

**THE STATE OF NEW HAMPSHIRE**  
**SUPREME COURT**

**In Case No. 2006-0858, Appeal of the City of Manchester,  
the court on January 18, 2007, issued the following order:**

Appeal from administrative agency is declined. See Rule 10(1). City of Manchester's motion to stay is, therefore, moot.

Under Supreme Court Rule 10, the supreme court has discretion to decline an appeal from an administrative agency. No appeal, however, is declined except by unanimous vote of the court with at least three justices participating.

This matter was considered by each justice whose name appears below. If any justice who reviewed this case believed the appeal should have been accepted, this case would have been accepted and scheduled for briefing.

Declined.

Broderick, C.J., and Dalianis, Duggan, Galway and Hicks JJ., concurred.

**Eileen Fox,  
Clerk**

**Distribution:**

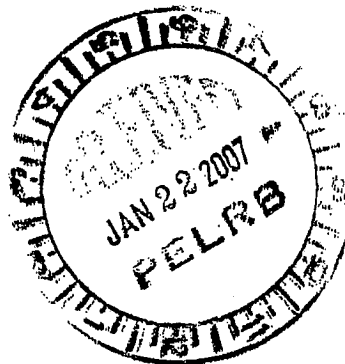
NH Public Employee Labor Relations Board #2006-126, 2006-173

James W. Donchess, Esq.

Daniel D. Muller Jr., Esq.

Attorney General

File



NH Supreme Court declined  
appeal of this decision on  
1-18-2007.  
(NH Supreme Court Case No.  
2006-0858)



**State of New Hampshire**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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City of Manchester Police Department

Complainant

v.

Manchester Police Patrolman's Association

Respondent

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Case No: P-0706-37

Decision No. 2006-126

APPEARANCES

Representing the Complainant:

David Hodgen, Chief Negotiator, City of Manchester

Representing the Union:

Deborah A. Notinger, Esquire, Donchess & Notinger, Professional Association

BACKGROUND

The City of Manchester Police Department (hereinafter "City") filed an unfair labor practice complaint on March 10, 2006 alleging that the Manchester Police Patrolman's Association (hereinafter "Union") committed unfair labor practices in violation of RSA 273-A:5 II (f), by its actions in demanding arbitration of a grievance that it filed against the City related to the City's creation of an additional shift within the Police Department, referred to as the "jeep shift", and prohibiting K-9 police officers from bidding onto that shift. The City asserts that any of its actions in this regard were properly undertaken as an exercise of management rights and that the Union's demand for arbitration violates RSA 273-A:5,II (f).

The Union filed its answer denying the Union's charge on March 23, 2006 and a Motion to Dismiss. While the Union generally admits to the chronology of events as described in the City's complaint, it denies that it has committed any improper labor practice and is entitled to have its grievance heard by an arbitrator, claiming that the City's actions constitute a breach of Section 8.3 of the parties collective bargaining agreement (CBA).

A pre-hearing conference was conducted on June 8, 2006. On July 18, 2006 a final hearing was scheduled. The parties stipulated to a total of 15 mutually agreed facts for the Board's consideration as appear below, the Board found additional facts listed as Findings #1, #2, #14, #15 and #20 from uncontested offers of proof and the CBA, itself. At the outset of the hearing, the Union's Motion to Dismiss was first considered by the Board. Offers of proof and oral argument were presented by the parties at this time. At the conclusion of argument of this issue, the Board recessed to consider whether or not to dismiss the City's complaint before proceeding further to a consideration of the merits, if necessary. The Board re-convened following its recess and informed the parties that it had reached a majority decision to dismiss the City's complaint by vote of 2-1, with Board Member James M. O'Mara, Jr. dissenting, and stating that this written order would subsequently issue from the Board.

#### FINDINGS OF FACT

1. The City of Manchester ("City") is a public employer within the meaning of RSA 273-A:1 X.
2. The Manchester Police Association ("Union") is the duly certified exclusive bargaining representative for certain individuals employed by the District.
3. The City and the Union are and have been parties to a collective bargaining agreement (hereinafter "CBA"), effective from July 1, 2004 through June 30, 2007.
4. The CBA does not state that an arbitrator can decide questions of arbitrability.
5. In 2005, Chief John Jaskolka (hereinafter "Chief Jaskolka") reestablished a fourth workshift, effective January 3, 2006, on an experimental basis, to start at 6:30 p.m. and end at 3:00 a.m. known as the "jeep shift".
6. The Union has not demanded negotiations regarding the reestablishment of the jeep shift.
7. Chief Jaskolka decided that the number of officers assigned to the jeep shift would be limited to eight (8), plus (1) officer who was on light duty. There are approximately thirty (30) officers [in the three Patrol Reliefs] assigned to each of the other three (3) work shifts.

8. Prior to January 3, 2006, one or more of the Police Department's eight (8) canine officers submitted shift selection request sheets, pursuant to Article 8.3 (A) of the CBA, asking to be assigned to work the jeep shift.
9. Chief Jaskolka decided that no (0) canine officers would be assigned to work the jeep shift.
10. On or about December 16, 2005, the Union filed a grievance, alleging a violation of Section 8.3 of the CBA.
11. On January 6, 2006, the parties met to discuss the grievance, and discussed settlement proposals, without success. The Department announced that it believed that the matter is precluded from arbitration.
12. On or about January 25, 2006, the Union filed a request for the appointment of an arbitrator with the PELRB.
13. On March 10, 2006, the City, believing that the matter is not arbitrable, filed the instant unfair labor practice complaint with the Public Employee Labor Relations Board.
14. The parties' CBA contains a grievance procedure within ARTICLE 7 that defines, in relevant part, a grievance as meaning "a claim or dispute arising out of the application or interpretation of this Agreement."
15. There is no provision in the parties' CBA that prohibits K-9 officers from bidding for any shift.
16. Section 8.3 of the Collective Bargaining Agreement with the MPPA and the City (the "CBA") states:
  - 8.3(B) Shift selection will occur twice per year with all non-probationary officers... Shift selection by seniority will apply to bargaining unit members in the Patrol Division only.
  - 8.3(D) K-9 Officers will select their shifts by seniority within their specialty areas.
17. Detectives at the Manchester Police Department are not within the Patrol Division.
18. Juvenile officers at the Manchester Police Department are not within the Patrol Division
19. Officers within the Patrol Division did bid for the Jeep Shift under Section 8.3 of the CBA.
20. Canine Officers are police personnel within the Patrol Division.

## DECISION AND ORDER

### JURISDICTION

The PELRB has exclusive original jurisdiction over the question of whether a party to a dispute is entitled to submit an issue to arbitration where the parties have not specifically otherwise granted that authority to an arbitrator. This is a threshold consideration often referred to as "determining the arbitrability" of an issue. In this matter, the parties have not expressly granted that authority to an arbitrator by the terms of their CBA. Without that specific reservation of authority to an arbitrator, the PELRB assumes jurisdiction to determine whether to refer the matter to arbitration. (See *Appeal of Hinsdale Federation of Teachers*, 138 N.H. 88, 90 (1993); *Appeal of AFSCME Local 3657 Londonderry Police Employees*, 141 N.H. 291 (1996); *Appeal of Belknap County Commissioners*, 146 N.H. 757, 761 (2001) It may also find that a party's request for arbitration constitutes a wrongful demand to use that forum in breach of the parties' collective bargaining agreement and, thereby, constitutes the commission of an unfair labor practice as provided in RSA 273-A:5, I (h) and RSA 273-A:5,II (f); See RSA 273-A:6,I.

### DISCUSSION

Under the terms of the parties CBA, contract interpretation of the substantive rights embodied within it is assigned to an arbitrator. However when, as here, the parties have not specifically assigned to the arbitrator the authority to determine whether or not an issue is arbitrable, then the decision to determine whether a matter requires arbitration is assigned to the PELRB. See *School District #42 of the City of Nashua v. Michael Murray et al.* 128 N.H. 414, 419 (1986). Further, as recently reiterated in *Appeal of the City of Manchester*, 153 N.H. \_\_ decided February 24, 2006, such a determination may require the PELRB to necessarily undertake some threshold level of interpretation of the terms and conditions within the CBA. In doing so, the Board looks to determine whether the instant dispute presents a "colorable issue of contract interpretation". *Appeal of Westmoreland School Board*, 132 N. H. 103, 109; cited in *Appeal of AFSCME 3567, Londonderry Police Employees*, 141 N. H. 291,295.

Before considering the merits of the City's complaint of unfair labor practice against the Union, we must first consider whether or not to grant the separate Motion to Dismiss filed by the Union. In doing so, we apply the common standard of New Hampshire courts which calls upon us to accept as true all of the City's properly pleaded facts and construe all reasonable inferences arising from those facts in a light most favorable to the City. However, we need not accept statements in the City's complaint that are merely conclusions of law. Our task is facilitated by the parties' respective positions which do not significantly differ as to material and relevant facts as appear above, the content of their respective offers of proof offered during the hearing on the Union's motion to dismiss and the express language of their collective bargaining agreement.

The present matter arises from a grievance filed by the Union as a result of the Police Chief refusing to consider canine officers for assignment to the service shift referred to as the "jeep shift". A grievance is expressly defined in the parties mutually agreed CBA as "a claim or dispute arising out of the application or interpretation of this Agreement". ARTICLE 7 – GRIEVANCE PROCEDURE, Joint Exhibit #1, p.7. The parties further provide in their CBA that unless they are able to resolve a grievance at an earlier stage, the grievance shall be referred to an arbitrator whose decision "shall be final and binding upon the parties as to the matter in dispute."

When we review the complaint in its entirety and measure it against the standard related to dismissal stated above, we do not find that the City has stated sufficient facts from which we can determine nor deduce the requisite inferences that would allow us to avoid concluding that the parties did not intend the instant dispute to be subject to arbitration. What we are left with is the City's assertion that the so-called "MANAGEMENT'S RIGHTS" provision in the parties' CBA permits the police Chief to prohibit certain officers in the Patrol Division from appointment to the "jeep shift" he had re-established. See Joint Exhibit – CBA, ARTICLE 2. Such an assertion represents a conclusion of law that we need not and do not accept as a vehicle to avoid arbitration under the circumstances of this dispute.

While the parties' to this CBA have agreed to certain reservation of rights to the Police Chief as expressed in the management's rights clause, they have also bargained to agreement on how rights to bid shift assignments would be exercised. This method by which officers within the Patrol Division, including canine officers, could bid on shift assignments is expressed in ARTICLE 8.3 – SHIFTS BY SENIORITY. There, they agreed that,

8.3(B) Shift selection will occur twice per year with all non-probationary officers... Shift selection by seniority will apply to bargaining unit members in the Patrol Division only.

8.3(D) K-9 Officers will select their shifts by seniority within their specialty areas.

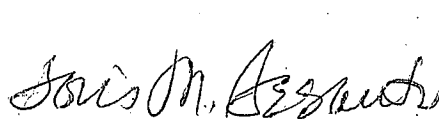
The application of these two provisions gives rise to the instant dispute and in the opinion of the majority a "colorable issue of contract interpretation" is presented by the imprecise language as applied to the circumstances presented here. What may be understood by one party as a clear reservation contained in a particular provision is understood to have been specifically addressed by the other party in a separate provision of the CBA. The need for substantive contract interpretation is obvious to the majority.

The presumption of arbitrability remains under the existing language of the parties' CBA as we do not find a preclusion from arbitrability that appears in ARTICLE 8.2 of the CBA to apply to the canine officers. Despite the allegations and reasonable inferences therefrom contained in the City's filings being viewed in the more favorable light, the majority cannot say with the requisite

"positive assurance" that this dispute should not be referred to arbitration. Therefore, the unfair labor practice complaint is dismissed. The parties are commended for their cooperation in presenting this dispute before the Board, but the substantive interpretations necessary to a resolution of this dispute must be resolved by an arbitrator. The parties shall therefore proceed to arbitration forthwith.

So ordered.

Signed this 31<sup>ST</sup> day of August, 2006.



Doris M. Desautel, Alternate Chair

By majority vote. Alternate Chair Doris M. Desautel presiding and voting in the majority joined by Board Member E. Vincent Hall.

#### DISSENT

I respectfully disagree with my fellow members' decision in dismissing the City's complaint. I do not believe that the matter should be dismissed because I do feel that a complete reading of the parties' CBA leads to an opposite result. The last sentence in Paragraph 2 of ARTICLE 8.2 states, "The decision of the Chief of Police shall be final and shall not be subject to the Grievance Procedure." I read this statement as a more general preclusion of issues arising from officer assignment from the grievance process than does the majority. This is particularly true when coupled with the provision appearing in the CBA, ARTICLE 2 - MANAGEMENT'S RIGHTS, that expressly reserves to the Police Commission and Police Chief the authority to "determine the methods, means and personnel by which the Police Department's operations are to be conducted." My reading of both of these provisions of the CBA, absent testimony to the contrary, leads me to conclude "with positive assurance" that the management rights reserved to the City under the CBA provisions unambiguously permits the City to create the so-called "jeep shift" and that the Chief's assignment of such staff as he deems appropriate is not precluded by any provision in the parties' agreement. The City has alleged sufficient facts in its filings, that when viewed in the more favorable light, sufficiently establishes a legitimate complaint that the Union's demand for arbitration constitutes an unfair labor practice. I would deny the Union's motion to dismiss the City's complaint in favor of hearing from the parties how this article has historically been applied.

Signed this 31<sup>st</sup> day of August, 2006.



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James M. O'Mara, Jr., Board Member

Distribution:

David Hodgen, Chief Negotiator, City of Manchester

Deborah A. Notinger, Esq.

James W. Donchess, Esq.





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Case No. P-0706-37

Decision No. 2006-173

ORDER ON MOTION FOR REHEARING

The Board has considered the City of Manchester Police Department's "Motion for Rehearing" and took the following actions:

1. Pursuant to RSA 541 and N.H. Admin R. Pub 205.02, it reviewed City of Manchester Police Department's Motion for Rehearing filed on September 28, 2006.
2. It examined its previous decision, PELRB Decision No. 2006-126, issued in this matter on August 31, 2006.
3. It reviewed the previous filings of the parties in this matter.
4. It DENIED the City of Manchester Police Department's motion by a majority vote consistent with each member's previous decision on the matter.

So ordered.

Signed this 26<sup>th</sup> day of October, 2006.

  
DORIS M. DESAUTEL  
Chair

By majority vote. Alternate Chair Doris M. Desautel presiding and E. Vincent Hall voting in the majority. Board member James M. O'Mara, Jr. voting in the minority.

Distribution:

Daniel D. Muller, Jr., Esq.

James Donchess, Esq.