STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Farmington Education Support Professionals United, NEA-NH

v.

Farmington School District

Case No. E-0047-6
Decision No. 2014-080

Appearances:

James F. Allmendinger, Esq.
NEA-New Hampshire
Concord, New Hampshire for the Complainant

Peter C. Phillips, Esq.
Soule, Leslie, Kidder, Sayward & Loughman
Salem, New Hampshire for the Respondent

Background:

On September 9, 2013 the Farmington Education Support Professionals United, NEA-NH (Association) filed an unfair labor practice complaint under the Public Employee Labor Relations Act (RSA 273-A) concerning the School District's outsourcing, or privatization, of food services effective at the start of the 2013-14 school year. The Association charges that the District violated RSA 273-A:5, I (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); and (h)(to breach a collective bargaining agreement) because it did not negotiate its decision to privatize food services. The Association contends that the District has, as a result, unilaterally and improperly changed the terms and

conditions of employment of District food service workers. The Association requests that the PELRB find that the District has committed an unfair labor practice, order the District to reinstate food service workers as employees of the District, and order the District to post the charges and the PELRB's decision in all District schools and to electronically post the same notices via the school's email system.

The District denies the charges. According to the District it has the contractual authority to privatize food services pursuant to the "management rights" clause in the 2012-13 CBA (Joint Exhibit 1). The District also maintains that it was not otherwise obligated to bargain its decision to privatize food services under the three part test set forth in *Appeal of State,* 138 N.H. 716 (1994). The District contends that its privatization decision primarily affects matters of broad managerial policy and also that requiring the District to negotiate its decision with the Association would interfere with public control of governmental functions. The District requests that the PELRB dismiss the complaint and deny all claims for relief.

The undersigned held a hearing on November 25, 2013 at the offices of the PELRB in Concord. Both parties submitted post-hearing briefs by the January 10, 2014 deadline, and the decision in this case is as follows.

Findings of Fact

1. The Farmington School District is a public employer within the meaning of RSA 273-A:1.

2. The Farmington Education Support Professionals United, NEA-New Hampshire, NEA is the exclusive representative of District Paraprofessionals and Food Service Workers as Per PELRB Decision No. 2012-108 (May 24, 2012). See Joint Exhibit 2.

3. The parties' most recent collective bargaining agreement covered the July 1, 2012 to June 30, 2013 time period (2012-13 CBA). See Joint Exhibit 1. It does not have a continuation or extension clause.

4. Article II is titled "Management Rights" and provides as follows:

> The Board and its Administrative Team shall retain exclusive control of the operation of the District and, except for the understandings reached within this agreement, nothing shall limit the Board in the exercise of its managerial rights. The Board retains, without limitation, all powers, rights, and authority vested in it by laws, rules and regulations including but not limited to: the right to make and amend Board Policy; manage and control school properties and facilities; select and direct personnel; determine, manage and control the school curriculum; relieve employees from duties for just cause; take such action as it deems necessary to maintain efficiency in the operation of the school system; and determine the methods, means, and personnel by which the functions of the school district will be performed. It is mutually agreed that all matters of managerial policy within the exclusive prerogative of the public employer or confided exclusively to the public employer by statute or regulations adopted pursuant to statute shall not be subjects for negotiation purposes and as defined and provided for in RSA 273-A:1, XI.

5. The 2012-13 CBA is silent with respect to the privatization, outsourcing, or sub-contracting of bargaining unit work.

6. For a number of years the costs of operating the District's food services has exceeded the revenue realized from sources such as student payments and federal subsidies. The District characterizes these costs as a food service program "loss." The District identifies the loss amounts as approximately $29,000.00, $69,000.00, and $77,000.00 for the fiscal years ending June 30 of 2011, 2012, and 2013, respectively.

7. At least one school board member acknowledges that money has been an issue in the food service program for six years.

8. The parties have been bargaining a successor agreement to the 2012-13 CBA and Association wage proposals were made sometime in the fall of 2012.

9. Benefits available to unit employees are as outlined in the 2012-13 CBA and include matters like just cause for removal of employees from their position, a wage schedule, longevity

pay, participation in a health care plan with 60% of the premium paid by the District or a single membership dental plan or $1,000 as per Article 9.1 and 9.2, paid holidays, sick leave, personal leave, an evaluation procedure, and a grievance procedure. Several food service workers participate in the New Hampshire Retirement System.

10. At the November 19, 2012 School Board meeting, District Business Administrator Jeanette Lemay discussed the food service program and the fact that revenue was less than expenses. She suggested the School Board consider raising the prices of lunches. Superintendent Welford also spoke, stating that "they were at a decision point regarding the school lunch program," pointing out that "they had needed to contribute $69,000.00 from the budget for the lunch program." The minutes do not indicate that he suggested or discussed the possibility of privatization. See District Exhibit 1.

11. The chronology of the District's consideration of food service privatization is reflected in part in District Exhibits 1 and 2, which include the following information. At its January 8, 2013 meeting, the School Board approved Warrant Article 12: *"To see if the voters of the Farmington School District would be interested in privatizing the Food Service program?"* At the School District's deliberative session of the annual meeting in February, 2013 voters amended Warrant Article 12 to read *"To see if the voters of the Farmington School District would be interested in having the School Board research the viability of privatizing the Food Service program which is currently operating at a deficit?"* Voters approved Article 12 at the March 12, 2013 voting session of the annual meeting. The School Board again discussed privatization of food services at its March 18, 2013 meeting and agreed to hear presentations from food service management companies at some future point in time. It appears that the food

services presentation did not occur as scheduled because one of the companies raised concerns that the presentations might violate the "bid statutes."

12. On May 22, 2012 Superintendent Welford issued the District's Request for Proposals (RFP) seeking proposals for a food services management contract on or before July 31, 2013. The RFP is a 40 page document consisting of 22 different sections, 6 Schedules, 7 Addenda, and 5 Exhibits. See District Exhibit 3; Joint Exhibit 6.

13. The District did not formally notify the Association of its intent to privatize District food services during the ongoing negotiations for a successor contract to the 2012-13 CBA.

14. During the summer of 2013, up to the end of July, several food service workers asked the Superintendent about outsourcing, and he advised that no decision had been made.

15. In early August, 2013 the Superintendent brought forward the question of privatization to the School Board and recommended the School Proceed to hire Café Services. There was no clear or formal communication to the Association about the Superintendent's intention to request that the School Board vote to hire Café Services at this time.

16. At its August 5, 2013 meeting the School Board voted to accept the Café Express proposed contract. See Joint Exhibit 3. By email dated August 8, 2013 (Joint Exhibit 4) Superintendent Welford notified Association President Laura Parker that:

> At its meeting on Monday, August 5, 2013 the School Board voted to contract out food services operations. The School Board understands this will impact certain positions within the Farmington Education Support Professionals United (FESPU) bargaining unit. As a result, the Board is willing to meet and negotiate with FESPU over the impact of this decision.

17. The District, in effect, obtained the commitment from the two companies that had submitted proposals to "hire the current employees of the food services program, provided the

building administrators are comfortable with all the members of the current staff." See District Exhibit 7.

18. The Association objected to the outsourcing decision and immediately sent a letter of protest on August 8, 2013. See Joint Exhibit 5. The District replied by letter dated August 23, 2013 and defended its decision and attempted to provide reassurances that affected employees will be treated fairly by Café Services and the School Board was justified in issuing the May RFP for food service management. See Joint Exhibit 6; District Exhibit 3.

19. The District has contracted with Café Services to manage District food services operations for the 2013-14 school year. The agreement also contains "four more options to renew for a 1 year period." See Joint Exhibit 7. The District and Café Services reached an agreement that Café Services would hired all former food service bargaining unit employees to perform the same work at the same wages, hours and locations. However, Café Services otherwise did not provide the former unit employees with all the benefits formerly available to them as outlined in Finding of Fact 9. This has allowed the District to avoid funding the benefits referenced in Finding of Fact 9 and resulted in the desired savings.

20. The District's decision to privatize food service was "motivated by budgetary concerns" as the District's stated objective was to save money. By subcontracting food services to Café Services the District in fact reduced costs by: 1) avoiding its financial obligations to provide bargaining unit food service workers with all the benefits established by the 2012-13 CBA as well as membership in the New Hampshire Retirement System; and 2) avoiding its obligation to bargain collectively with the food service employees.

Decision and Order:

Decision Summary:

The District's privatization of its food services constitutes an improper unilateral change in the terms and conditions of employment which in the circumstances of this case cannot be justified by the District's managerial prerogative. The District has committed an unfair labor practice by violating its obligation to negotiate in good faith all mandatory subjects of bargaining and by making unilateral changes in a mandatory subject of bargaining. The District shall take the steps necessary to restore all terms and conditions of employment to the affected employees and otherwise refrain from making unilateral changes in areas that are mandatory subjects of bargaining.

Jurisdiction:

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

Discussion:

By August of 2013, when the school board voted to outsource food services, the 2012-13 CBA had expired, and the parties' relationship was governed by the status quo doctrine:

> In the absence of a binding automatic renewal clause, a CBA ends on its termination date. Once a CBA expires, while the parties continue to negotiate for a successor agreement, their obligations to one another are governed by the doctrine of maintaining the status quo.
>
> [T]he principle of maintaining the status quo demands that all terms and conditions of employment remain the same during collective bargaining after a CBA has expired. This does not mean that the expired CBA continues in effect; rather, it means that the conditions under which the teachers worked endure throughout the collective bargaining process.

Appeal of Alton School District, 140 N.H. 303, 307 (1995)(citations omitted). It is an "unlawful refusal to engage in required negotiations" when a public employer makes unilateral changes in

"mandatory subjects of collective bargaining" during the status quo. *Appeal of City of Nashua Bd. of Educ.,* 141 N.H. 768, 772-73 (1997)(citations omitted). Terms and conditions of employment are defined under the Act as:

> ....wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's 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. *See also* RSA 273-A:3, I (employer must bargain terms of employment with employee organization).

In general, the assessment of whether a public employer must negotiate a particular proposal or action, either during ongoing negotiations, during the contract term, or after its expiration, is determined by the application of the three part test adopted in *Appeal of State,* 138 N.H. 716 (1994). *See also Appeal of City of Nashua Bd. of Educ.,* 141 N.H. 768, 773-776 (1997)(applying three part test during status quo following contract expiration and holding that city's reorganization of its custodial staff was a mandatory subject of bargaining). The three part test separates proposals or actions into three classifications: mandatory, permissive, or prohibited subject of bargaining.

> First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation....
>
> Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy....
>
> Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI.

> A proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.

In re Appeal of Nashua Police Commission, 149 N.H. 688, 691-92 (2003)(citing *Appeal of State,* 138 N.H. at 721-723). In this case the parties dispute how the second and third steps of the three part test should be applied. They agree the District's decision to outsource food services is not a prohibited subject of bargaining under the first step.

Appeal of Kennedy, 162 N.H. 109 (2011); *Appeal of Hillsboro-Deering School District,* 144 N.H. 27 (1999); and *Appeal of City of Nashua Bd. of Educ.* are three cases involving the application of the *Appeal of State* three part test in circumstances where the public employer sought to outsource or reorganize its workforce. In particular, these decisions provide fairly detailed discussions of the proper application of the second and third steps of the three part test. Based upon these authorities and the facts in this case, I find that the District's decision and action to outsource was a mandatory subject of bargaining.

The circumstances and issues in Farmington are most similar to those present in *Appeal of Hillsboro-Deering.* In both cases the public employer is attempting to save money by converting a segment of its bargaining unit work force to employees of an independent contractor. *Id.* at 30. In both cases arrangements were made to continue the employment of the bargaining unit employees, but with reduced benefits. *Id.* at 32-33. In both cases employees continued to performed the same job duties before and after the privatization. *Id.* at 33. In both cases the respective employers did not negotiate the subcontracting decision with the employee organization (the Association in this case). *Id.* at 30.

Factual differences between Farmington and *Appeal of Hillsboro-Deering* include the type of bargaining unit work (food services in Farmington and maintenance/custodial in *Hillsboro-Deering)* and also the timing of the outsourcing activity. In Farmington the school board formally voted to outsource and acted to implement its decision on and after August of 2013. This was during the status quo period, following the expiration of the 2012-13 CBA on June 30, 2013. However, the record also reflects earlier District outsourcing activity, including preparation and issuance of the May RFP (District Exhibit 3). In contrast, in *Appeal of Hillsboro-Deering* the school district acted at the start of the third year of the contract. *Id.* at 30. *See also Appeal of City of Nashua* (city acted to reorganize custodial staff after the contract expired but without hiring an outside contractor).

As to the second step the court in *Appeal of Hillsboro-Deering* observed that "[r]educed to its essence, the school district's action in this case replaced bargaining unit employees with those of independent contractors to perform the same duties at reduced wages and benefits." *Id.* at 32. The court concluded that the school district's actions primarily affected the terms and conditions of employment, and not matters of broad managerial policy. As to the third step, the court rejected the school district's argument that "it subcontracted bargaining unit services in order to obtain higher quality work at less cost." The court's rational included the following:

> The PELRB found, however, that the school district was primarily motivated by budgetary concerns. The PELRB noted that the school district's decision followed a study projecting $91,008 in yearly savings if the school district privately subcontracted bargaining unit work. Moreover, the record reveals that the school district urged the independent contractors to interview and consider hiring the eleven union employees. Based on this record, we cannot say the PELRB's finding was unreasonable. *Therefore, limiting the school district's ability to unilaterally decide to subcontract with private companies for the same custodial and maintenance work performed by bargaining unit employees would not interfere with public control of governmental functions. The school district's decision to privatize custodial and maintenance services did not alter the school district's basic operations. It merely replaced existing employees with those of an*

> *independent contractor to do the same work under similar conditions of employment. Therefore, to require the school district to bargain about the matter would not significantly abridge its freedom to manage its operations.*

Appeal of Hillsboro-Deering at 32-33 (emphasis added). The court also pointed out that "[a] true layoff or reorganization would not violate the CBA or constitute an unfair labor practice claim..." But, there is no "true layoff or reorganization" for the purposes of a RSA 273-A:5, I unfair labor practice charge where the same jobs continue and the amount and nature of the work does not change. *Id.* at 30.

In *Appeal of City of Nashua* the court held that the city's reorganization of its custodial staff (from full time to part time performing same job duties at lower wages and benefits) was a mandatory subject of bargaining under the three part test. The court stated that in many instances the second part of the three part test will "touch on significant interests of both the public employer and the employees." *Id.* at 774. Such cases "cannot be resolved through simple labels offered by management, such as 'restructuring' or 'personnel reorganization,' or through conclusory descriptions urged by employees, such as 'inherently destructive' conduct." *Id.* Often, both the public employer and the employees will have significant interests affected by a proposal or action, and "determining the primary effect of the proposal requires an evaluation of the strength and focus of the competing interests." *Id.* The court concluded, as to the second part of the three part test, that the city's substitution, after the contract had expired, of part time employees at lower wages for full time employees performing the same job duties constituted an action that primarily affected terms and conditions of employment, and not matters of broad managerial policy.

With respect to the third part of the three part test, the court found no interference with public control of governmental functions:

> On the third prong of the test, we conclude that limiting the city's ability to reorganize in the specific manner utilized here would not interfere with public control of governmental functions. Preventing the city from unilaterally replacing full-time custodians with lower-paid part-time employees--to perform the identical job functions--does not present the type of problem we have identified in this context: hindering or impeding a public employer's authority to establish policy, standards, or criteria for disciplinary action. *Finally, we note that an overly expansive view of the proposals or actions that "interfere with public control of governmental functions" could embrace any term of employment, thereby eliminating the category of mandatory subjects and thwarting the collective bargaining process required by RSA chapter 273-A.*

Appeal of City of Nashua, 141 N.H. at 775-76 (emphasis added).

Finally, in *Appeal of Kennedy,* 162 N.H. 109 (2011), the court affirmed the PELRB's dismissal of a charge that the school district had engaged in impermissible subcontracting and violated its reduction-in-force policy. In discussing the second step of the three part test the court placed particular emphasis on the fact that job duties had not been transferred:

> Of significance is the fact that (the employee's) job duties were not simply transferred to an outside contractor. Thus, this case is distinguishable from *Appeal of City of Nashua,* in which we held that a school board's dismissal of unionized custodial workers and subsequent hiring of part-time employees to perform the same duties at reduced wages and benefits constituted an unfair labor practice. *In so holding, we recognized that, because the actual job duties to be performed remained the same, the action was one that primarily affected wages and hours.* On the record before us, we agree with the PELRB's conclusion that the elimination of the Hinsdale band program was part of a reorganization within the district's managerial prerogative.

Appeal of Kennedy at 113 (emphasis added)(internal citations omitted). The court also stated that the "prerogatives afforded to management....do not include the right to substitute subcontracted work for bargaining unit work." *Id.*

The similarities between Farmington and *Appeal of Hillsboro-Deering* are striking. In both cases the public employer's motivation was to save money by avoiding the wage and benefit structure imposed by collective bargaining, to be accomplished by hiring a third party, while maintaining the same work force performing the same duties. Bargaining unit employees

did not lose their school district employment in either case because there was less work or no work, or because their former duties had been restructured, modified, or reassigned to other employees as a result of a restructuring or reorganization of the work force or the services their employer was providing. There was no plan or intent to implement any substantive change to the custodial/maintenance services in *Hillsboro-Deering* or the food services program in Farmington. Instead, in both cases the public employer's intent and plan was to save money, not through the collective bargaining process, but by circumventing the collective bargaining process. This was to be accomplished via the hiring of a third party contractor, through whom the public employers in both cases could indirectly provide its former employees with reduced benefits to perform the same bargaining unit work.

As was true in *Appeal of Hillsboro-Deering* and *Appeal of City of Nashua* the District's actions in Farmington cannot be legitimized as a true layoff or reorganization that is not subject to an unfair labor practice claim. As in *Hillsboro-Deering* and *Appeal of City of Nashua* the District's actions in Farmington primarily affected the terms and conditions of employment (second step) given the resulting reduction and loss of employee benefits in circumstances where, apart from the involvement of Café Services, through whom the District now routed employee wages, the same jobs continued and the nature and amount of the work did not change. As to the third step, requiring the District to negotiate its decision and action will not interfere with public control of government operations since the District's basic operations were not altered.

The noted differences between Farmington and *Appeal of Hillsboro-Deering* and *Appeal of City of Nashua* do not lead to a different conclusion. The differences between the types of bargaining unit work (maintenance/custodial vs. food services) are, for purposes of this analysis,

distinctions without a difference. The District has not made any persuasive argument that such differences should serve as a basis for a different outcome in Farmington.

The same is true with respect to the fact that in Farmington the school board voted to privatize in August, after the expiration of the 2012-13, and hired Café Services thereafter. *Appeal of Hillsboro-Deering, Appeal of City of Nashua, Appeal of Kennedy,* and *Appeal of State* do not provide that the three part test does not apply, or should be applied differently, just because a collective bargaining agreement has expired. To the contrary, *Appeal of City of Nashua* requires the PELRB to apply the three part test during the status quo period following a contract's expiration to judge whether the public employer has made improper unilateral changes in the terms and conditions of employment established by the expired collective bargaining agreement. Likewise, these decisions do not appear to stand for the proposition that the mere fact of a contract's expiration is, by itself, grounds for a finding that a particular public employer decision or action that is otherwise subject to mandatory bargaining under the *Appeal of State* three part test is no longer negotiable.

The District's contention that the "management rights" clause in the 2012-13 CBA authorizes or justifies its conduct is inconsistent with the court's treatment of a similar argument advanced by the school district in *Appeal of Hillsboro-Deering.* In rejecting the school district's argument in that case the court stated that "[i]f the school district wanted the prerogative to subcontract bargaining unit work, it should have specifically negotiated such a right into the CBA. Because it failed to do so, the "management rights" provision of the CBA provides no refuge." *Id at 30* (citations omitted). The management rights clause in the Farmington 2012-13 CBA does not provide the District with any rights greater than those at issue in *Appeal of Hillsboro-Deering* or, for that matter, recognized in RSA 273:1, XI. Accordingly, the District's

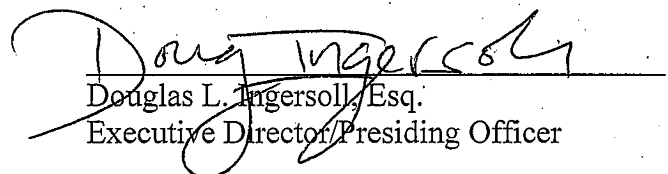
reliance on the management rights clause in the 2012-13 CBA as an independent basis and justification for its actions is not persuasive.

In accordance with the foregoing, the District made unilateral changes in a mandatory subject of bargaining during the status quo which constitutes "an unlawful refusal to engage in required negotiations." The District has committed an unfair labor practice in violation of RSA 273-A:5, I (a), (e) and (g). The District has interfered with its employees in the exercise of their rights conferred by the Act, including the right to representation by the exclusive representative in negotiations over mandatory subjects of bargaining. The District actions are a refusal to negotiate in good faith with the Association and a failure to comply with the Act, such as its obligation to bargain as required by RSA 273-A:3, I.

The District shall restore all lost benefits and employment to the affected food services employees and positions and make them whole consistent with the terms and conditions of employment established by the 2012-13 CBA (referenced in Finding of Fact 9) and their status as District employees. The District shall also refrain from making unilateral changes in areas that are mandatory subjects of bargaining and shall post this decision in a conspicuous place where affected employees work for 30 days and complete and file a certification of posting within 7 days.

So ordered.

March 28, 2014



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