



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION OF
NEW HAMPSHIRE, INC.

Complainant

V.

STATE OF NEW HAMPSHIRE

Respondent

CASE NO. S-0363

DECISION NO. 82-53

APPEARANCES

REPRESENTING THE STATE EMPLOYEES
ASSOCIATION OF NEW HAMPSHIRE, INC.:

Robert Clark, Esq., Counsel
Richard Molan, Esq., Assistant Executive Director

REPRESENTING THE STATE OF NEW HAMPSHIRE

James E. Townsend, Esq., Assistant Attorney General
John J. Ratoff, State Negotiator

BACKGROUND

Under date of July 1, 1981, the parties to this dispute signed a Collective Bargaining Agreement which, on its face, was for the period "1981-1983", covering fiscal years beginning on July 1, 1981, and ending on June 30, 1983, State fiscal years 1982 and 1983. After agreement on this contract, the State Legislature in its 1981 regular session failed to fully fund some of the provisions of the contract and enacted a salary increase for only one year of the biennium (stating that funding of a 9% salary increase for the second year of the biennium and any additional increase would be subject to revenues of the State and the enactments of the Legislature in special session during 1982). The Legislature funded some contract benefits for only one year, funding the remainder for the full biennium.

During the 1982 special session, a supplemental State

budget was considered, passed, vetoed, reconsidered, passed and finally signed by the Governor. This budget failed to fund the additional 9% pay raise for State employees but continued the initial 9% for State employees under the collective bargaining agreement. In addition, the budget provided funds to continue benefits for the second year of the biennium.

In the supplemental budget passed by the Legislature and signed by the Governor, however, was a provision known as Laws of 1982"42"213, hereinafter referred to as "the footnote" which stated, in its entirety:

Section 213. Class 50 Employee Benefits Suspended. Notwithstanding other provisions of law and personnel department rules, no benefits other than the employer share of FICA and applicable unemployment compensation and workmen's compensation provisions shall be granted to any Class 50 employee, except a seasonal employee as defined in RSA 98-A:1, II, effective July 1, 1982. The comptroller shall, no later than 10 days after the effective date of this section, after consultation with appropriate department heads, determine the savings in each agency that will result from this action; and these amounts shall lapse to the appropriate fund from each affected agency.

The parties hereto have made stipulations of fact attached hereto as Exhibit A and made a part hereof which state that there are a maximum of 316 "permanent-temporary" employees in Class 50 of State service, some being those who are in jobs with temporary funding, some "permanent-part-time" employees and/or otherwise defined as employees classified in State service as Class 50 employees for whatever reason. The parties further stipulate that the best current estimate of the number of those employees affected by the footnote is in the range of 150 to 200 employees. The parties are unable to agree on the number of those employees covered by the Collective Bargaining Agreement or the specific identity of those individuals because no such inquiry has ever been made by the State. There is no debate, however, that some of the departments in which they work are covered by the Collective Bargaining Agreement as part of the bargaining unit.

The present action is an unfair labor practice complaint brought by the State Employees Association of New Hampshire, Inc. (hereinafter SEA) against the State of New Hampshire alleging that the application of the footnote to employees covered by the Collective Bargaining Agreement is a violation of RSA 273-A:5 I (e), (g), (h) and (i). The theory on which this is based is that the parties entered into a Collective Bargaining Agreement for a period of two years, certain provisions of which were dependent on further funding by the Legislature. The Legislature continued funding for certain of these benefits

and did not increase funding for salaries but did what it did for all employees covered by the Collective Bargaining Agreement. The Legislature in passing the footnote, however, deprived only one class of employees of certain of these benefits. The SEA states that if this footnote and the deletion of benefits is applied to employees covered by the Collective Bargaining Agreement, it is an unfair labor practice because such an application by the Executive Branch (employer) breaches as a preexisting Collective Bargaining Agreement without negotiations and in contravention of RSA 273-A.

The State responds to the argument of the SEA by stating, first, in form of a Motion to Dismiss, that the Board is without subject matter jurisdiction over this matter since the footnote was passed as an enactment of the Legislature, subsequent to the passage of RSA 273-A and that the Legislature, as a co-equal branch of government, is authorized and empowered to pass whatever legislation it deems essential for the governance of the State and the Board is without power to vacate or change the legislation. Further, the State contends that it may well be that no Class 50 employees were in fact covered by the Collective Bargaining Agreement and therefore under statutory definitions of temporary and part-time employees, they are not subject to the jurisdiction of the Board. Finally, the State asserts that as a matter of contract law, the Collective Bargaining Agreement was not a two-year contract but a one-year contract when first funded by the Legislature which could in fact be continued for an additional year if funding were made available by the Legislature. Failing that funding, it is the State's view that there was only a one-year agreement, regardless of its format or terms, alleging as a matter of law that it was subject to a condition subsequent in order to become a two-year contract, the condition never having been satisfied, namely full funding for a second year and that the Legislature in only partially funding it for a second year continued it only for certain employees and not those in Class 50.

The Board has held two hearings on this matter. The first, an emergency temporary hearing at the offices of the Board on July 1, 1982, resulted in a temporary order by the Board to the State to continue the benefits pending full hearing. This order was vacated by the Supreme Court of New Hampshire in Case No. 82-295 on July 6, 1982, in which a Petition for Writ of Prohibition brought by the State was granted, without prejudice. The second hearing was held at the offices of the Board on July 8, 1982. As stated, the parties stipulated to the overwhelming majority of facts and exhibits, the stipulation of facts being attached hereto as Exhibit A. The remainder of the hearing primarily consisted of legal argument. The SEA moved to amend its unfair labor practice complaint to substitute certain parties respondent and to substitute a new paragraph 11 for that originally stated, which amendment was granted, and which states:

11. The application of the budgetary footnote number 212, set forth in paragraph 8 by the respondents with respect to any employees who are members of the bargaining unit set forth in paragraph 5, under the circumstances in this matter, is an unfair labor practice under RSA 273-A:5, I, (e), (g), (h) and (i).

The effect of these amendments was to allege that the Executive Branch's application of the footnote to employees covered by the Agreement and not the Legislative passage of the footnote was the unfair labor practice.

FINDINGS OF FACT AND RULINGS OF LAW

The case at hand presents a very difficult issue to the Board because of the State's characterization of the unfair labor practice as a request that the Board hold that the Legislature cannot pass a statute. The State cites the State Constitution and moves for dismissal of the case under the terms of the New Hampshire Constitution, Part 1, Article 37, Part 2, Articles 1, 2, 3, 5 and 56. This is a separation of powers argument and the State contends that the footnote which begins with "notwithstanding other provisions of law..." suspends, repeals or revokes all other laws in connection with the employees and benefits affected. In addition, the State contends that RSA 273-A:1 IX excludes from the bargaining process any temporary or seasonal employees. This second argument neglects to consider the entire text of the statutory provision which restricts the characterization of temporary or part-time employees. Since no hearing has been held on the identity of individuals covered by the Collective Bargaining Agreement who may be in Class 50, the second part of the State's argument may apply to some but will be presumed not to apply to all such employees and that ground is rejected. For reasons stated below, the first argument of the State is also rejected by the Board because of its characterization of the case at hand. Therefore, the Motion of the State to dismiss, is denied.

The Legislature passed RSA 273-A in 1975 and under its terms presumed to be bound by its provisions, making no exception for the State as an employer defining "public employer" as "the State and any political subdivision thereof...", RSA 273-A:1 X. The Legislature also included in the law the following unfair labor practices if found to have been committed by employers:

- (G) To fail to comply with this Chapter or any rule adopted under this Chapter;
- (H) To breach a Collective Bargaining Agreement;

(I) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule.

The Board will not presume that the Legislature in passing the footnote intended by broad brush to repeal any or all of RSA 273-A. In addition, the Board does not question the right of the Legislature to pass statutes. The Board further recognizes that to the extent possible, laws passed by the Legislature must be read to make sense, to be consistent and to comply with other obligations of the State. The Board believes that the footnote, RSA 273-A and the Collective Bargaining Agreement can be read consistently.

No one questions that there are certain Class 50 employees not covered by the Collective Bargaining Agreement either because they are employees not subject to the provisions of RSA 273-A because of the nature of their employment or because they are employed by units of the State not subject to the Collective Bargaining Agreement. As to these employees, there is no question that the provisions of the footnote apply and that the benefits are not available. The Board believes and rules that it is to these employees that the Legislature intended the footnote to apply. If the footnote were read as intended to apply to Class 50 employees covered by the Collective Bargaining Agreement, then the unamended complaint brought by the State Employees Association would apply since the Legislature would have continued benefits (that is, those benefits which were funded for one year by the first budget passed in 1981) for all employees covered by the agreement for a second year, and then would have deleted certain employees from this coverage, without negotiation, and without the opportunity for negotiation concerning the effect of the legislation.

The Legislature recognized that it was not fully funding everything contained in the contract and enacted a directive (Committee of Conference on Senate Bill 23, Page 10, II (a) (1) (A), House Record, Vol. 4, No. 217) as follows:

The executive through the state negotiating committee, and the state employee organization certified as the representative thereof shall re-open negotiations to consider an agreement for fiscal year 1983. Said renegotiation shall be limited to the amount of the fiscal year 1983 salary increase.

The quoted language appears to the Board to be a recognition that with the exception of one matter, salaries, the agreement was a two-year agreement and was continuing, not subject to

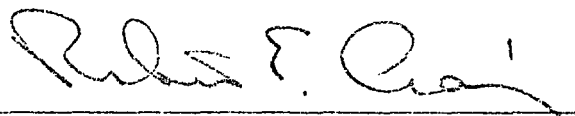
renegotiation.

The State appears to interpret the legislation to require it to delete benefits from all Class 50 employees and not merely those who are not covered by the Collective Bargaining Agreement in effect. Were this the case, as stated, an unfair labor practice would have been directed by the Legislature. Reading the footnote to be consistent with the law of Collective Bargaining, RSA 273-A, and the contract entered into by the State, recognized by the Legislature and executed by the State as a binding agreement, is in the Board's opinion the proper legal interpretation of the legislation. Under this reading, it is the State's interpretation of the statute and application of the statute to all employees and elimination of benefits from those Class 50 employees covered by the Collective Bargaining Agreement which is the unfair labor practice. This action by the public employer is an administrative one clearly within the jurisdiction of this Board. Therefore, if the State's interpretation continues and the benefits continue to be denied to employees covered by the Collective Bargaining Agreement, an unfair labor practice will continue. This is a violation of RSA 273-A:5 I (h) and (i).

Consistent with these findings, the Board issues the following order:

ORDER

1. The parties are directed to meet and confer to determine the number and identity of those Class 50 employees covered by the Collective Bargaining Agreement and to submit a list of such employees to the Board within ten (10) days.
2. The State is ordered to cease and desist the actions to delete benefits provided to all employees covered by the Collective Bargaining Agreement from Class 50 employees covered by the agreement and to restore said benefits retroactive to July 1, 1982, to those Class 50 employees covered by the agreement.
3. In making the determination required in paragraph 1 of this order, the Board orders that no employee be determined to be temporary solely by reason of the source of funding of the position in which he is employed and that the definitions in the contract as to covered employees shall apply.



ROBERT E. CRAIG, Chairman
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Signed this 27th day of July, 1982.

Chairman Robert E. Craig presiding. Members Osmand and Hilliard concur. Member David L. Mayhew dissents (See following page). Executive Director Evelyn LeBrun and Board Counsel, Bradford E. Cook, also present.

Member, David L. Mayhew dissenting:-

I respectfully dissent from the decision of the Board reached today. I do not believe that there was evidence before the Board that the Legislature did not fully understand the impact of its decision and its effect on all employees in Class 50, or the contract. Therefore, I believe the Board is without power to negate an act of the Legislature and the position taken by the State at hearing must be upheld.

A handwritten signature in cursive script, reading "David L. Mayhew", is written over a horizontal line. The signature is fluid and extends to the right with a long, sweeping tail.

DAVID L. MAYHEW, Board Member

Signed this 27th day of July, 1982