STATE OF NEW HAMPSHIRE

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, INC. Complainant and DEPARTMENT OF RESOURCES AND ECONOMIC DEVELOPMENT, STATE OF NEW HAMPSHIRE Respondent	CASE NO. S-0305:1 DECISION NO. 780023

APPEARANCES

Representing the Complainant, SEA:

Richard E. Molan, Assistant Executive Director

Representing the Respondent, DRED State of N. H.:

James C. Sargent, Jr., Assistant Attorney General

Witnesses:

FOR SEA: Fred Whitcomb, Employee of Franconia State Park

FOR DRED: George Gilman, Commissioner
Albert Nolin, Business Administrator
William Carpenter, Supervisor of Parks

BACKGROUND

Agreement was made and entered into between the State of New Hampshire and the State Employees' Association of New Hampshire and duly signed by authorized representatives on October 22, 1977.

On February 28, 1977, SEA representative Richard E. Molan filed with PELRB a complaint of unfair labor practice against the Department of Resources and Economic Development alleging violation of RSA 273-A:5 I(e) for refusal to bargain in good faith on changes in the working hours of certain employees of the Department.

A hearing on the unfair labor charge was held on April 26, 1978, in the Board's office, Manchester Street, Concord, New Hampshire.

The complaint was the reduction in the number of hours worked by employees in particular departments post execution of the collective bargaining agreement; the work week worked by the employees in question was of long standing and a past practice of the department. He further emphasized that these employees had every reason to expect that the past practice would continue and there was no indication to the contrary during the course of negotiations from the state.

The alleged offense, or change, in work hours took place with respect to employees of the Parks Division at Franconia and Sunapee in the Division of Design, Development and Maintenance and State Nursery on or about November 1, 1977, and the exclusive representative, SEA, did not find out about it until late in November at which time they requested a meeting with the Department and a meeting was granted and held on January 4, 1978. At that meeting, SEA's position was that a change in the past practice, in this case reduction in work hours, was a mandatory subject of bargaining specifically under RSA 273-A:1, XII, defining terms and conditions of employment, and the appropriate Section, 273-A:3, Obligation to Bargain.

Witness introduced by SEA testified on his work schedule in effect prior to the execution of the collective bargaining agreement and his work schedule now in effect.

The SEA argued that the schedule was a past practice and that past practice was a fact of life in both private and public sectors; that contracts in terms of labor agreements did not foreclose the rights of employees; that while it was true that no clause existed within the contract guaranteeing all rights and benefits pre-existing, it was equally true that there was also no converse, no traditional "zipper" clause or "savings" clause restricting the terms and conditions of employment to the four corners of the agreement. SEA further stated that it was a known fact during the negotiations and each side at some time had a savings clause, SEA wanted to maintain benefits and the State wanted to preclude past practices, and both issues were dropped, SEA maintained that, that being so, if past practice could be shown, any change in condition of employment would fall under the duty to bargain.

The State produced witnesses who testified that the Department tried to use their manpower and funds in the most efficient manner and that work week was based on the demands in specific areas. Testimony was also presented on the number of employees and the basic work week by analysis made through time cards dating back to 1973 with no guarantee on any number of hours over 40. Evidence was also introduced that no statement had been made or implied on guarantee at time of hire.

The State's argument was that overtime is discretionary; that it impacts on the functioning of the state agency in terms of whether the agency is running on an economically sound basis and the subject is not included in the contract. Further, the State is not bound to pay a set amount of overtime to any employee in the state and overtime depends on many conditions, and further the standard work week for full-time trade, custodial and law enforcement employees, Article VII, Basic Workweek, Section 7.1.a is forty (40) hours per week.

FINDINGS OF FACTS

1. SEA is the certified exclusive representative for all classified employees of the Department of Resources and Economic Development, recognition granted them by New Hampshire Supreme Court Decision, SEA v. N. H. PELRB, No. 7540, November 9, 1976.

2. A collective bargaining agreement exists between SEA and DRED, State of New Hampshire, executed October 22, 1977 and to remain in effect through June 30, 1970.

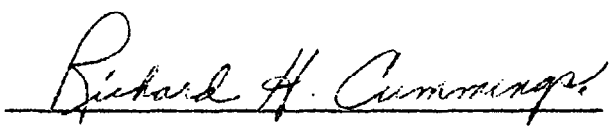
3. A specific number of employees, prior to the execution of the contract, did work a fairly uniform schedule of hours, however other than a regular schedule, there was no guarantee by the State for overtime prior to the execution of the contract between the parties.

4. There is no provision in the agreement protecting prior rights of employees.

DECISION AND ORDER

The Board carefully reviewed the evidence and testimony presented at the April 26, 1978 hearing and they cannot, and will not, presume to dictate to anyone how to run their department or how and when their employees are to work; however, the question remains on whether the department had the authority to make the change or whether they should have met with the exclusive representative before making the change. As pointed out by the Attorney for DRED, there was a reopening of negotiations after the contract, on a limited basis, and the issue was brought up during the brief reopening period in the agreement. It is hoped that a resolution on the issue will be reached within a short period. PELRB is the case of SEA v. DRED rules as follows:

> PELRB declines to find DRED guilty of unfair labor practice, remands the issue to the parties and orders them to follow the grievance procedure outlined in the existing agreement.



RICHARD H. CUMMINGS, ACTING CHAIRMAN
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed this 2nd day of June, 1978

Unanimous vote. Present and voting, Acting Chairman Richard H. Cummings, Joseph B. Moriarty and James C. Anderson. Also present, Clerk Evelyn C. LeBrun. Absent: Chairman Edward J. Haseltine and Edward L. Allman.