



NH Supreme Court affirmed this decision on November 23, 1999, Slip Op. No. 97-273, Appeal of the City of Manchester, 144 NH 320 (1999).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

CITY OF MANCHESTER
(POLICE DEPARTMENT)

Complainant

v.

MANCHESTER POLICE PATROLMANS
ASSOCIATION

Respondent

CASE NO. P-0706:30

DECISION NO. 96-111

APPEARANCES

Representing City of Manchester:

David Hodgen, Chief Negotiator

Representing Manchester Patrolman's Association:

Kenneth Gould, Esq.

Also appearing:

- Dale K. Robinson, Dept. Chief of Police
- Peter Bartlett, Manchester Police Patrolman's Association
- Greg Murphy, Manchester Police Patrolman's Association
- Jim Flanagan, Manchester Police Patrolman's Association
- Jim Curran, Manchester Police Patrolman's Association
- Phil LeBlanc, Manchester Police Patrolman's Association

BACKGROUND

The City of Manchester (City) by and on behalf of its Police Department filed unfair labor practice (ULP) charges against the Manchester Police Patrolman's Association (Association) on September 17, 1996 alleging violations of RSA 273-A:5 II (f) and (g) resulting from the Association's engaging in concerted activity by failing to volunteer or discouraging police

volunteers for the 1996 Riverfest Festival as well as a breach of contract because the collective bargaining agreement (CBA) provides that the Association will not engage in a work stoppage, slowdown or withholding of service. The Manchester Police Patrolman's Association filed its answer on September 26, 1996, inclusive of a counterclaim. The City filed a Motion to Amend on October 2, 1996 followed by an answer to the counterclaim and Motion to Dismiss on October 10, 1996. This matter was then heard by the PELRB on November 26, 1996.

FINDINGS OF FACT

1. The City of Manchester is a "public employer" of police officers and other employees in its police department within the meaning of RSA 273-A:1 X.
2. The Manchester Police Patrolman's Association is the duly certified bargaining agent for all regular full-time police officers employed by the City.
3. The City and the Association are parties to a CBA for the period July 1, 1991 through June 30, 1994 and continuing thereafter under the status quo doctrine. Article 12 of the agreement defines special or extra details as "that duty performed by an off-duty police officer for an employer other than the Manchester Police Department and will include those duties required by statute or ordinance and those duties for which requests are made to the...Department." The rules and regulations of the Department apply to personnel performing extra details (Article 12.2) but those details are voluntary, i.e., "Personnel desiring extra details shall submit their name..." (Article 12.3). Article 9 addresses overtime. "Planned overtime, which is defined as assignments to parade duty, Christmas traffic duty, election details and other scheduled events shall be assigned to officers on a voluntary basis. If insufficient officers volunteer within five (5) calendar days of the scheduled event[,] then assignments shall be made to regular officers first, in inverse order of seniority, and auxiliary officer second, as needed." Such duty is paid at time-and-a-half. Article 26 addresses strikes and work stoppages, to wit: "No employee covered by this Agreement shall engage in, induce or encourage any strike, work stoppage, 'sick-in', 'sick-out', slowdown or withholding of services

to the City of Manchester. The Union agrees that neither it, nor any of its officers or agents, national or local, will call institute, authorize, participate in, sanction or ratify any such strike, work stoppage, slowdown or withholding of services of the City of Manchester."

4. The City was scheduled to observe its annual Riverfest Festival on September 5-8, 1996. This festival is sponsored and operated by Riverfest, Inc. and usually requires approximately sixty extra details. In 1994 and 1995, per the parties' stipulation, police officers volunteered for extra duty Riverfest details but in 1996 they did not. Moreover, in 1996, the Association encouraged its members not to volunteer for those details because there was simultaneous union activity planned for the same date and place, namely an informational picket to attract public attention to stalled contract negotiations and no new agreement to follow termination of the last CBA on June 30, 1994, e.g., Union Exhibit E and Page 4 of Exhibit D to the Association's answer. In Exhibit D to The City's ULP, Union President Murphy told his members "officers who are ordered to work will have no choice and must work the detail....If you are not ordered to work, you have a choice. Do not volunteer and do not cross the [picket] line." In testimony before the PELRB, Murphy stated, "I needed my members to take part in a 36 hour activity," referring to periods of informational picketing over a three day period.
5. By August 27, 1996, management-level, non-unit police supervisors became aware that patrolmen were not signing up for extra-duty Riverfest details. (See Exhibit C to ULP, Deputy Chief Robinson's memo to Chief Driscoll where Robinson recounted a telephone conversation with Officer Flanagan in which Flanagan was alleged to have said "that probably no officers, in fact, would be signing up for the Riverfest detail.") On August 28, 1996, Robinson spoke to Murphy and told him that the City planned to take action "either through the Superior Court or PLRB [sic] if [this job action] was not rescinded." (Exhibit C, page 2 to ULP.) On this same date Robinson sent another memo to Driscoll relating his conversation with Murphy to wit:

"Murphy stated to me during the conversation that members of his union have been directed not take the Riverfest assignment as there are union activities planned for the same time period that the officers are required to attend." (Exhibit C, page 3 to ULP.)

5. On August 30, 1996, the City sought injunctive relief from the Superior Court in the form of a Petition for Ex Parte Temporary Restraining Order. (Exhibit C to Association's Answer.) The City argued that a restraining order was necessary "to provide sufficient officers to insure adequate policing and security for Riverfest." (Page 5 of Exhibit C to Association's answer.) In an Opinion and Order dated September 4, 1996, Associate Justice Robert Lynn denied the City's request for the restraining order. Previously Justice Perkins had denied the City's request for a restraining order on an ex parte basis. (Page 2 to Exhibit D of Association's Answer; Hillsborough, ss, Docket No. 96-E-257) In the Opinion and Order of September 4, 1996, Justice Lynn found that "it is clear, both from Article 12 and from two prior arbitration awards [IBPO, Local 539 v. City of Manchester, AAA No. 1139-1826-83, March 20, 1984, M. Irvings, Arb., Exhibit G to Association answer and IBPO, Local 394 v. City of Manchester, AAA No. 1139-1551-93, July 15, 1994, T. Buckalew, Arb., Exhibit H to Association answer] dealing with the issue, that extra detail work is entirely voluntary and that no officer can be compelled to perform such duties" and that "Article 9 of the CBA authorizes the City to compel officers to work emergency overtime and also provides that if an insufficient number of officers volunteer for planned overtime, the City may compel this duty as well, in inverse order of seniority." Thereafter, Justice Lynn concluded:

It is clear the City cannot show it will suffer irreparable harm if a restraining order is not granted. Notwithstanding the refusal of MPPA members to volunteer for extra detail work at Riverfest, the City unquestionably has to the authority

under article 9 of the CBA to compel overtime work from a sufficient number of officers to meet the policing and security needs occasioned by that event. (Page 6 to Exhibit D of Association answer.)

6. There is evidence that picketing did occur during the course of Riverfest and that it was conducted by members of the Association. Murphy testified that it was focused from 5:00 to 8:30 p.m. on Friday, from 9:00 a.m. to 8:00 p.m. on Saturday and from 9:30 a.m. to 5:00 p.m. on Sunday. Murphy also testified that he was careful to advise his membership to comply with direct orders to work and with the terms of Article 9 as it pertains to mandated overtime. He stated that the Association warned its membership about job actions because he did not want any members to jeopardize their employment because of improper participation in such activities. He reported that the leadership of the Association had evaluated the impact of this picketing when it was discussed internally on August 14, 1996 and concluded that there was neither a violation of RSA 273-A:13 nor the CBA because the City was not left without services from its police officers or a means for ordering them to duty on the days needed.
7. There is no evidence that either the informational activities of the Association or the reluctance of its membership to volunteer for extra details for the Riverfest festival deprived the City of police coverage for that event, that security for that event was compromised or that the City was unable to mandate a sufficient number of officers to work in order to provide that security and police presence. It is undisputed that extra detail coverage for Riverfest is a voluntary activity as defined by Article 9 of the CBA.

DECISION AND ORDER

This issue is not a new one for the parties. In 1984, Arbitrator Mark Irvings, AAA Case No. 1139-1826-83, told the parties that a supervisor "breached the contract when he compelled [an officer] to work details for which he had not

volunteered....By ordering [an officer to a detail], under threat of discipline,...[the supervisor] was giving [the officer] a mandatory overtime assignment....Once the slot could not be filled through the established extra detail procedures, the [supervisor] had a number of choices....What he could not do was give a mandatory assignment to an off-duty police officer and pay him as if he were working a voluntary extra detail." Ten years later, a similar result occurred when Arbitrator Timothy Buckalew found the City violated the CBA when it reassigned officers working an extra detail to a planned overtime detail without following the Article 9 provisions which set forth what happens when insufficient officers volunteer. (AAA Case No. 1139-1151-93.) Finally, in September of this year, Justice Lynn, knowledgeable of and referring to these two prior awards, denied injunctive relief.

In denying injunctive relief, Justice Lynn looked to a three-pronged test: (1) likelihood of prevailing at PELRB, (2) irreparable harm to be suffered before getting a PELRB decision, and (3) a balancing assessment that the harm to the City outweighs harm to the Association or to the public interest. By saying that "Even if I were to assume that Officer Murphy's directive to MPPA members to refuse extra detail work...constitutes an unlawful job action [under] Hinsdale School Board v. Hinsdale Federation of Teachers," PELRB Decision No. 91-49 (August 1, 1993) and 138 N.H. 88 (1993), Justice Lynn indicated that he had not accepted that the facts of this case necessarily equate with Hinsdale. We agree.

This case is not a Hinsdale case nor should it be covered by its doctrine. Voluntary activities were involved in both cases but that is where the similarity stops. In this case, the parties had negotiated and contractually agreed on both a manner of defining and handling extra details as well as a method of handling the need for police services when there were insufficient volunteers to cover those details. Second, and unlike Hinsdale, there was no impact on the public employer resulting from the reluctance of bargaining unit members to volunteer for Riverfest extra duties, with the possible exception of the Department's need to "juggle details," as explained in Mr. Hodgen's opening argument. Police services, security and public safety -- the essential functions of the police department -- were maintained without interruption or deprivation. (Finding No. 7.)

Looking back at Hinsdale, we find even more dissimilarities. There, teachers had traditionally performed voluntary services, such as evening parent conferences, chaperoning field trips, PTA committee work, dances, recognition nights, and awards nights for

which they were not compensated. [Emphasis added, Hinsdale School Board, PELRB Decision No. 91-49, Page 3, Finding No. 8. (August 1, 1991)]. Further, this Board found that to have been a past practice in Hinsdale, supra, Finding Nos. 8 and 10. Exactly the opposite is true here: the volunteers were paid for specific duties and the tradition of receiving that compensation is, itself, a compelling past practice in their favor.

Finally, the City was able to get the job done without Article 12 volunteers. It now cannot prevail in charges that would impair the Association's rights to organize and administer its affairs merely because it had the expectation of volunteers or had to "juggle" schedules. To do so, would ignore both the associational rights of the MPPA and the public interest in being informed of the nature, severity and duration of the labor strife between the parties. Because Riverfest extra details were voluntary and because there is no evidence that they were not adequately covered by the City's exercising its options under Article 9, there has been no violation of Article 26, the withholding of services to the City, whether on its own behalf in directing mandated overtime or on behalf of its contracting party, Riverfest, Inc.

The City's ULP is DISMISSED and, likewise, the Union's counterclaim for a violation of Article 3.2 is also DISMISSED for failure to establish any nexus, improper motivation or impact between the City's attempting to secure coverage for Riverfest details and contractually protected activities.

So ordered.

Signed this 10th day of December, 1996.


 JACK BUCKLEY
 Alternate Chairman

By unanimous decision. Alternate Chairman Jack Buckley presiding. Members E. Vincent Hall and William Kidder present and voting.