State of New Hampshire
Public Employee Labor Relations Board

New England Police Benevolent Association,
Auburn Police Union

v.

Town of Auburn, Police Commission

Case No. G-0195-3
Decision No. 2017-103

Appearances: Peter J. Perroni, Esq., Nolan Perroni, P.C.
No. Chelmsford, Massachusetts for the NEPBA Auburn Police Union

Kathleen C. Peahl, Esq., Wadleigh, Starr & Peters, PLLC
Manchester, New Hampshire for the Town of Auburn

Background:

On October 12, 2016, the New England Police Benevolent Association, Auburn Police Union (Union) filed an unfair labor practice complaint against the Town of Auburn, Police Commission (Commission). The Union complains that the Commission's unilateral decision to hire Tideview Group (Tideview) to investigate a police misconduct complaint violated: 1) Police Department General Order #209 governing the conduct of police department internal affairs investigations; 2) the Commission's obligation to negotiate any change in the conduct of internal affairs investigations; and 3) the Commission's obligation to bargain over the impact of the change on the terms and conditions of employment. The Union charges that the Commission actions violated RSA 273-A:5, I (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost

item agreed upon in negotiations) and (g)(to fail to comply with this chapter or any rule adopted under this chapter). The Union seeks all appropriate remedies available under RSA 273-A.

The Commission denies the charges. According to the Commission, the decision to hire a consultant like Tideview is within the Commission's exclusive managerial prerogative and is not a mandatory topic of bargaining. The Commission also maintains that the Union has failed to show that impact bargaining is required in the circumstances of this case. The Commission requests that the PELRB dismiss the Union's complaint.

This case was scheduled for hearing on November 22, 2016, but on the Union's motion the hearing was rescheduled to January 24, 2017. The parties then moved to cancel the hearing and submit this case for decision on briefs and stipulations. The hearing was cancelled, and the parties have duly submitted their briefs, stipulations of fact, and exhibits. The parties' stipulations of fact are included as Findings of Fact 3 through 37. The board's decision is as follows.

Findings of Fact

1. The Auburn Police Commission is a "public employer" under RSA 273-A:1, X.

2. The New England Police Benevolent Association, Auburn Police Union is the exclusive representative of all full and part-time Town Police Officers and Sergeants per PELRB Decision No. 2012-178 (July 23, 2012).

3. In early 2016 the Town Board of Selectman contracted with Municipal Resources, Inc. ("MRI") to conduct an operational review and risk assessment of the Police Department.

4. On April 5, 2016, the Commission received a complaint from the Town Road Agent, Michael Dross relating to the Police Department's handling of an investigation which had led to his subsequent prosecution and eventual acquittal (the "Dross Complaint").

5. The Commission voted on April 5, 2016 to support the MRI study.

6. The Commission initially voted on April 5, 2016 to retain MRI to conduct a separate internal investigation of the Dross Complaint.

7. The Commission voted on April 5, 2016 that the Chief and all employees be directed to cooperate in the MRI study and investigation.

8. On April 9, 2016, the Union submitted a written demand to bargain over the decision to retain MRI.

9. On April 13, 2016, the Commission Chair responded to the demand to bargain.

10. The Commission declined to bargain with the Union regarding the decision to use an outside investigator to conduct an internal investigation.

11. Although the Commission declined to bargain over the decision to retain MRI, the Commission did offer to meet with the Union to hear their concerns.

12. On April 28, 2016, the Commission sent a memo to all employees of the Police Department clarifying the scope of the MRI study.

13. The parties met on May 3, 2016 and discussed the MRI study and pending investigation of the Dross Complaint.

14. At the May 3, 2016 meeting, the Commission clarified the scope of the MRI study.

15. At the May 3, 2016 meeting, the Commission informed the Union that they were going to reconsider their vote to retain MRI to conduct the investigation of the Dross Complaint.

16. At the May 3, 2016 meeting, the Commission also informed the Union that the Town Counsel had identified a different company, Tideview, whose owner, Michael Pardue, was a former Police Chief, and was recommending that the Commission retain Tideview to conduct the investigation.

17. At the May 3, 2016 meeting, the Union raised the issue of the existence of a Department rule regarding internal investigations, General Order # 209.

18. At all times relevant hereto, the Town of Auburn[1] had promulgated General Orders governing the operation of the Police Department.

19. General Order #209 was issued on February 1, 2015 by Chief Edward Picard. In the "Procedures" portion, Section III, it provides as follows:

D. Responsibility for Handling Complaints:

> 1. As a rule, complaints regarding law enforcement operations will be handled through the chain of command. Complaints involving how police service is provided or a failure to provide service or improper attitude or behavior will normally be investigated and handled by the Investigator or the Chief of Police. The Chief of Police may ask an investigator from another agency or the Department of State Police to undertake the investigation.

20. At the meeting on May 3, 2016, the Commission expressed its belief that it was not obligated to follow General Order #209 with respect to the Dross Complaint.

21. At the May 3, 2016 meeting, the parties discussed the fact that the County Attorney's Office could not do the investigation since they were involved in the prosecution of the case which was the subject of the Dross Complaint.

22. The Commission also stated that it believed there was a conflict of interest that prevented the Attorney General's office from conducting the investigation.

23. The Union does not believe there was a conflict which would have prevented the Attorney General's office from conducting the investigation.

24. At the May 3, 2016 meeting, the Union raised concern that Tideview had some affiliation with MRI and therefore would not be completely independent.

[1] Presumably all General Orders concerning Police Department operations are issued by the Chief of Police, as was true with respect to General Order #209.

25. Immediately following the meeting with the Union on May 3, 2016, the Police Commission held a regular Commission meeting.

26. At its meeting on May 3, 2016, the Commission voted to reconsider its vote to retain MRI to conduct the investigation of the Dross Complaint.

27. On May 3, 2016 the Commission also voted to retain Tideview Group to conduct an investigation of the Dross Complaint.

28. The Commission confirmed that they were going to verify Tideview's independence and would reconsider the selection if a conflict were identified.

29. On May 4, 2016 Town Counsel emailed the Union representative and confirmed that Tideview had no affiliation with either MRI or the Town of Auburn.

30. On May 17, 2016, the Union submitted a second demand to bargain regarding the decision to retain Tideview.

31. On May 25, 2016, Town Counsel responded to the Union, reaffirming its position that the decision to retain an investigator was not a subject of bargaining.

32. On June 16, 2016, the Union President sent Town Counsel a list of questions regarding the scope and conduct of the investigation.

33. On June 17, 2016, Town Counsel provided answers to the Union's questions.

34. Tideview completed its investigation and issued its report on or about July 15, 2016.

35. Article 6 of the collective bargaining agreement sets for the contractual grievance procedure, which includes four levels of review, beginning at Level 1- Immediate Supervisor, followed by Level 2 – Police Chief, Level 3- Police Commission (final and binding except for terminations), and Level 4 – Joint Personnel Board (final and binding).

36. Article 7 of the collective bargaining agreement is titled "Disciplinary Action" and provides as follows:

> 7.1 Disciplinary actions may include an oral or written warning or reprimand, suspension with or without pay, reduction in pay, demotion, probation and termination from the Auburn Police Department.
>
> 7.2 Examples of circumstances which are causes for disciplinary actions are contained in the "General Rules of Conduct" for the Auburn Police Department. It is understood that those rules are examples only and other acts and omissions may also be grounds for disciplinary action.
>
> 7.3. No disciplinary action will be taken against any officer without just cause. Disciplinary action shall mean verbal or written warning, suspension without pay or discharge. Just cause shall mean that there is sufficient evidence to support the reason for the discipline. It is understood that the discipline need not be imposed in any order but must be appropriate to the offense.

Decision and Order

Decision Summary

The Commission was not obligated to negotiate the selection of a third party consultant like Tideview as charged by the Union, nor was the Commission obligated to impact bargain with the Union over its decision in the circumstance of this case. The Union's complaint is dismissed.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion

We begin our analysis of the Union's claims with a review of the law governing the parties' bargaining rights and obligations.[2] Under RSA 273-A:3, I, the Commission is obligated

[2]Tideview is arguably covered by the phrase "[t]he Chief of Police may ask an investigator from another agency..." contained in General Order #209. However, we decide this case based on the bargaining principles discussed in our decision.

to bargain with the Union over the "terms and conditions of employment," a phrase that is defined as follows:

> "Terms and conditions of employment" means wages, 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.

See RSA 273-A:1, XI. In *Appeal of State*, 138 N.H. 716 (1994), the court adopted a three step test to resolve bargaining disputes over the scope of "terms and conditions of employment" like the one in this case. The three step test distinguishes between terms and conditions of employment, which are mandatory subjects of bargaining, managerial policy within the exclusive prerogative of the public employer, which are permissive subjects of bargaining, and matters "confided exclusively to the public employer by statute or regulations adopted pursuant to statute," which are prohibited subject of bargaining.

> 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.

Id. at 724.

The Union's claim that the Commission failed to negotiate a mandatory subject of bargaining passes the first step of the *Appeal of State* test. The selection of Tideview to investigate the Dross Complaint is not a prohibited subject of bargaining. The Commission has

not identified any constitutional provision, statute, or statutorily adopted regulation that reserves the decision to determine who shall conduct internal affairs investigations, like the one at issue in this case to the exclusive managerial authority of public employers. *See Appeal of Nashua Board of Education,* 141 N.H. 768,774 (1997)(the reference to "statutes" reserving particular subjects to the exclusive managerial authority of the public employer means statutory authority independent of the managerial policy exception expressed in RSA 273-A:1, XI).

However, the Union's claim does not pass the second step of the *Appeal of State* test because the decision about who will investigate matters like the Dross Complaint primarily affects matters of broad managerial policy, and not the terms and conditions of employment. This means the Union's proposal is a permissive topic of bargaining. We reach this conclusion after having considered and balanced the competing employer and employee interests. By statute, the Commission's management rights "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." There is no doubt that a central part of workforce management, supervision, and oversight (selection, direction and number of personnel) is the right to investigate alleged employee misconduct. This is a basic duty and responsibility which necessarily includes the specific authority to decide who will conduct an investigation on the Commission's behalf. To conclude otherwise would improperly dilute this important and fundamental management right.

According to the Union, a police officer has an interest in who investigates his behavior because the investigation results "could directly impact discipline under the collective bargaining agreement." This is certainly true and is a valid point, but it is not enough to support a finding

that the Union's proposal is one that primarily affects "the terms and conditions of employment, rather than matters of broad managerial policy" given the corresponding management interests. In reaching this conclusion we note that the Union has not made any showing that the fairness or impartiality of an investigation will be less certain, or the potential impact on terms and conditions of employment greater, if the Commission selects a third party like Tideview to investigate the Dross Complaint. We are also mindful of protections provided to unit employees under the collective bargaining agreement in Articles 6 and 7, which provide standards and process by which the Union can address the cited disciplinary concerns.

Based upon the foregoing, we conclude the Union's bargaining proposal primarily "affects matters of broad managerial policy," does not pass the *Appeal of State* second step, and therefore is a permissive, not a mandatory, topic of bargaining. The Commission did not violate its statutory bargaining obligation when it refused to bargain the Union's proposal.

The Union also claims that at a minimum the Commission was required to engage in impact bargaining. We have recognized the obligation of employers to impact bargain in a number of cases. See *Hudson Federation of Teachers, AFT, AFL-CIO, Local No. 2263 v. Hudson School Board,* PELRB Decision No. 86-64 (school board ordered to participate in impact bargaining to include discussion about impact of schedule change, return to status quo not ordered); *Rochester Federation of Teachers, Local 3606, AFT, AFL-CIO v. Rochester School District,* PELRB Decision No. 1999-040 (topics protected under managerial policy exception are subject to impact bargaining because employer unilateral action changed working conditions); *Laconia Education Association/NEA-NH v. Laconia School District,* PELRB Decision No. 2008-204 (District ordered to impact bargain class schedule change). However, it is the Union's burden to demonstrate an effect on working conditions caused by the employer's decision which

justifies impact bargaining. There is insufficient evidence in this case to support such a finding, and therefore we cannot find that the Commission improperly refused to engage in impact bargaining.

In accordance with the foregoing, the Union's complaint is dismissed.

So ordered.

Date: 6/19/17

Peter G. Callaghan, Esq., Chair

By unanimous vote of Alternate Chair Peter G. Callaghan, Esq., Board Member James M. O'Mara, Jr., and Board Member Senator Mark Hounsell.

Distribution: Peter J. Perroni, Esq.
Kathleen C. Peahl, Esq.