



NH Supreme Court reversed this decision on December 8, 1999, Slip Op. No. 97-141, Appeal of the City of Manchester, 144 NH 386 (1999).

**State of New Hampshire**

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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CITY OF MANCHESTER POLICE	:	
DEPARTMENT	:	
	:	
Complainant	:	CASE NO. P-0706:29
	:	
v.	:	DECISION NO. 96-100
	:	
MANCHESTER POLICE	:	
PATROLMAN'S ASSOCIATION	:	
	:	
Respondent	:	
_____		:

APPEARANCES

Representing City of Manchester:

David Hodgen, Chief Negotiator

Representing Manchester Police Patrolman's Association:

Edward Kelly  
Kathy M. Sinclair, Esq.

Also appearing:

Mark Driscoll, Manchester Police  
Gregory J. Murphy, Manchester Police

BACKGROUND

On July 22, 1996, the City of Manchester filed unfair labor practice charges alleging violations of RSA 271-A:5 II (f) and (g) for requesting arbitration of an inarbitrable matter. The relief requested included a stay of arbitration proceedings pending the Board's decision. On July 29, 1996, the Manchester Police Patrolman's Association filed its response. A hearing was held before the PELRB on September 26, 1996. On October 23, 1996, the City of Manchester renewed its Motion for an Interim Cease and Desist Order. The Association filed its answer on October 25, 1996. The City's request was denied on October 31, 1996.

FINDINGS OF FACT

1. The City of Manchester (City) employs police officers and other personnel in the operation of the Manchester Police Department and thereby is a public employer within the meaning of RSA 273-A:1 X.
2. The Manchester Police Patrolman's Association (Association) is the duly certified bargaining unit for police officers employed by the City of Manchester.
3. The City and the Association are parties to a collective bargaining agreement (CBA) for the period beginning July 1, 1991, and ending June 30, 1994, the terms of which may be expressly terminated or changed at the end of the contract period in accordance with the Duration Clause, Article 30. Neither party exercised the aforementioned option.

Other relevant articles of the CBA are:

Article 2. MANAGEMENT'S RIGHTS

- 2.1 The Commission and the Police Chief will continue to have, whether exercised or not, all the rights, powers and authority heretofore existing, including, but not limited to the following: The Commission and/or the Police Chief will determine the standards of services to be offered by the Police Department, determine the standards of selection for employment, direct its employees: take disciplinary action, relieve its employees from duty because of lack of work or for other legitimate reasons: issue and enforce rules and regulations: maintain the efficiency of governmental operations: determine the methods, means and personnel by which the Police Department's operations are to be conducted, determine the content of job classifications: exercise complete control and discretion over its organization and the technology of performing its work: and fulfill all of its legal responsibilities. All of the rights, responsibilities and prerogatives that are inherent in the Commission or the Police Chief by

virtue of statutory and charter provisions cannot be subject to any grievance or arbitration proceeding.

Article 4. PRESERVATION OF RIGHTS AND  
BENEFITS

The Commission agrees that conditions of employment and working conditions previously established as policy of the Commission shall be not less than those now in effect and will remain in effect unless specifically modified by this Agreement. Nothing in this Article will limit the rights of the Commission to revise the Rules and Regulations, policies and/or working conditions to improve the efficiency of the Department, provided, however, any such change or revision shall not be subject to the grievance procedure.,

4. The Manchester City Charter, Section 3.10 (Attachment A to Complaint) reads, in pertinent part:
  - (a) Authority: Except as otherwise limited in this Charter, each Board and commission shall be vested with full control and management of, its department subject to directives of the Board of Mayor and Aldermen.
  - (b) Directives: In exercising directives, the Board of Mayor and Aldermen shall act as a body by formal vote in public sessions and may issue mandatory directives to boards, commissions, or department heads relative to operational methods, personnel matters, the expenditure of funds, the use of personnel, or general policy requirements, provided that such directives are not in conflict with this Charter, with the law, or with contractual obligations.
5. Article 7 of the CBA allows grievance of a "... dispute arising out of the application or interpretation of this Agreement, under express provisions of the Agreement...." The final step of the grievance procedure is final and binding arbitration.
6. On May 8, 1996, the Manchester Police Commission revised the Department's Standard Operating Procedure regarding discipline. On June 5,

1996, the Association grieved the change as a unilateral action contrary to past practice and the CBA. It filed for arbitration with the American Arbitration Association on July 5, 1996. The matter was scheduled for arbitration on November 4, 1996.

7. The Association's evidence includes the deposition of former chief, Chief Thomas King, dated November 18, 1994, establishing that the negotiations process was used when the trial board was added to the disciplinary procedure. It is this trial board hearing that has been replaced with an interview with the Chief of Police during which the grievant is informed of the formal charge against him but is not given the employer's evidence supporting the charge prior to the imposition of discipline which may include termination. The Union argues that the interview offends constitutional due process, Cleveland Board of Education v. Loudermill et al., 470 U.S. 532 (1984).

#### DECISION AND ORDER

This case presents the question of arbitrability of a change to an aspect of the Manchester Police Department's discipline procedure. When the question is one of arbitrability, the overarching issue is whether the parties have actually negotiated to arbitrate the dispute. When the parties have bargained to include final and binding arbitration as the culmination of the grievance procedure for settling disputes which arise under the collective bargaining agreement, arbitration is presumed to apply. The subject is considered arbitrable in the absence of "positive assurance" in the form of an express exclusion or very strong evidence that the parties intended exclusion of the matter in dispute. Appeal of Westmoreland School Board, 132 N.H. 102, 105-6 (1989).

In the present case, the parties have approved a CBA with an end date in 1994, the provisions of which continue since they have not been terminated in accordance with Article 30 of the CBA and because the principle of maintaining the status quo controls. Appeal of Milton School District, 137 N.H. 240 at 247 (1993). The parties have bargained for final and binding arbitration of grievances and for a definition of grievance which is limited to disputes which arise out of application or interpretation of provisions of the CBA, (Finding No. 5).

This hearing involved just such a dispute, a matter of contract interpretation. Essentially, the City stated that the last sentence of Article 4 of the CBA (Finding No. 3) is an express exclusion which renders the changes to the discipline procedure inarbitrable.

The Union argued that, in accepting Article 4, the City agreed to refrain from unilateral changes to matters subject to the grievance procedure, and, since the trial board hearing was negotiated into the discipline procedure, past practice dictates that the hearing may be eliminated from the discipline procedure only by re-negotiation, but that it may not be unilaterally eliminated. Each party claimed the other's reading to be a misinterpretation of Article 4 when read in light of other provisions of the CBA.

Without speaking to the merits of the underlying dispute, we find that the arbitration clause of the CBA is susceptible of a reading that would cover the dispute and that there has not been a showing, sufficient to satisfy the "positive assurance" standard, that the parties intended to exclude change in the trial board procedure of the discipline process from arbitration. A colorable issue of contract interpretation has been raised. Appeal of Westmoreland, 132 N.H. at 105-109. No improper practice is found; therefore, the charge is dismissed.

So ordered.

Signed this 10th day of December, 1996.

  
 EDWARD J. HASELTINE  
 Chairman

By unanimous decision. Chairman Edward J. Haseltine presiding.  
 Members E. Vincent Hall and William F. Kidder present and voting.