



**STATE OF NEW HAMPSHIRE**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**Teamsters Local 633 of New Hampshire,  
Manchester Police Department Support Staff**

v.

**City of Manchester**

**Case No. G-0187-6  
Decision No. 2014-267**

Order

I. Background:

On September 25, 2014, the Teamsters Local 633 of New Hampshire, Manchester Police Department Support Staff (Union) filed an unfair labor practice complaint alleging, that the City of Manchester (City) violated RSA 273-A:5, I when it unilaterally outsourced custodial duties previously performed by bargaining unit employees to an outside company and laid off the remaining members of the custodial staff. The Union requests that the PELRB order the City to reinstate laid-off bargaining unit employees and direct that all future custodial functions be performed by bargaining unit employees and that the custodial staff work under the terms and conditions of the current collective bargaining agreement (CBA).

The City denies the charges and asserts, among other things, that the City's actions were within its exclusive managerial prerogative; that the Union's complaint is untimely under RSA 273-A:6, VII; and that the PELRB has no jurisdiction over the claims because the parties' CBA provides for arbitration and the claims arise out of the interpretation of the CBA. The City requests that the PELRB deny and dismiss the complaint with prejudice.

II. Facts:

1. The Union is the exclusive bargaining representative for all regular full-time and regular part-time employees of the Manchester Police Department in the classifications of:

Accounting specialist I & II; Administrative Assistant I & II; Program Specialist; Custodian; Emergency Services Dispatcher (Police); Equipment Mechanic I; Evidence Specialist; Information Support Specialist; Payroll Coordinator; Police Records Specialist I & II; Customer Service Rep II; and Police Services Specialist.

2. The City is a public employer within the meaning of RSA 273- A:1, X.

3. The City and the Union are parties to a Collective Bargaining Agreement (CBA) in effect until June 30, 2015.

4. On January 30, 2013 the Police Department contracted with Aramark Management Services to provide custodial services to supplement the Police Department Support Staff Custodians.

5. One bargaining unit custodian retired on February 28, 2014. Instead of replacing that custodian the Police Department used the services of Aramark Management Services.

6. On March 31, 2014 pursuant to CBA Article 29.2 the Police Department provided the Union with notice of its plan to contract out custodial services.

7. On May 20, 2014 City's Board of Mayor and Aldermen eliminated the custodial positions within the Police Department.

8. On or about August 15, 2014 the Police Department laid off the last remaining custodian in the Police Department Support Staff Bargaining unit and now relies solely on Aramark Management Services for custodial services within the Manchester Police Department Building.

9. The final step of the CBA grievance procedure is arbitration. However, the CBA does not provide that the arbitrator's decision will be "final and binding."

10. On August 29, 2014 the Union filed the following grievance:

On or about Aug 15, 2014 the City of Manchester, in violation of Articles 1, 19, and all others that apply of our contract imposed a lay off & elimination of the custodians

positions outlined in our contract of Alba Baez, in order to pay a subcontractor and non-bargaining unit member less money to do the work. The Union demands the city reinstate Ms. Baez and make her whole for lost wages and benefits.

11. Article 29 of the CBA provides:

29.1 The City recognizes the concern of the Union in regard to contracting or subcontracting work which results in a reduction of the work force.

29.2 If the City of the Department changes its method of operations which involves contracting out work which is now being performed by bargaining unit employees, the City and/or the Department will give notice to the Union of its intention. Furthermore, the City will make every effort to absorb affected employee into other City positions. In those cases where employees are not absorbed in other City positions, the City and/or Department will provide as much advance notice of pending lay-offs as reasonably possible.

III. City's Motions to Dismiss:

Following the October 22, 2014 pre-hearing conference the City filed two separate motions to dismiss. The first, filed November 7, 2014, requests dismissal based on the fact that the parties' collective bargaining agreement has a grievance procedure which includes arbitration as Step 4. The Union's grievance states as follows:

On or about Aug 15, 2014 the City of Manchester, in violation of Articles 1, 19, and all other that apply of our contract imposed a lay off & elimination of the custodians positions outlined in our contract of Alba Baez, in order to pay a subcontractor and non-bargaining unit member less money to do the work.

The City's second motion to dismiss was also filed November 7, 2014 and argues that the Union's complaint is barred by the six month limitations period set forth in RSA 273-A:6, VII. The City states that it first contracted with Aramark Management Services on January 30, 2013 to perform the custodial services at issue, and also states that when a custodial bargaining unit employee retired on February 28, 2014 the police department did not replace the custodian but instead used Aramark Management Services to perform the custodial services. The City argues that this contracting out is, in substance, what the Union now complains about, and therefore the complaint was filed after the six month limitation period set forth in RSA 273-A:6, VII expired.

The Union has not filed any objections to the City's pending motions to dismiss, and the time for filing of Union objections has passed per N.H. Admin. Rules, Pub 203.04 (d):

#### IV. Discussion and Order:

The analysis of arbitrability disputes is governed by four general principles:

(1) arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit ...; (2) unless the parties clearly state otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator; (3) a court should not rule on the merits of the parties['] underlying claims when deciding whether they agreed to arbitrate; and (4) under the "positive assurance" standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists, and in the absence of any express provision excluding a particular grievance from arbitration,..only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail ...

*Appeal of the City of Manchester*, 144 N.H. 386, 388 (1999)(citations omitted).

A presumption of arbitrability exists if the CBA contains an arbitration clause, but the court may conclude that the arbitration clause does not include a particular grievance if it determines with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute. Furthermore, the principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties.

*Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998). As explained in *Appeal of State Employee's Association*, 139 N.H. 441 (1995), in the case of a grievance procedure whose final step is final, but not binding, the PELRB still does not have jurisdiction until after the grievance process is complete:

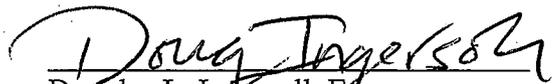
[At] any step of the procedure, a decision may become final...“the ‘final’ step in the grievance procedure merely defines the last avenue to resolution of the grievance within the four corners of the CBA. As in *Appeal of Campton School District* and *Appeal of Hooksett School District*, review by the PELRB then follows implicitly.

*Id.* at 444. (citations omitted.) See also *In re Silverstein*, 163 N.H. 192 (2012). The PELRB also addressed jurisdictional arguments similar to those raised by the City in *Professional Firefighters of Goffstown, IAFF Local 3420*, PELRB Decision No. 2012-128 (June 7, 2012). In *Goffstown*, the PELRB granted the employer's dismissal request.

Based upon the foregoing I cannot find with positive assurance that the parties' CBA is not susceptible of an interpretation that covers the dispute in this case, and therefore the City's first motion to dismiss is granted. No ruling is made on the City's second motion. The hearing scheduled for December 12, 2014 is cancelled, and this case is dismissed.

So ordered.

Date: 12/9/2014

  
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