State of New Hampshire

Public Employee Labor Relations Board

National Correctional Employees Union

v.

Rockingham County Department of Corrections

Case No. G-0140-8
Decision No. 2018-106

Appearances: Paul Brunetti, Esq., Moncure & Barnicle, Brunswick, Maine, for the National Correctional Employees Union

Elizabeth A. Bailey, Esq., Sheehan Phinney Bass & Green PA, Manchester, New Hampshire, for the Rockingham County Dept. of Corrections

Background:

On June 9, 2017 the NCEU filed an unfair labor practice complaint against the County. The charge arises from the County's unilateral adoption and implementation of new employee work schedules. The NCEU claims the County's actions are unlawful changes to the terms and conditions of employment, violate the parties' collective bargaining agreement, violate the County's duty to negotiate a mandatory subject of bargaining, and are prohibited practices under RSA 273-A:5, I (a), (b), (e), (g), (h), and (i). As relief, the NCEU requests that the board order the County to: 1) cease and desist from making unilateral changes to the conditions of employment; 2) cease and desist from violating the collective bargaining agreement; 3) maintain current schedules in accordance with the collective bargaining agreement; 4) make all bargaining

unit members whole; 5) award the NCEU attorney fees; and 6) post the board's order in the workplace.

The County denies the charges. According to the County, the disputed schedule changes are limited to first and second shift employees; the County did not violate the collective bargaining agreement or change scheduled shifts; the County has properly exercised its management rights to change and implement a different "days off rotation"; and the new "days off rotation" is more favorable to employees than the prior version.

On July 6, 2017 the PELRB granted NCEU's motion for an immediate cease and desist order. See PELRB Decision No. 2017-106. This order states that "[w]ork schedules can fairly be characterized as one of the more basic and fundamentally important terms and conditions of employment, and work schedules include the days and hours employees will work as well as the days and hours when they will not work." The board's order provides that the "County shall return to the status quo, and reinstate the work schedule in place prior to June 11, pending the hearing on the complaint." In a pleading filed October 18, 2017 (Complainant's Response to Respondent's Motion to Stay Hearing and NCEU's Motion to Enforce the PELRB Order of July 6, 2017), the NCEU moved to enforce the PELRB's cease and desist order based upon the County's alleged non-compliance.

After six continuances[1], the PELRB held a hearing on NCEU's complaint on April 19, 2018. Both parties have filed post-hearing briefs, and the decision is as follows:

[1] 8-1-2017 hearing continued at parties' request to allow more time to resolve this case by agreement, see PELRB Decision No. 2017-125 (July 13, 2017); November 9, 2017 hearing continued for similar reasons, see PELRB Decision No. 2017-194 (November 7, 2017); December 13, 2017 hearing continued at NCEU request, see PELRB Decision No. 2017-204 (December 7, 2017); January 23, 2017 hearing continued due to scheduling issues, see PELRB Decision No. 2018-012 (January 22, 2018); March 8, 2017 hearing continued at NCEU request for weather related reasons, see March 6, 2018 order.

Findings of Fact

1. The Rockingham County Department of Corrections is a public employer within the meaning of RSA 273-A:1, X.

2. The NCEU is the certified exclusive bargaining representative for Rockingham County Department of Corrections Correctional Officers and Control Operators. See PELRB Decision No. 2014-176 (July 21, 2014).

3. The parties' current collective bargaining agreement covers the period from January 1, 2017 to December 31, 2018 (2017-18 CBA). This was preceded by an agreement effective from April 1, 2015 to December 31, 2016 (2015-16 CBA), and before that a July 1, 2006 to June 30, 2010 agreement (2006-10 CBA).

4. Article 20 of all three agreements is titled "Hours of Work and Overtime."

5. Article 20.1 of all three agreements is titled "Work Week," defined as 41.25 hours per week with a weekly pay period of Monday through Sunday in the 2006-10 CBA, and Sunday through Saturday in the other two CBAs.

6. Article 20.2 of all three agreements is titled "Work Day," and all three agreements have the same language:

> The daily eight and one-quarter hour shifts will normally be 6:45 a.m. to 3:00 p.m. (1st shift), 2:45 p.m. to 11:00 p.m. (2nd shift), and 10:45 p.m. to 7:00 a.m. (3rd shift) as well as float positions which are normally 5:45 a.m. to 2:00 p.m., 12:45 p.m. to 9:00 p.m., and 1:45 p.m. to 10:00 p.m.

7. Article 20.3 of all three agreements addresses the fifteen minute briefing and shift change period.

8. Article 20.4 of all three agreements is titled "Work Schedule," and all three agreements have the same language:

> The parties agree that during the terms of this Agreement the existing shift schedules for the facility shall be maintained. In selecting employees to fill open shift assignments, the Department shall consider the qualifications of the applicants, and the scheduling needs of the facility, and if the qualifications of the applicants are equal, seniority shall be the determining factor in making the assignment.

9. The Article 20.1 change in the weekly pay period included in the 2015-16 CBA was a matter of administrative convenience for the County, as most other, if not all other, County employees worked under a Sunday to Saturday weekly pay period. However, during the term of the 2015-16 CBA, the parties continued to follow the existing (Monday to Sunday) weekly pay period because, according to the County, "more time was needed to figure it out." Joint Exhibit 14.

10. For a period of sixteen years, if not longer, the work schedules for most first and second shift corrections officers had remained the same, and followed the six week work schedule pattern set forth in the top table at Joint Exhibit 8, page 73. This scheduling pattern includes working five days in a row (twice) before receiving one or two days off, and working four days in a row (five times) before receiving one or two days off, and is known as the "4-2" work schedule. Third shift employees followed a 5-2 (5 days of work, 2 days off) schedule. The County also refers to employee work schedules as the "days off rotation," but the 4-2 schedule pattern covers both the number of days employees will work and the days they are off from work. Under the regular 4-2 work schedule, employees never worked more than five days in a Monday to Sunday pay period, which equates to the 41.25 hours work week called for under CBA Article 20.1.

11. The parties negotiated the 2017-18 CBA during bargaining sessions held from approximately May to August of 2016. During the course of these negotiations, the County informed the NCEU of the County's intent to implement the Sunday to Saturday weekly pay

period (first included in the 2015-16 CBA) in 2017. The County did not propose, and the NCEU did not agree or otherwise acquiesce to, changes in the existing 4-2 work schedule, or changes in any provisions in Article 20 or other terms and conditions, as necessary to implement a Sunday to Saturday weekly pay period.

12. In early 2017, Department of Corrections Superintendent Church directed then Sergeant (now Lt.) Warden to develop a new work schedule to accommodate the anticipated change to the Sunday to Saturday work week. The Superintendent informed Lt. Warden that he needed to improve the 4-2 work schedule because it "would not fit" the Sunday to Saturday work week. For example, using the existing 4-2 work schedule under a Sunday to Saturday pay period would result in six work days during some weekly pay periods, and four work days during other weekly pay periods.

13. By March of 2017 Lt. Warden had developed four schedule options, identified as A, B, C, and D. He presented the A-D schedule options to employees at a shift briefing, and employees were ultimately directed to choose one of the A-D work schedule options, which would be implemented effective June 11, 2017. See Joint Exhibit 3 and Joint Exhibit 8, p. 71. The A-D scheduling options differed from the existing 4-2 schedule in a number of ways. They preserved the 41.25 hour work week, but two of the options (A and D) included six work days in a row. It also reduced the number of times employees would work only four days in a row before receiving a day off, and in two options (B and C) only provided for five work days in a row before receiving a day off.

14. By March 15, 2017 the NCEU learned about the proposed A-D work schedule options and requested an outline of the proposed new schedule from the County. On March 16, 2017 the County forwarded the A-D work schedule options to the NCEU. By letter dated March

17, 2017 the NCEU formally protested to the Superintendent and requested that the County cease and desist from discussing the scheduling changes with NCEU members until the parties could meet and discuss the proposed changes. See Joint Exhibit 2-4.

15. Although on March 28, 2017 the NCEU withdrew its cease and desist request (Joint Exhibit 5), the NCEU and the County did discuss the County's contemplated work schedule changes by phone, email, and in meetings numerous times before June 11, 2017. During this period, the NCEU clearly informed the County that work schedule changes were a mandatory subject of bargaining, violated Article 20.4, and must be negotiated. For its part, the County clearly informed the NCEU that it considered changes to employee work schedules (like those represented by the proposed A-D work schedules) to fall within the scope of its managerial prerogative. The County nevertheless agreed to discuss work schedule changes with the NCEU and listen to any NCEU suggestions, but the County refused to negotiate any changes to the existing work schedules.

16. For example, on March 29, 2017 Superintendent Church stated to NCEU representative Christopher Murphy as follows:

> As you are aware the CBA calls for a change in the work week. In order for the work week not to be detrimental to bargaining unit employees there should be an adjustment made to the days off rotation for second and third shift employees. We have proposed new days off rotation schedule (sic) that does not affect the shift schedule that unit employees have already bid for by seniority. I believe that this proposed day off rotation change has a positive effect on the bargain (sic) unit employees....I would like to open a dialog...This dialog does not constitute collective bargaining.

See Joint Exhibit 6.

17. During an April 13, 2017, meeting NCEU representative Christopher Murphy stated that "the change of the rotation schedule is a collective bargaining issue." Superintendent

Church disagreed, stating that "it is a Management Right to change days off rotations and does not constitute collective bargaining." See Joint Exhibit 14.

18. Ultimately, the parties did not agree to changes to the work schedule, and the County implemented the new pay period, together with the new A-D work schedules, on June 11, 2017.

19. After the NCEU filed this complaint and obtained a cease and desist order from the board directing the County to return to the status quo prior to June 11, 2017 pending the hearing, the County reverted to the 4-2 work schedule but continued to utilize the new Sunday to Saturday pay period. This work schedule is depicted in the middle table in Joint Exhibit 8, p. 73.

20. Based on employee input, which the County says included potential grievances, and its own assessment of what work schedule is in the employees' best interests, based on factors such as number of weekends off, the County then changed the work schedule to the one depicted in the bottom table shown in Joint Exhibit 8, p. 73. The County did not apply to the PELRB for permission to make these changes, nor did the County obtain the NCEU's agreement to these changes.

21. After the issuance of the cease and desist order, and pursuant to that order's requirement that the parties meet and confer, the parties met in August, September, and November of 2017 to discuss the work schedule issues. NCEU representatives agreed to have one County work schedule proposal voted upon by employees, but it was rejected.

Decision and Order

Decision Summary

By unilaterally promulgating and implementing the A-D work schedule changes, the County violated 2017-18 CBA Article 20.4 and failed to negotiate a mandatory subject of bargaining as demanded by the NCEU. These actions violated RSA 273-A:5, I (e), (g), (h), and

(i). The sub-sections (a) and (b) claims are dismissed, and the NCEU request for attorney fees is denied. The NCEU motion to enforce the board's prior order is moot. The County shall return to the status quo in place prior to June 11, 2017, including the Monday to Sunday pay period. The County shall refrain from implementing the Sunday to Saturday pay period until the parties have agreed to any necessary changes in the terms and conditions of employment which will be affected by a change to the Sunday to Saturday pay period, such as, but not limited to, the 4-2 work schedule. The County shall post this decision in the workplace for 30 days.

Jurisdiction

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

Discussion

Under the Public Employee Labor Relations Act (Act), it is 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;
> (b) To dominate or to interfere in the formation or administration of any employee organization;
> (c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization;
> (d) To discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under 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;
> (f) To invoke a lockout;
> (g) To fail to comply with this chapter or any rule adopted under this chapter;
> (h) To breach a collective bargaining agreement;
> (i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule.

See RSA 273-A:5, I. The NCEU charges that the County violated sub-sections (a), (b), (e), (g), (h), and (i).

As to the sub-section (h) breach of collective bargaining agreement claim, we find the County's actions violated Article 20.4 ("Work Schedule") of the 2017-18 CBA, which provides that "existing shift schedules for the facility shall be maintained." The title "work schedule" indicates this contract provision relates in part to matters like the 4-2 work schedule at issue in this case. The phrase "shift schedules" refers to the shift and the days employees work (i.e. 1st shift on a 4-2 schedule). This is consistent with the board's 1999 decision in a case involving the same bargaining unit, public employer, and contract language. In that case, the union alleged the county was improperly "letting bargaining unit vacancies go unfilled and then creating and filling other, new positions with a different schedule." Ultimately the board dismissed the complaint, finding that, unlike the present case, "there has been no violation of the schedules (days and rotations worked) as evidenced by County Exhibit 3...[d]ays and rotations have remained intact even though there has been dissatisfaction with and at least one grievance about how vacancies were filled." As to the phrase "shift schedules," the board stated as follows:

> It appears that the language of Article 20.2 and 20.4 has caused some confusion and misunderstanding. Maintaining "shifts" should be held to mean those shifts over a 24 hour period which allow for around-the-clock coverage. "Schedules" appears to mean, from the language of the contract and the testimony offered, days and rotations worked. The evidence is insufficient to show that obligations pertaining to either of them have been ignored or violated. Nevertheless, combining both terms as "existing shift schedules" in the first sentence of Article 20.4 has not met with universal understanding by of the parties. We encourage the parties' on-going discussions about actual or perceived problems with "scheduling" as we have defined it, above, but find no ULP to have been committed.

See PELRB Decision 1999-026 (March 18, 1999), *SEA of NH, SEIU, Local 1984 for Rockingham County Corrections Employees v. Rockingham County Dept. of Corrections,* Case No. S-0386-9.

The NCEU still prevails in this case, regardless of our ruling on the sub-section (h) claim, because a change to the 4-2 work schedule is a mandatory subject of bargaining in any event. Under the Act, "terms and conditions" of employment are:

> [W]ages, 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.

See RSA 273-A:1, XI. See also RSA 273-A:3, I, which "provides that terms of employment are subjects of mandated bargaining." *Appeal of White Mountains Regional School Board,* 125 N.H. 790, 792 (1984).

Whether a particular matter qualifies as a "term and condition of employment" is determined by a three step analysis:

> 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.

Appeal of State, 138 N.H. 716, 721-723 (1994).

In *Appeal of Strafford County Sheriff's Office,* 167 N.H. 115 (2014), the New England Police Benevolent Association, Local 95 (union) challenged the sheriff's unilateral changes to the work schedules of two deputies made after a petition to form a new bargaining unit was filed and before the representation election. At the time the petition was filed, the deputies worked a

"4-10" schedule (four ten hour work days, followed by three days off) in the civil department. In September and October of 2012 both considered taking new United States Immigration and Customs Enforcement (ICE) contract positions provided they would be on a "5-8" schedule (five eight hour work days, followed by two days off). When the new ICE positions were configured on a 4-10 schedule the deputies elected to remain in their civil department positions. However, the sheriff changed their civil department work schedule from a 4-10 to a 5-8 schedule. *Id.* at 115-117.

The court affirmed the board's conclusion that the county "committed an unfair labor practice by changing the terms and conditions of employment of Sheriff's Office employees during the period when (the union) was seeking certification of a bargaining unit that included these employees." *Id.* The basis for the court's conclusion (and for the board in the proceedings below) was that work schedules constituted a mandatory subject of bargaining under the "three-step analysis for measuring a particular proposal or action against the managerial policy exception." *Id.* at 120-122 (citations and quotations omitted). First, the court determined there was no "*independent* statute, or any constitutional provision or valid regulation, that reserves to the [county] the exclusive authority to alter the deputies' work schedules." (Emphasis in original, quotations and citations omitted). As to the second step, the court concluded that the schedule changes "primarily affect[s] the terms and conditions of employment, rather than matters of broad managerial policy." The court explained as follows:

> As previously noted, RSA 273-A:1, XI defines the terms and conditions of employment to specifically include wages, hours and other conditions of employment. [O]ur cases have consistently recognized proposals and actions that primarily affect wages or *hours* as mandatory subjects of bargaining. Additionally, a public employer's 'greater' power to create or eliminate a position or program does not necessarily include the 'lesser' power to unilaterally determine wages and hours for the position or program. Thus, the change in Rowe's and Lemoi's hours of work in the civil department from 4-10 to 5-8 schedules primarily affected the terms and conditions of the deputies' employment.

Id. at 120-121 (quotations and citations omitted)(emphasis in original). As to the third step, the court found that a contract provision covering this subject would "not interfere with public control of governmental functions." *Id.*

In the present case, as in *Appeal of Strafford County Sheriff's Office*, the question is whether employee work schedules are a mandatory subject of bargaining. During the unit formation period under consideration in *Appeal of Strafford County Sheriff's Office,* the county, as the public employer, was barred from making unilateral changes to the terms and conditions of employment (work schedules). After bargaining unit certification, the county and other public employers, like the County in this case, are subject to a statutory bargaining obligation which requires the negotiation of any changes to the terms and conditions of employment like work schedules. This public employer duty to bargain does not lapse once a unit is certified and successive contracts have been negotiated. To the contrary, it is an ongoing obligation.

As was true in *Appeal of Strafford County Sheriff's Office*, the County in this case has not cited any independent[2] authority which gives the County the exclusive authority to alter the work schedules of first and second shift employees. As to the second step of the analysis, when the County implemented the A-D work schedules, it did so to accommodate the activation of the Sunday to Saturday pay period, a contract change which was a matter of administrative convenience for the County since it would align the pay periods of all County employees. However, at the same time, the County changed the number of hours and consecutive days first and second shift employees must work before receiving time off, something which materially affects and alters a core component of working conditions. Like the change in *Appeal of Strafford County Sheriff's Office,* it "primarily affect[s] the terms and conditions of employment,

[2] The provisions of RSA 273-A cannot serve as the basis for the independent authority required under the first part of the *Appeal of State* test. *Appeal of City of Nashua Bd. of Educ.*, 141 N.H. 768, 774-775 (1997).

rather than matters of broad managerial policy." Finally, as was true in *Appeal of Strafford County Sheriff's Office,* the record indicates a contract provision covering this subject would "not interfere with public control of governmental functions."

In summary, there is no substantive legal distinction between this case and *Appeal of Strafford County Sheriff's Office* on the work schedule issue, and like the changes to the sheriff's deputies' 4-10 schedule, changes to the 4-2 work schedule here are a mandatory subject of bargaining. The County's adoption of the A-D work schedule was a prohibited practice in violation RSA 273-A:5, I (e), (g), and (i).

The remaining issues in the case are the NCEU motion to enforce the board's prior order and its' request for attorney fees. As to the motion to enforce, the board's prior order required the County to return to the status quo in place prior to June 11, 2017 pending a hearing on the complaint and also to meet and confer in an effort to resolve the issues in this case. The parties met at least three times after the order issued in an attempt to resolve this case as directed, and the County deserves credit for its participation in those discussions. However, the County did not fully comply with the status quo order. As recounted in findings of fact 19 and 20, the County briefly reverted to the 4-2 schedule (Joint Exhibit 8, p. 73, middle table), but retained the Sunday to Saturday pay period, and then transitioned to a different schedule. Despite these deviations from the requirements of the board's order, the NCEU failed to raise the matter with the board until October 18, 2017, three months after the board's order issued. This may have led the County to believe that the NCEU had acquiesced in the scheduling arrangement, pending the hearing on the complaint or at least the discussions intended to resolve the case. In any event, at this juncture, the NCEU motion to enforce is moot, as this decision supersedes our prior order. As to an award of attorney fees, we find that the NCEU has not demonstrated its entitlement to

such an award based on the record of these proceedings. We therefore do not assess whether, and in what circumstances, the board can issue an award of attorney fees in unfair labor practice proceedings under RSA 273-A:6, VI.

In accordance with the foregoing, we find that the County has committed an unfair labor practice in violation of RSA 273-A:5, I (e), (g), (h), and (i). The sub-sections (a) and (b) charges are dismissed. The County is ordered to revert to the status quo in place prior to June 11, 2017 and to refrain from implementing the Sunday to Saturday pay period in a way that changes the 4-2 work schedule or other terms and conditions, including those listed in other Article 20 provisions, except by agreement with the NCEU.

Posting: The County shall post this decision for thirty (30) days in a conspicuous place where employees affected by this decision work. The County shall complete and return a Certificate of Posting (PELRB Form C-1) within three business days after the County's receipt of this decision.

So ordered.

Date: 7/17/18

Peter Callaghan, Esq., Alternate Chair

By unanimous vote of Alternate Chair Peter Callaghan, Esq., Board Member James M. O'Mara, and Board Member Senator Mark Hounsell.

Distribution:

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