtime. Thereafter, she continued to elect compensatory time. Peter Flood, who has been her supervisor since 2003, has never required her to select compensatory time instead of overtime. Since Ms. Carmen's compensatory time pay-out request was denied, she has been electing overtime and not compensatory time.

20. Ms. Carmen has never been denied a request to utilize her accrued compensatory time to take time off.

Decision and Order

Decision Summary:

The evidence is insufficient to establish the existence of a binding past practice requiring the County to pay out an employee's accrued compensatory time upon request. The Union's complaint is denied.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

The Union claims that the County violated RSA 273-A:5, I (a), (e), and (g)¹ when it denied Ms. Carmen's request for pay-out, thereby unilaterally changing a past practice of issuing

¹RSA 273-A:5, I provides in relevant part:

It shall be a prohibited practice for any public employer:

(a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter; . . .

(e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations; . .

(g) To fail to comply with this chapter or any rule adopted under this chapter; . . .

payment for compensatory time earned by bargaining unit employees. In this case, Article 5.10 of the parties' CBA provides employees with the right to elect between receiving overtime pay and receiving compensatory time for overtime work. The CBA, however, does not specifically address when employees are entitled to receive payment for accrued compensatory time.

The PELRB may examine parties' past practice and other extrinsic evidence to discern the intent of the parties where the language of a collective bargaining agreement is ambiguous or where "the contract is entirely silent." See *Wheeler v. Nurse*, 20 N.H. 220, 221 (1849); see also *Appeal of N.H. Dep't of Safety*, 155 N.H. 201, 208-09 (2007). To establish the existence of a past practice, a party must prove that both parties had knowledge that the practice existed and by their respective actions over the protracted period of time demonstrated acceptance of it. See *Appeal of N.H. Dep't of Safety*, supra, 155 N.H. at 210. See also *Hampton Police Assoc. Inc. et al v. Town of Hampton*, PELRB Decision No. 2010-029. Past practice "is not mere prior conduct but is something of sufficient duration that is a consistent, repeated, mutually understood and accepted practice which is binding upon the parties even though not contained within the parties' written collective bargaining agreement." *New England Police Benevolent Association, Local 250 v. State of New Hampshire, Department of Corrections*, PELRB Decision No. 2011-114 (internal quotation marks omitted). See also *Exeter Police Association v Town of Exeter*, Case No. P-0753-17, Decision No. 2009-183.

In the present case, the evidence is insufficient to prove the existence of a binding past practice. The evidence shows that, since the parties reached an agreement in 1996, there have been three instances in which the County paid out accrued compensatory time upon employees' requests. These instances involved Jonathan Nightingale, Daniel Grant, and Earnest Castle. However, the evidence also shows that management granted Mr. Nightingale's and Mr. Grant's requests for pay-out in part because both employees demonstrated hardship and urgent need for

funds. The compensatory time pay-out request of William Barry was denied, as was Ms. Carmen's. There is also evidence of the 2001 pay-out by the County of all compensatory time on the books but this evidence is not particularly probative because this event did not involve an individual employee's request for pay-out and because the pay-out was conducted at the County's discretion without involvement of the Union. The Board finds that there is insufficient evidence to prove the existence of a "consistent, repeated, mutually understood and accepted" past practice that would obligate the County to provide the requested pay-out to Ms. Carmen.

Based on the foregoing, the Union's evidence is insufficient to prove that the County violated RSA 273-A:5, I (a), (e), and (g) when it denied Ms. Carmen's application for pay out of the accrued compensatory time. Accordingly, the Union's claims and requests for relief are denied.

So ordered.

May 29, 2012



Charles S. Temple, Esq., Chair

By unanimous vote of Chair Charles S. Temple, Esq. and Board Members Richard J. Laughton, Jr. and Carol M. Granfield.

Distribution:

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