NH Supreme Court affirmed this Decision on 7-18-2003, Slip Op. No. 2000-342 (NH Supreme Court Case No. 2000-342).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NASHUA POLICE PATROLMAN'S ASSOCIATION Complainant v. CITY OF NASHUA, POLICE DEPARTMENT Respondent	CASE NO. P-0740:11 DECISION NO. 2000-020

APPEARANCES

Representing Nashua Police Patrolman Association:

James Donchess, Esq.

Representing City of Nashua:

James McNamee, Esq.

Also appearing:

James E. Mulligan, Nashua Police
Donald J. Gross, Nashua Police Department
Thomas Felch, Nashua Police Department
Dona D. Conley, Nashua Police Department
Thomas McLeod, Nashua Police Department
Richard Bailey, Nashua Police Department
John Fisher, Nashua Police Patrolman Association
Chris Peach, Nashua Police Patrolman Association

BACKGROUND

The Nashua Police Patrolman's Association (Union) filed unfair labor practice (ULP) charges on December 3, 1999 against the City of Nashua Police Department (City) alleging violations of RSA 273-A:5 I (e), (h) and (i) resulting from breach of contract and failure to

bargain when a standard operating procedure (SOP) was unilaterally implemented by the City, contrary to negotiations and to Article 26 of the collective bargaining agreement (CBA). The City filed its answer and a motion to dismiss on December 20, 1999 after which this matter was heard by the PELRB on January 11, 2000. The record was closed after receipt of post-hearing briefs from the Union on January 24, 2000 and from the City on January 26, 2000.

FINDINGS OF FACT

1. The City of Nashua, by and through the Nashua Police Commission, operates a police department and, in so doing, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Nashua Police Patrolman's Association is the duly certified bargaining agent for sworn full-time, non-probationary officers of the Nashua Police Department below the rank of sergeant.

3. The City and the Union are parties to a collective bargaining agreement for the period July 1, 1998 through June 30, 2002, notwithstanding that that agreement was not signed until on or about September 15, 1999. Article 10 of the CBA provides a comprehensive grievance procedure, which, if settlement is not achieved after a grievance is processed by the Nashua Police Commission, permits the Union to submit the grievance to the American Arbitration Association, the Public Employee Labor Relations Board or the Hillsborough County Superior Court. The 1998-2002 CBA also contains provisions pertaining to "Court Time" at Article 26. It reads:

> For time in court, employees shall be paid time and one-half the regular rate of pay. All court overtime shall be for a minimum of three (3) hours, provided that if the three (3) hour minimum overlaps with regular duty time, overtime may shall be paid based upon hours worked. The Department will notify an employee of the need to appear in Nashua District Court at least twenty-four (24) hours in advance. The Department shall notify an employee of the cancellation of a Nashua District Court appearance at least twenty-four (24) hours in advance. If the Department does not give twenty-four (24) hours notice of a Nashua District Court appearance or cancellation, the Department shall pay the employee one (1) hour of overtime compensation in addition

to any other amounts due.

4. The subject of "court time" is not new to the on-going negotiations between these parties. On June 1, 1999, the Union filed a ULP (Case No. P-0740:9) about the former contract language which pertained to court time, to wit:

> For time in court, employees shall be paid time and one-half the regular rate of pay, less court witness fees. All court overtime shall be for a minimum of three (3) hours, provided that if the three (3) hour minimum overlaps with regular duty time, over-time pay shall be only for hours in court in excess of the regular duty schedule. No district court cases are to be scheduled on the department-wide shift change date. (Union Exhibit No. 8.)

That ULP claimed that on or about January 29, 1999, the Nashua Police Department (NPD) promulgated a policy (Exhibit E to City Answer, Case P-0740:9) limiting unit members to only one three (3) hour minimum even in instances where multiple court appearances were involved. Before this matter went to hearing as scheduled for July 15, 1999, the parties requested, by joint stipulation, that this matter be continued on the PELRB's docket until they shall have reviewed, ratified or rejected their tentative agreement for the 1999-2002 CBA, with the caveat that joint ratification would dispose of the ULP charges in Case No. 0740:9. Decision No. 1999-065 (July 9, 1999). The tentative agreement was ratified and the ULP was dismissed. Decision No. 1999-102 (October 13, 1999) with the result that Article 26 was amended to read as shown in Finding No. 3, above.

5. The foregoing ratification of new contract language was verified in testimony from Det. Thomas MacLeod, current Union president, who confirmed that the unit members had ratified the tentative agreement. Notification provisions were an important part of that new language and were part of a *quid pro quo* for the Union's agreeing to the new interpretation of the "three hour minimum" as opposed to its former position that each separate appearance was a distinct event with an entitlement for its own three hour minimum. MacLeod explained how the Union originally sought a 72 hour notice period because last minute notices were regularly impacting days off (Union Exhibit

No. 9), how the City sought language limiting three hour minimums to only one "per calendar day" (Union Exhibit No. 10) and how the ultimate language settled on a 24 hour notice provision (Union Exhibit No. 11.) with the burden of giving that notice being on the NPD, i.e., "the Department shall notify an employee of the cancellation..." and "If the Department does not give twenty-four (24) hours notice...." MacLeod said that without the compromise to a 24 hour notice, the Union would not have agreed to the provisions which ultimately led to the dismissal referenced in Decision No. 1999-065 and to the language currently appearing at Article 26.

6. Officer Christopher Peach is the Union vice president and has six years of experience on the executive board. He has been involved in four of the last five contract negotiations, including the 1999 negotiations. His experience up to and through those negotiations was that court cancellation notices would be by "court slips" (e.g., City Exhibit No. 3 and Union Exhibit No. 1), phone calls or pagers. He testified that as of July of 1999, "notice" meant being contacted by a supervisor of the legal bureau about his appearance in or cancellation of court.

7. Officer John Fisher is a community relations officer and union treasurer. He testified that prior to September of 1999, notices of appearances or cancellations were in writing. Before and as of July of 1999, "notice" meant in writing and "occasionally to be telephonically."

8. Notwithstanding the foregoing bargaining history and testimony, after negotiations were concluded and ratification occurred, the NPD issued a new SOP pertaining to "Court/ALS Appearance - Notifications and Cancellations." The Union found two provisions thereof to be contrary to its understanding of the contract and past practice, to wit:

   C. An enclosed bulletin board is designated near the rear employee's entrance for all court scheduling and ALS Hearings. The time of day members/employees are required to appear for court or an ALS hearing will be noted on the scheduled [sic] or if an appearance has been cancelled. The date and time the information was posted or canceled will be listed on the

form.

D. It is the responsibility of all members/ employees to check the bulletin board regularly to become aware of court cases and ALS Hearings and to maintain an awareness of any changes to status of cases scheduled. (Union Exhibit No. 12)

MacLeod testified that, during the negotiations process, neither side suggested that the notice provisions of the "new" Article 26 were intended to change the responsibilities for notifying officers about court and ALS appearances or cancellations. Likewise, Deputy Chief Donald Gross, a member of the City negotiation team, said that there were no demands or requests from the Union during negotiations to clarify the need for or methodology involving either phone-in or in-person notification. The foregoing SOP carried an effective date of October 15, 1999. (Union Exhibit No. 12) The Union filed a grievance on September 22, 1999. (Union Exhibit No. 13.) That grievance was denied by the Nashua Police Commission by letter of October 28, 1999 (Union Exhibit No. 14.) This ULP then followed, allegedly a cause for this matter to be dismissed, according to the City's Motion to Dismiss, because the Union did not pursue the matter through the last step of the grievance process, presumably arbiration though the American Arbitration Association.

9. Richard Bailey, a 24 year veteran of the department, was a captain in charge of the legal bureau, the prosecutorial branch of the police department, from 1986 to 1996. The bureau is responsible for managing upwards of 25 to 40 criminal matters a day, an equal number of arraignments and juvenile cases. It is also responsible for police officer attendance at those proceedings. He explained the historical progression of announcing cancellations in hearings at roll call (or phoning or making a radio call to officers not at roll call) which was followed by a slip notification system. Officers scheduled to be on vacation were required to notify the bureau of their status. If a hearing was scheduled during an officer's vacation, the bureau would seek a continuance, attempt to arrange a plea or *nol pros* the complaint. He said court notices have appeared on a bulletin board from 1976 to the current time and that it is a "rare

exception" when officers are ordered to be present in Superior Court by the county attorney. On cross examination, he said it has been "a constant" from 1976 to 1999 that officers have been given a radio or telephone call, a slip or have had personal contact from the department when it has been necessary to notify them of a canceled hearing. He acknowledged that the new SOP (Union Exhibit No. 12) shifts the burden to the police officer to be informed about changes in scheduled court proceedings.

10. James Mulligan, a captain in the department, headed the legal bureau from 1996 to 1998. He testified that the three-part notification slips worked until they were abandoned when the new SOP (Union Exhibit No. 12) became effective. He thought the three-part notification slips worked better than any notification methodology which preceded them. In the case of last minute hearing cancellations during his tenure as head of the legal bureau, Mulligan would call the officer involved. There is no evidence that such calls are outside the scope of or prohibited by the new SOP.

11. Donald Conley, the captain responsible for the legal bureau since September of 1998, designed the new SOP and described it as working "very well." Cancellations made a "couple of days in advance" are posted and phone calls are "not usually" made to the officer involved. Short-term, pre-weekend cancellations are given (City Exhibit No. 9) to the desk sergeant who then handles inquiries. Both the bulletin board and the computer docket (City Exhibit No. 8) are supposed to be updated daily. He acknowledged the practice of trying to notify officers of cancellations by telephone but said there are problems when there is no answer. When asked it this issue ever rose to the level of discussions or proposals in the negotiations process, Conley said that he had never brought it up formally.

DECISION AND ORDER

The City's Motion to Dismiss is denied. By pursuing this matter to the PELRB, the Union has done no more and no less than to utilize the process agreed to by the parties in Article 10 of the CBA. (Finding No. 3.) If it had been the intent of the parties to restrict the choices available to the Union after Step 4 of the grievance procedure, then the language of Step 5 would need to be more

restrictive than the current provisions which contemplate further proceedings in any one of these forums, the American Arbitration Association, the Public Employee Labor Relations Board or the Hillsborough County Superior Court.

Our review of the record, especially as recited in Finding Nos. 3, 4 and 5, is cause to conclude that the parties, either directly or indirectly, have negotiated over the over the issue of notice, certainly to the extent the "Court Time" language of the current CBA (Finding No. 3) reads differently and more specifically than the earlier "Court Time" language (Finding No. 4). Union testimony (Finding No. 5) explains a cause or reason for that change. Departmental testimony, on the other hand, suggests that the issue of the manner of notification was not raised in negotiations by management (Gross, Finding No. 8 and Conley, Finding No. 11). Taking the testimony about the negotiations process as a whole, as it was presented to us, we find that there was a *quid pro quo* for the "new" contract language referenced in Finding No. 3, inclusive of The "Department shall notify ..." provisions.

It is also apparent that there developed, over at least thirteen years, a protocol for notifying officers of cancellations. Regardless of the reiteration of that protocol at any time prior to the implementation of the "new SOP," in each instance the initiative or responsibility for notification has been on the Department (Finding Nos. 6, 7, 8, 9 and 10). If, then, there is a desire by a party, i.e., the City, to change a practice of long duration, it is the responsibility of that party to initiate talks to implement such a change. The record shows that the City did not make such a proposal (Finding Nos. 8 and 11). To the contrary, the City agreed to the language now found at Article 26 (Finding No. 3). Bypassing for a moment the "clear language" implications of Article 26 as it is now written, without express provisions or understandings as to changes in a past practice, whether memorialized by contract, side bar or another mutually acceptable means, the past practice will prevail and continue as a *status quo* working condition.

This case need not, however, be decided solely or in part by the strength of past practice. The "clear language" of Article 26, as discussed in Finding Nos. 3 and 5, places the burden for notification clearly on the shoulders of the Department, e.g., "The Department shall notify..." and "If the Department does not give 24 hours notice....." Obligations this explicit appearing in the CBA, a bilateral instrument, cannot be voided by the unilateral imposition of a contrary SOP by one of the parties. The City is not protected by "managerial policy exclusions" of RSA 273-A 1:XI because it is not the scheduling and manpower issues which are controlling in this case. While scheduling and manpower issues may be protected as being within the exclusive managerial authority of the public employer, the issue

of notice and the methodology used in giving that notice are not protected because they "primarily affect terms and conditions of employment, rather than matters of road managerial policy." Appeal of State of New Hampshire, 138 NH 716, 722 (1994). Notwithstanding what the parties have already negotiated, the issue of giving notice does not intrude into the functions, programs and methods of the public employer, such as to permit the public employer to be able to make unilateral changes in the manner of giving notice or to avoid contractually negotiated language.

The actions of the City, through its administrative and managerial control of the Nashua Police Department (1) are violative of the obligation to bargain found at RSA 273-0A:5 I (e) which was triggered when the SOP was implemented without negotiations and displaced an exiting past practice, (2) constitute a breach of contract relative to Article 26 and is violative of RSA 273-A:5 I (h) and (3) violate the proscription found at RSA 273-A:5 I (h) against adopting any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer. The City is directed to CEASE and DESIST from these practices and to return forthwith the *status quo* as it existed prior to the implementation of the "new SOP".

So ordered

Signed this 8th day of a March, 2000.

JACK BUCKLEY

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting