STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1349

St. Paul Police Federation,
Appellant,

vs.

City of St. Paul, et al.,
Respondents.

Filed May 18, 2010
Affirmed
Stoneburner, Judge

Ramsey County District Court
File No. 62CV085530

Christopher K. Wachtler, Mark Gehan, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for appellant)

Gerald T. Hendrickson, Interim St. Paul City Attorney, Portia Hampton-Flowers, Assistant City Attorney, St. Paul, Minnesota (for respondents)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant union challenges summary judgment granted to respondents dismissing claims that respondents violated the Public Employment Labor Relations Act. We affirm.

FACTS

In May and September 2007, appellant St. Paul Police Federation (union), the exclusive representative for certain job classifications in the city's police department,[1] notified the respondent City of St. Paul by letter, on three occasions, that the city's use of non-union personnel to do work performed by union members at the impound lot and in questioning juvenile runaways was subject to mandatory bargaining under the parties' collective bargaining agreement (CBA). In the fall of 2007, city and respondents Police Chief John Harrington and Office of Human Resources Director Angela Nalezny (collectively, the city) accepted an 18-month federal grant for $259,977 to establish a "cold-case unit" designed to solve "cold," or unsolved, homicide cases by using DNA evidence. The grant provided that the cold-case unit was to be staffed by non-union retired homicide investigators.

In December 2007, the Union sued the city for violation of the Public Employment Labor Relations Act (PELRA). Initially, the lawsuit alleged only the use of non-union staff to question juvenile runaways, replacement of a union Commander with a non-union employee at the St. Paul Impound Lot, and use of a senior clerical employee in the records unit in a position previously occupied by a union Sergeant. But in an amended complaint, the union alleged that the use of non-union retired police officers as analysts or investigators in the cold-case unit without notice or negotiations also constituted an unfair labor practice.

[1] The union is the exclusive representative for the job classifications of Senior Commander, Commander, Sergeant, and Police Officer, referred to as "sworn" positions that can only be held by licensed peace officers.

In November 2008, the union sought a temporary restraining order (TRO) alleging irreparable harm if the city was not restrained from implementing or continuing the complained-of personnel actions. The union asserted that the cold-case unit would directly impact (1) the number of Investigative Sergeants in the union; (2) the capacity to train veteran investigators; (3) the quality of investigations; and (4) the members' promotional and investigative-experience opportunities. The district court denied the motion for a TRO, noting the short duration of the grant, the possibility that the grant could be lost if the cold-case unit were operated outside the grant's parameters,[2] and the public interest in implementing the grant to demonstrate the need for permanent funding for a cold-case unit benefitting the public and the union.

The city then moved for summary judgment, and the union moved for partial summary judgment. By the time of the hearing on the summary judgment motions, the sole remaining issue was whether establishment of the research-analyst positions in the cold-case unit violated PELRA and the CBA. The district court granted summary judgment to the city, concluding that (1) the union failed to submit evidence that only sworn officers can or did perform the functions of a research analyst in the cold-case unit; (2) no terms and conditions of employment of union members changed by the addition of the cold-case unit research-analyst positions; and (3) no union members were denied

[2] In the grant application, the city indicated that it would rely on the experience of retired investigators if it secured the grant.

career advancement opportunities by establishment of the cold-case unit.[3] This appeal follows.

D E C I S I O N

"On appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[ ] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We review both the existence of genuine fact issues and application of the law de novo. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Id.* at 76–77.

The provision of the CBA relevant to this appeal is article 5.2, which states that the "functions and programs of the [city], its overall budget, utilization of technology, and organizational structure and selection," are "matters of inherent managerial policy." This clause is comparable to the PELRA provision stating that

> [a] public employer is not required to meet and negotiate on matters of inherent managerial policy. Matters of inherent managerial policy include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilization of technology, the organizational structure, selection of personnel, and direction and the number of personnel.

[3] The district court correctly noted in its memorandum that, pursuant to the CBA, were the cold-case unit to become permanent, the parties' dispute regarding staffing of that unit "shall" be submitted to the Bureau of Mediation Services for a determination of whether the research analyst positions in the cold-case unit should be included or excluded from the CBA.

Minn. Stat. § 179A.07, subd. 1 (2008). PELRA imposes on public employers the "obligation to meet and negotiate in good faith . . . regarding grievance procedures and the terms and conditions of employment." *Id*. subd. 2 (2008). "Terms and conditions of employment" are defined as hours, compensation, certain benefits, and "personnel policies affecting the working conditions of the employees." Minn. Stat. § 179A.03, subd. 19 (2008). The Minnesota Supreme Court has recognized that terms and conditions of employment and matters of inherent managerial policy often overlap and at times are far from distinct. *City of W. St. Paul v. Law Enforcement Labor Servs., Inc.*, 481 N.W.2d 31, 33 (Minn. 1992); *Law Enforcement Labor Servs., Inc., v. County of Hennepin*, 449 N.W.2d 725, 727 (Minn. 1990).

I. Establishment of cold-case unit research-analyst positions does not affect the terms and conditions of Union members' employment.

The union concedes that the city has an inherent managerial right to create a cold-case unit. But the union argues that the city violated the CBA and PELRA by staffing the cold-case unit with non-sworn-peace-officer non-union employees. The union argues that the city's practice amounts to contracting out work traditionally performed by union members "and/or [contracting out] work members would hope to be able to do as part of the departmental career track," thereby affecting its members' terms and conditions of employment. But, as noted by the district court, the union failed to present evidence that only sworn officers can perform or already do perform the duties of a cold-case-unit research analyst, and failed to present evidence that any of its members have actually been denied career advancement opportunities due to staffing of the cold-case unit.

The union compares its case to *Gen. Drivers Union Local 346 v. Indep. Sch. Dist. No. 704*, in which the employer school district proposed to lay off union bus drivers and contract the work to non-union members. 283 N.W.2d 524, 526 (1979). The supreme court concluded that "whether or not an employee's job will be terminated so that the same function can be performed by a non-unit employee is a subject contemplated for negotiation as a term and condition of employment." *Id*. at 527 n.1. But here, no union members were doing the work of a cold-case-unit research analyst: no union positions had to be eliminated and no union members were replaced by non-union personnel.

The union argues that the *Gen. Drivers* holding is not limited to "situations where union members lose their jobs or are displaced by non-union personnel," and cites *Foley Educ. Ass'n v. Indep. Sch. Dist. No. 51*, 353 N.W.2d 917, 923 (Minn. 1984), for the proposition that an unfair labor practice can exist where the decision to employ non-union personnel "had a direct adverse impact on the employment opportunities for . . . members of the bargaining unit." In *Foley*, the supreme court concluded that, "the school district's unilateral action in assigning to persons who were not [union-member] teachers study hall supervisory duties traditionally assigned to teacher union members, changed the unit work jurisdiction and, therefore, constituted an unfair labor practice." *Id*. at 924.

But, like *Gen. Drivers*, *Foley* involved assigning non-union members to jobs already being done by union members. *Gen. Drivers*, 283 N.W.2d at 526; *Foley*, 921 N.W.2d at 920. In contrast, the cold-case unit did not reassign the duties of any union members to non-members. The cold-case analyst position was a new job classification involving no duties that required a sworn peace officer and did not affect any existing

officers' jobs or duties. The union concedes that it "presented no evidence that any . . . member was denied career advancement opportunities, . . . promotion, or a request to take on additional responsibilities." The union has not offered any evidence to refute the affidavit of cold-case-unit supervisor, Sergeant Anita Muldoon (a union member), that research analysts in the cold-case unit are not performing the law enforcement duties of a homicide investigator as alleged by the union.

The union has not produced evidence to sufficiently demonstrate that creation of the federally funded cold-case unit, which is staffed by non-union personnel, affects its members' hours of employment, compensation, fringe benefits, or personnel policy which, under Minn. Stat. § 179A.03, subd. 19, constitute the terms and conditions of employment, that if changed, must be negotiated. The union's speculations and arguments are not sufficient to overcome summary judgment. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997) (stating that a plaintiff must provide more than mere assertions to survive summary judgment). The district court did not err by concluding that the union failed to present evidence creating a material fact question about whether the terms and conditions of members' employment were changed by staffing the cold-case unit with non-union temporary research analysts. The grant of summary judgment to the city was appropriate.[4]

[4] Despite conceding that the city has an inherent managerial right to create a cold-case unit, the union nonetheless argues that the city should have created the unit differently, arguing that there is no evidence that the federal government required that the unit be staffed with non-union peace officers. The union argues that the city could have asked the funding authority about a change in the proposal to use union officers as research analysts, stating that the funding authority "undoubtedly would have considered the

II. Documents and notations not in the record are not considered.

The city alleges in its brief that certain documents in the union's appellate-brief appendix were not submitted to the district court. Under Minn. R. Civ. App. P. 110.01, "[t]he papers filed in the [district] court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal." Documents included in a party's brief that are not properly part of the appellate record may be stricken. *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd*, 504 N.W.2d 758 (Minn. 1993).

A review of the district court record reveals that two of the seven documents the city alleges were not part of the record are, in fact, not in the record. The affidavit of Christopher K. Wachtler and the inter-office memorandum from John Harrington are nowhere in the district court record and should not have been included in the union's appendix. But neither these documents nor handwritten notes that appear on other documents in the union's appendix, which are also outside the record, have been relied on in reaching our decision. Therefore, the city's request to strike these documents and notations is moot.

Affirmed.

City's violating state law as a compelling reason to at least consider allowing [the city] to implement the program . . . using [union] personnel, and likely would not have withheld its concurrence for making that simple adjustment." But this argument assumes that staffing the unit with non-union personnel violated PELRA, and we have concluded that it did not.