



State of New Hampshire
Public Employee Labor Relations Board

AFSCME Local 3657, Hillsborough County Sheriff's Office

v.

Hillsborough County

Case No. G-0012-22

Decision No. 2021-085

Appearances: Sean Cronin, Esq., AFSCME Council 93, Boston, Massachusetts
for AFSCME Local 3657, Hillsborough County Sheriff's Office

Carolyn M. Kirby, Esq., Goffstown, New Hampshire for
Hillsborough County

Background:

On November 25, 2019, the AFSCME Local 3657, Hillsborough County Sheriff's Office (Union) filed an unfair labor practice complaint with the Public Employee Labor Relations Board (PELRB) against Hillsborough County under the Public Employee Labor Relations Act. The Union represents full-time deputy sheriffs and other employees of the County Sheriff's Office.

The substance of the Union's complaint is as follows:

1) The Sheriff's office cancelled Extra Work/Outside Details (outside detail work) for the week of June 16, 2019 in retaliation for the failure of any bargaining unit employee to voluntarily accept overtime during the weekend of June 7, 2019 and/or because the Union had previously rejected the County's overtime standby duty proposal. The Union charges that this violates 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) and (e)(refusal to negotiate in good faith).

2) During bargaining sessions held on September 24, October 7, and October 21, 2019 the Sheriff told the Union bargaining team that outside detail work was not guaranteed which the Union understood as a threat that outside detail work would be withheld if the Union did

not agree to the County's overtime standby duty proposal. The Union claims this is also a violation of RSA 273-A:5, I(a) and (e).

3) On October 30, 2019 the Deputy Sheriff unilaterally implemented a new overtime ordering-in procedure applicable only to bargaining unit employees (and not the part-time deputy sheriff and lieutenant positions) and which changed overtime from a voluntary process in the parties' collective bargaining agreement (CBA) to ordering in deputies on a rotating basis. The Union contends this action improperly targets bargaining unit employees and discourages membership in the bargaining unit¹ by not ordering in non-bargaining unit members in the same manner as bargaining unit members. The Union claims this is a violation of RSA 273-A:5, I (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).

4) The Union claims the October 30, 2019 overtime ordering-in procedure is also a breach of CBA Article 23.2 and therefore is a violation of RSA 273-A:5, I (h)(breach of collective bargaining agreement).

5) Finally, the Union also claims that the County did not impact bargain and/or bargain the October 30, 2019 overtime ordering in procedure in violation of RSA 273-A:5, I (g)(to fail to comply with this chapter or any rule adopted under this chapter) and (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).

The Union requests that the board order the County to cease and desist from committing such violations and provide such other remedy as the board deems just.

The County denies the charges. As to the outside detail work claims, the County maintains that the Sheriff's approval of outside details is always required per the CBA, grievance arbitration is pending as to the June 16, 2019 detail work, and there was insufficient evidence to support the claims of retaliation or of threats and misconduct at the bargaining table. As to the October 30, 2019 overtime ordering in procedure memo, the County maintains that the Sheriff's managerial prerogative includes the right to call deputy sheriffs back to work to cover the statutory responsibilities of the office, call backs are an established past practice, and the October 30, 2019

¹ Presumably the Union means "union membership" since the composition of the bargaining unit is determined by the PELRB.

Memo was nothing more than an update to existing procedure to address a concern raised at the bargaining table. The County also claims the Union never filed a grievance over the memo and never requested impact bargaining to discuss overtime ordering in procedures. The County requests that the board dismiss the charges and order the Union to make the County whole for all costs and expenses the County has incurred in responding to the complaint.

This case was originally scheduled for hearing on February 12, 2020. Following the Union's request to reschedule, the hearing was moved to April 14, 2020. This hearing was cancelled because of the COVID-19 pandemic,² and subsequent pre-hearing conferences were postponed to provide the parties with additional time to resolve matters. When such efforts proved unsuccessful a hearing was scheduled for February 2, 2021. This hearing was continued because of a witness availability issue.³ Subsequently the board held a hearing on March 4, 2021 via WebEx video. Both parties filed post-hearing briefs by the April 2, 2021 deadline, and our 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 bargaining representative for certain employees of the County Sheriff's Office, including full time Deputy Sheriffs.
3. The term of the parties' most recent collective bargaining agreement was July 1, 2015 to June 30, 2019 (CBA).
4. CBA Article 5-Hours of Work and Overtime, provides:
 - 5.1 *The normal work week shall be forty (40) hours of actual work per week and the normal work day shall be eight (8) consecutive hours [of] work per day in any one day, provided however, that nothing in this provision shall in any way limit or restrict the right or ability of the Sheriff to in any way change the*

² See PELRB Decision No. 2020-070 (March 24, 2020).

³ See PELRB Decision No. 2021-021 (February 3, 2021).

starting and dismissal times for any employee or group of employees.

5.2 *Authorized time worked in excess of eight (8) consecutive hours in one day or authorized time worked in excess of forty (40) hours in one work week shall be compensated at the rate of one and one-half (1 1/2) times the employee's regular hourly rate of pay, provided, however, that in determining whether an employee is entitled to compensation at the overtime rate for authorized hours worked in excess of forty (40) hours in one regular week, any time worked in excess of eight (8) hours during a single work day shall not be counted. The overtime premium or rate shall not be pyramided, compounded, added together or paid twice for the same time worked. Absences for any reason other than an absence because of a paid holiday by those employees whose normal work week is fixed at Monday through Friday shall not be counted as hours or days worked in determining whether or not an employee is entitled to compensation at that overtime rate.*

5.3 *It shall be the duty of all able-bodied employees to make themselves available during the course of emergencies.*

5.4 *(Omitted)*

5.5 *An employee covered by this Agreement who has left his normal place of work for his residence and is called back for a specific task or job function work shall be guaranteed a minimum of four (4) hours work at time and one-half the employee's regular hourly rate of pay. Should the task or function be completed prior to the four (4) hour minimum, the employee shall be released without reduction to the minimum.*

5.6-7 *(Omitted)*

5.8 *The Sheriff will give on-duty full-time deputies the first opportunity to fill partial shift openings.*

5.9 *The Sheriff will maintain the right to fill full shifts with part-time deputies.*

5.10 *(Omitted)*

5. A deputy sheriff working CBA Article 5 overtime is still performing the statutory duties conferred upon a deputy sheriff by RSA 104:3-e through 104:15. Examples of overtime duties include transports and involuntary emergency admissions.

6. Responsibility in the Sheriff's office for staffing CBA Article 5 overtime work lies with the Officer in Charge, who sends a call back to duty text message to all deputies on their County

issued cell phones. If no one responds and voluntarily accepts the overtime work, the Officer in Charge will resort to ordering a deputy back to work. The Sheriff's office has been calling deputies back to work in this manner for many years prior to the filing of the complaint in this case.

7. Part-time deputies also perform overtime work, but their availability is limited because of restrictions on the number of hours per week they can work, and there are not enough part-time deputies to cover all overtime work. Non-bargaining unit employees like the Officer in Charge also work overtime, but budgetary considerations mean deputies must be relied on more.

8. According to a May 9, 1995 arbitration award (Union Exhibit 10), the Sheriff's office use of non-bargaining unit part-time deputies to cover night and week-end transports did not violate the version of the parties' collective bargaining agreement in effect in 1995. However, this award does not mandate that the Sheriff's office rely on part-time deputies to cover such work. Additionally, the arbitration award does not clearly and unequivocally dictate the scope of its precedential effect.

9. CBA Article 20 "Extra Work/Overtime Details" covers what is commonly known as "outside detail" work, where a third party like the City of Manchester pays the Sheriff's office to provide deputies to work assignments like traffic control, construction duties, and other assignments. It provides:

20.1 (a) Extra work/overtime details are duties, performed by a certified full time or part time Deputy Sheriff, which are not a course of his or her regular duties. Any reference below to personnel shall be certified in their respective classification.

(b) These types of assignments may be, but are not limited to the following: Traffic control, Construction duties, Escorts, Fairs, Town meetings, Hospital details, Racing events, Security or Executive protection, Parades or any other special assignment or detail that the Sheriff may designate.

....

20.2 ASSIGNMENT OF DETAILS: Once an Extra Work/Overtime Detail has been approved

by the Sheriff, the following procedures will take place for the assignment of Deputies to these details.

....

10. The Sheriff's Office contacts deputies on their County issued cell phones to staff outside detail work, and deputies can earn as much as \$12 an hour more working an outside detail than when working overtime. For years, the Sheriff's office has been able to find deputies willing to work outside details without difficulty, but the same is not true with respect to CBA Article 5 overtime.

11. During negotiations in April and May of 2019, the County made an overtime standby duty proposal providing that a deputy on standby has "to be available for work on the employee's off-duty time which may include nights, weekends, or holidays..." The proposal includes scheduling detail and a stipend schedule. See Union Exhibit 5. In early May the Union rejected the standby proposal and declared a bargaining impasse.

12. In early June the County cancelled outside details scheduled for the week of June 16, 2019 and the Union filed a grievance⁴ citing a violation of CBA Article 20 and past practice. The County denied the grievance and the Union advanced the grievance to final and binding arbitration, which is the last step of the CBA Article 16 grievance procedure. There was no evidence that the County cancelled or withheld any other outside detail work, and there was limited evidence about the failure of deputies to cooperate in staffing overtime in early June.

13. The parties held bargaining sessions on September 4, September 24, and October 7, 2019 and continued to discuss the County's standby duty proposal, including why the County felt

⁴ CBA Article 16 provides that "[f]or 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 during the term of this Agreement. Grievances are limited to matters of interpretation and/or application of specific provisions of this Agreement..." (sic)

a standby duty arrangement was necessary. The County reviewed the relative difficulty in staffing overtime compared with outside detail work. The Union made a counter-proposal at the September 4 session which the County rejected. At two of the bargaining sessions the Sheriff stated that outside details were not guaranteed, a reference to the approval language in CBA Article 20.2. There was no evidence that the Sheriff made these statements in a threatening or intimidating manner, and the Union did not question or confront the County negotiating team about the Sheriff's statements during these or any other bargaining sessions.

14. At the October 7 negotiations the Union bargaining team agreed to a "Tentative Agreement without Recommendation," inclusive of the County's standby duty proposal. However, the Union membership subsequently rejected this tentative agreement.

15. The parties resumed negotiations, on October 21, 2019. Discussion focused almost exclusively on the County's standby duty proposal, with the Sheriff again stating outside details were not guaranteed, but the parties did not reach an agreement and eventually the Union declared impasse. However, during this session, a member of the Union bargaining team complained that the same deputies were regularly called back to cover overtime. The County bargaining team commented that newer deputies were the only ones responding to call back requests, that this was a valid concern, and "it was an easy fix." There was not much discussion beyond this and there was no bargaining over this particular issue.

16. A Chief Deputy Ordering In Procedure memo dated October 30, 2019 (Union Exhibit 8) explains how the Sheriff's office will conduct and track overtime assignments going forward. This was the "easy fix" the County mentioned at the October 21, 2019 bargaining session, and it provides:

In the event that overtime becomes available a Command Staff member of the Officer in Charge (OIC) shall attempt to fill the assignment by "paging" the assignment to all eligible

personnel. If the assignment cannot be voluntarily filled the following order-in process shall be utilized.

The Command Staff member or the OIC shall order in the least senior employee to fill the assignment utilizing the number [of] "hits" that have been accumulated on a rotating seniority basis, least senior to most senior employee.

Any deputy, who is ordered in, regardless of the amount of time, shall receive a "hit" on the order in roster.

It is expected that personnel will answer their issued telephones during these situations.

If you have any questions concerning the procedure please let me know.

17. The Union never made a request that the County impact bargain the effect of how the Sheriff's office was calling back deputies to cover overtime work either before, or after, the October 30, 2019 ordering in procedure memo.

Decision and Order

Decision Summary:

The PELRB does not have jurisdiction over the Union's breach of collective bargaining agreement claims filed under RSA 273-A:5, I (h) because the last step of the CBA grievance procedure is final and binding arbitration. As to the rest of the complaint, there is insufficient evidence to prove the County committed unfair labor practices in violation of RSA 273-A:5, I (a), (c), (e), (g), or (i). The complaint is dismissed.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6. However, in this case the PELRB does not have jurisdiction to interpret the parties' collective bargaining agreement to resolve breach of contract claims since final and binding arbitration is the last step of the CBA grievance procedure. *See Appeal of Silverstein*, 163 N.H. 192 (2012). This is true regardless of whether the Union has filed a grievance. Therefore, any claim

that the County violated CBA Article 20 (outside details) when it cancelled outside details for the week of June 16, 2019, is dismissed, as is any claim that the County violated CBA Article 5 (overtime) or 23 (weekend schedule) when the Deputy Sheriff issued the October 30, 2019 ordering in procedure memo.

As to the May 8, 1995 arbitration decision (Union Exhibit 10), we do not have jurisdiction to determine whether it is binding precedent or the law of the contract for the reasons discussed in *Appeal of State*, 147 N.H. 106 (2001):

Unless the arbitral award clearly and unequivocally dictates the scope of its precedential effect, we hold that the PELRB lacks jurisdiction to determine whether, under the terms of a CBA, an arbitral award becomes the "law of the contract." Although the PELRB may find a well-reasoned arbitral award persuasive when evaluating an unfair labor practice claim, it cannot, absent a clear and unequivocal statement of precedential effect in the award itself, incorporate it into the terms and conditions of a CBA under the "law of the contract" doctrine.

Here, the State and the SEA agreed to submit unresolved grievances arising out of the CBA to arbitration. The CBA arbitration provision gives the arbitrator the power to interpret or apply the terms of the CBA and it provides that his or her decisions shall be "final and binding." The CBA provides no guidance on whether arbitral awards become the "law of the contract." The 1992 and 1993 arbitral awards contain no indication as to whether they were intended to become the "law of the contract" and the parties to those awards never submitted this issue to arbitration. Accordingly, whether the terms of the CBA establish arbitration as binding precedent or the "law of the contract" is a matter of contract interpretation for an arbitrator, not the PELRB.

Id. at 110-111 (quotations in original).

Discussion:

I. Cancellation of June 16, 2019 Outside Detail – RSA 273-A:5, I (a) and (e)

The Union contends the cancellation of this outside detail work was not only a breach of CBA Article 20⁵, it was also: 1) an attempt to coerce the Union to accept the County's standby duty proposal; 2) in retaliation for the failure of any deputy to voluntarily accept overtime the weekend of June 7, 2019; and 3) a violation of the County's obligation to negotiate in good faith.

⁵ The claim that is the subject of the pending grievance arbitration.

These claims are all based on the assumption that deputies were otherwise entitled to outside detail work during the week of June 16, 2019 and they overlap with the pending grievance arbitration. However, assuming claims of coercion, retaliation, and violation of good faith bargaining with respect to the cancellation of the outside detail work are properly before us, there is insufficient evidence to prove these charges.

The County's and the Union's obligation to bargain in good faith is set out in RSA 273-A:3, I, which provides:

It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. "Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.

The outside detail work was cancelled approximately a month, if not more, after the Union had rejected the County's standby duty proposal.⁶ Given the passage of time, and the fact that outside detail work was otherwise made available, the evidence is insufficient to establish that the cancellation was a reaction of any kind to the Union's bargaining position or a failure to bargain in good faith in violation of sub-sections (a) and/or (e).

II. Sheriff's Statements that Outside Details are not Guaranteed – RSA 273-A:5, I (a) and (e)

The Union argues the Sheriff's statements that outside details are not guaranteed was also an attempt to coerce the Union into accepting the County's standby duty proposal and a violation of the County's obligation to bargain in good faith. We evaluate this portion of the Union's complaint with the understanding that parties should be able to discuss, explain and defend their positions on particular bargaining proposals during negotiations. The free and open exchange of

⁶ There was also some reference at hearing to the failure of deputies to cover overtime work one to two weeks prior to the cancellation. However, the Union did not address or elaborate on this in its brief.

such information is an acceptable and necessary component of bargaining. There must be some flexibility in the range of acceptable “give and take” in order for the process to work, but the law does not allow for threats, intimidation, and coercion. In reviewing the Sheriff’s comments in the context of the entire negotiations, we consider, to the extent ascertainable, his intent and demeanor, the context, whether the statement is factual and relevant, the frequency of the statement, and the actual or likely effect of the statement. Here, the Sheriff’s comment was a clear reference to the approval language set forth in CBA Article 20. Although he repeated the statement on at least three separate occasions, he apparently made the comment in a matter of fact manner. There is no evidence that he ever expressed any intent to take specific action to actually limit or withhold outside details or that any such action was ever taken. In other words, it does not appear that the County ever had any genuine intent or interest in actually reducing the availability of outside detail work in order to gain an advantage at the bargaining table or for any other reason. The context in which the comment was made included ongoing difficulties in staffing overtime as compared to outside details, and the comment is relevant given this background and history. There is no indication that his comments actually affected how the Union conducted negotiations or responded to the County’s standby duty proposal. There was also no evidence that the Union complained about the Sheriff’s statements at the time they were made. Based on these factors and considerations, there is insufficient evidence to find that the Sheriff’s conduct constituted an unfair labor practice in violation of sub-sections (a) or (e).

III. October 30, 2019 Ordering In Memo – RSA 273-A:5, I (c), (g), (i)

Overtime work, such as night and weekend transports and involuntary emergency admissions, is required to fully discharge the duties of the Sheriff’s office. For many years the Sheriff or Officer in Charge has contacted deputies on their County issued cell phones to notify

deputies of overtime work “opportunities” with the expectation that deputies will respond so that the work can be assigned. However, the response rate has been poor, which compels the Officer in Charge to order in an individual deputy. It is true that part-time deputies and non-bargaining unit employees (like the Officer in Charge) have also covered overtime work in the past. However, there are good reasons why the County cannot and does not regularly depend on these employees to staff overtime. The availability of part-time employees is limited, and for budgetary reasons it is more cost effective to have deputies work overtime instead of a non-bargaining unit employee like the Officer in Charge. Over time, newer deputies have received more overtime assignments than other deputies as was mentioned at the October 21 bargaining session. This resulted in the October 30, 2019 memo.

The Union claims the County is using the memo to target deputies to encourage or discourage Union membership⁷ in violation of sub-section (c). However, other than pointing out that in the past part-time deputies and non-bargaining unit employees, like the Officer in Charge, have covered overtime, the Union does not adequately explain why we should reach the conclusion that Union membership is being discouraged based on the evidence submitted. Further, the record does not otherwise lead us to find that such an unfair labor practice has occurred. We are not persuaded that the County has violated sub-section (c) as charged.

The Union has also pleaded a sub-section (i) claim, which requires evidence that the memo constitutes a “rule” which invalidates a provision of the CBA. However, the Union has not adequately explained and addressed how any particular CBA provision has been invalidated. To the extent the premise for this claim is that previously deputies performed overtime exclusively on a voluntary basis, we note the evidence is to the contrary. The Sheriff’s office has resorted to

⁷ In its complaint, the Union says membership in the bargaining unit, but employees cannot “join” a bargaining unit. They can join the Union.

ordering in deputies to work overtime for years as necessary. Further, the memo preserves the same approach to staffing overtime on a voluntary basis in the first instance as happened prior to October 30. The memo states that the Officer in Charge “shall attempt to fill the assignment by ‘paging’ the assignment to all eligible personnel. If the assignment cannot be voluntarily filled the following order-in-process shall be utilized...” See Union Exhibit 8. There is insufficient evidence to support the Union’s sub-section (i) claim.

This leaves the Union’s failure to bargain claim. In general, the County is obligated to negotiate the “terms and conditions of employment” with the Union, defined under RSA 273-A:1, XI as:

[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.

Id. See also RSA 273-A:3, I. The extent of the County’s obligation to negotiate various matters is resolved by the court’s three-step analysis, which provides:

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, 724 (1994)(emphasis added). As discussed already, the memo doesn’t convert overtime from a voluntary to non-voluntary status, as deputies have been ordered in to work overtime for years prior to 2019. Additionally, the County’s decision to assign or order

deputies to work overtime to perform the duties of the Sheriff's office is within the County's managerial rights under *Appeal of State*, although the parties have negotiated other matters relating to overtime, as set forth in CBA Article 5. However, neither the inclusion of Article 5 in the CBA nor the County's failed standby duty proposal serve to divest or restrict the Sheriff's office of its right to order deputies to work overtime. The October 30, 2019 memo simply updates how the County is exercising its managerial prerogative to call in deputies to work overtime. The Union's brief does not include any persuasive discussion or legal analysis which leads to a different conclusion. There was also no evidence that the Union requested impact bargaining as to the County's exercise of its managerial prerogative either before or after the memo was issued. Accordingly, we do not find any violation of the County's obligation to bargain with respect to the October 30, 2019 memo.

For the foregoing reasons, the Union's requests for relief are denied.

So ordered.

May 17, 2021

/s/ Peter G. Callaghan
Peter G. Callaghan, Esq.
Chair/Presiding Officer

By unanimous vote of Alternate Chair Peter G. Callaghan, Esq., Board Member Carol M. Granfield, and alternate Board Member Glenn Brackett.

Distribution: Sean R. Cronin, Esq.
Carolyn M. Kirby, Esq.