The HR REPORT

Understanding "Work to Rule"

By Mark T. Broth

During September 2018, the labor union that represents firefighters in the City of Manchester announced their intent to restrict their work activities to those duties identified in their job descriptions and in their collective bargaining agreement. This type of restriction on work activities is commonly referred to as "work to rule". The Union's announcement followed the Board of Mayor and Alderman's rejection of a proposed wage adjustment for City firefighters, whose last collective bargaining agreement expired in 2017. As a result of the Union's announcement, the Manchester Fire Department anticipated that few firefighters would volunteer to participate in the annual Fire Prevention Week Parade scheduled for October 7, 2018. As a result, the event, a 64 year tradition, was cancelled.

Under New Hampshire law, public employees have the right to join labor unions and to collectively bargain with their employers. In the private sector, employers and employees engaged in collective bargaining have the ability to use their respective economic power to try to leverage their negotiating positions. For employers, this means the right to "lock out" employees and prevent them from reporting to work or receiving a paycheck. For employees, this means the right to strike and withhold their services. When employing these strategies, the employer's customers often suffer an interruption in the delivery of supplies or services.

In enacting New Hampshire's public sector collective bargaining law, RSA 273-A, the Legislature recognized that public employers provide essential services whose disruption during a labor dispute would be contrary to the public good. Accordingly, RSA 273-A:5 establishes that it is an unfair labor practice for employers to invoke a lockout or for employees "to engage in a strike or other form of job action." Further, RSA 273-A:13 expressly declares "strikes and other forms of job action by public employees" to be unlawful and authorizes public employer to seek injunctive relief. Recognizing that both public employers and employees would lose bargaining power if denied their respective rights to lockout or to strike, the Legislature established a dispute resolution procedure intended to facilitate settlement of labor contracts. The dispute resolution system provides for mediation and non-binding fact finding, and which allows the labor organization to appeal directly to the public employer's legislative body to support changes in wages and benefits that the employees might be seeking.

RSA 273-A does not define a "job action." In a case arising from a previous dispute between Manchester and its firefighters, the NH Supreme Court stated that a job action "generally involves union activities such as strikes, or sickouts, in which a public employer is unable to perform its essential governmental services." In 1980, the Court determined that a "sickout" by Manchester firefighters was a form of unlawful job action, in that it strained the City's ability to deliver Fire Department services. However, in a 1999 decision, the Court said that the refusal of police officers to work paid details did not constitute an unlawful job action, in that the employer had an alternate method (forced overtime) of assuring adequate police coverage.

Even if employees limit their work activities to those defined in a job description or a collective bargaining agreement, they may still be considered to have engaged in an unlawful job action. In 1991, the PELRB held that a teacher union had engaged in an unlawful job action when it discouraged members from volunteering their participation in after school events, including parent conferences, committee work, and other school events. In a rare instance where "past practice" worked in the employer's favor, the PELRB held that "the decision to withhold the volunteer duties well understood and established through past practice is a [unlawful] concerted action." Similarly, in a decision that predates RSA 273-A, the Court held that the refusal of firefighters to voluntarily respond to bell alarms and mutual aid calls while off duty was unlawful, in that responding to these calls was a longstanding past practice, regardless of the job description or collective bargaining agreement language, and that the refusal to respond interfered with the employer's ability to deliver services.

Based on these PELRB and Court decisions, limiting work activities to those described in a job description or collective bargaining agreement may still constitute an unlawful job action. If employees no longer engage in activities which they have a past practice of participating in and if their refusal to participate interferes with the delivery of essential services, the conduct may be unlawful. Manchester may not get its parade, but the public should expect that employees will respond to the bell and return to work when an emergency arises.

Mark Broth is a member of DrummondWoodsum's Labor and Employment Group. His practice focuses on the representation of private and public employers in all aspects of the employer-employee relationship. This is not a legal document nor is it intended to serve as legal advice or a legal opinion. Drummond Woodsum & MacMahon, P.A. makes no representations that this is a complete or final description or procedure that would ensure legal compliance and does not intend that the reader should rely on it as such. "Copyright 2018 Drummond Woodsum. These materials may not be reproduced without prior written permission."