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. 83-02

APPEARANCES

Representing the State Employees Association of New Hampshire, Inc.

Robert Clark, Esquire, Counsel

Representing the State of New Hampshire

James E. Townsend, Esquire, Assistant Attorney General
Leslie J. Ludtke, Esquire
John J. Ratoff, State Negotiator

BACKGROUND

This is a case arising from the decision of the Public Employee Labor Relations Board, No. 82-53, issued July 27, 1982. The underlying dispute concerns the applicability and enforceability of a footnote passed by the 1982 legislature in connection with "Class 50" employees of the state. In the initial decision, the Board found that the footnote passed by the legislature had been misapplied by the officials and officers of the state (the public employer) to members of bargaining units covered by collective bargaining agreements and, as a portion of its order, ruled as follows:

> "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."

The parties attempted to identify the employees in question and, instead of submitting a list, have submitted voluminous pleadings to the Board which indicate a basic disagreement between them as to which employees are covered. Without restating all of the arguments contained in those pleadings, all of which are part of the record, the basic dispute centers on the number and identity of employees in Class 50 who are covered by the Board's order.

A hearing was held by the Public Employee Labor Relations Board to resolve the issue and clarify the identity of the employees on January 11, 1983. At the hearing, the parties identified eight classifications of employees to whom the initial ruling could apply. Joint Exhibit #1, attached hereto, is a chart setting forth those categories. Briefly, the categories include temporary full-time employees, part-time employees, probationary employees and seasonal employees. Further, each of those categories is divided into two parts, those who are employed in a unit of state government which was designated and identified for collective bargaining purposes prior to the passage of RSA 273-A and was therefore "grandfathered", and those which have been created since the passage of RSA 273-A and therefore were created according to the requirements of that statute. See State Employees Association of New Hampshire, Inc. v. New Hampshire Public Employees Labor Relations Board, 116, N.H. 653 (1976).

Certain employees in Class 50 are agreed by the parties not to be covered by the initial Board order and not to be in dispute. These include those who are employed by units of state government which are not covered by collective bargaining, seasonal employees whether in units which were grandfathered or created after the passage of RSA 273-A, part-time employees in units created after the passage of RSA 273-A (because of the provisions of RSA 273-A:1, IX (d)), and probationary employees in units created after the passage of RSA 273-A who are excluded if the position in which they are working is an original hire position and they have not worked for twelve months, according to the definitions contained in statute.

There are four categories of employees on which the parties cannot agree as to coverage or noncoverage under the decision of the Board. These include temporary full-time employees, part-time employees and probationary employees in grandfathered units and temporary full-time employees in units created after the passage of RSA 273-A. The Board received testimony and argument concerning these categories at its hearing.

FINDINGS OF FACT AND RULINGS OF LAW

Three of the categories can be discussed together. These are the temporary full-time employees, part-time employees and probationary employees in units which were grandfathered, that is created prior to the passage of RSA 273-A and covered by a grandfather provision as interpreted by State Employees Association of New Hampshire, Inc. v. New Hampshire Public Employee Labor Relations Board, supra. At hearing, it was shown by the SEA that the petitions for certification of grandfathered units requested "all classified employees" and it was asserted that prior to the passage of RSA 273-A the pre-existing units contained not only full-time employees but also temporary full-time employees, part-time employees and probationary employees. Therefore, the SEA asserted that since they are classified employees, they should be included regardless of the definitions contained in RSA 273-A:1 IX (d) which defines "public employee" in connection with temporary, probationary and the like. The State countered with the argument that provisions of RSA 273-A should control even in grandfathered units or that in the alternative only those employees who were employed prior to the passage of RSA 273-A should be grandfathered and not the units themselves. The Board finds this last argument to be counter to the findings of the Supreme Court of New Hampshire in the cited case and rejects them. However, the only testimony at hearing, from John Ratoff, State Negotiator, former legislator and participant in the passage of the legislation as well as State Liquor Commissioner prior to the passage of RSA 273-A, the only State Negotiator who has negotiated since the passage of that statute, was that no negotiations have ever taken place on behalf of temporary full-time, part-time or probationary

employees. Indeed, there was no testimony by the SEA that it had ever asserted coverage for these employees or challenged the non-coverage of them under the contracts either before the Board or in court.

Having considered the testimony and its obligations to discover the intent of the parties beyond mere words, the Board is constrained to find that the true meaning of the words defining the "classified state employees" contained in the grandfathered units, set by a practice, custom and recognition as well as the defined postures of the parties in negotiations and the terms of the contracts agreed upon, clearly indicate that temporary full-time, part-time and probationary employees were not part of the grandfathered units. They, therefore, are not included in the grandfathered units or covered by Board order 82-53, except to the extent that they are considered public employees under the provisions of RSA 273-A:1 IX (d). Thus, temporary full-time employees in grandfathered units are subject to the same analysis and concessions as the temporary full-time employees in the non-grandfathered units, see infra. As to the excluded temporary full-time, part-time and probationary employees in grandfathered units, some of the misunderstanding may have arisen from the fact that there were provisions in other statutes which afforded them benefits given to other employees under certain provisions of RSA 98-A. These are benefits conferred by statute, however, and not by the provisions of collective bargaining agreements and as to these benefits, the legislature certainly has the power to delete the benefits. An unfair labor practice was not committed by the public employer deleting benefits from these employees (by statute) since these are employees on whom benefits were conferred by other statutes and statute could remove these benefits as well.

As to the fourth category, temporary full-time employees in units created after the passage of RSA 273-A, it is the position of the SEA that such employees are public employees if they are deemed temporary solely by reason of the source of funding of their positions or if they have achieved the status of permanent temporary employee under RSA 98-A:3. The first of these arguments is based on the definition of public employee found in RSA 273-A:1 IX (d) which states an employee will not be considered temporary solely on the basis of funding of this position (an argument agreed to by the State). The second is based on an argument by the SEA that an employee who achieves the classification of "permanent temporary" employee under the provisions of RSA 98-A:3, having worked in the position for six months or more, is no longer in a "temporary status" as defined in RSA 273-A:1 IX (d) since his "status" has been redefined by other statute. The State contends that only employees whose positions are funded by temporary sources are included as public employees and that the applicability of RSA 98-A:3 is incorrectly relied upon by the SEA.

The Board agrees with the SEA that temporary full-time employees in units created after the passage of RSA 273-A are public employees if they are deemed temporary solely by their reason of the source of their funding or are public employees if they have worked in a position for six months or more and therefore have become permanent temporary employees under RSA 98-A:3 since their status has been redefined under another, not inconsistent, statute.

In conclusion, the Board has found and rules that the employees who were covered by the original order of the Board and should not have benefits taken from them since those benefits were conferred by Collective Bargaining Agreements between the parties and not solely conferred by statute include the following:

1. Temporary full-time employees whether in grandfathered or non-grandfathered units who have achieved permanent temporary status under RSA 98-A:3 or are deemed temporary solely by reason of their source of funding and therefore are defined as public employees under RSA 273-A:1 IX (d).

2. Probationary employees only if they are defined as public employees under RSA 273-A:1 IX (d).

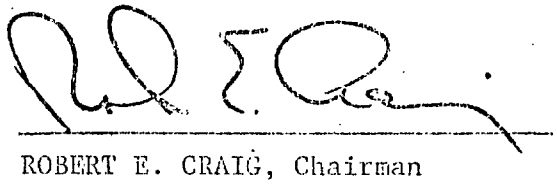
The Board further rules that the order covers no part-time employees since no evidence was introduced at hearing that any part-time employees were actually covered or considered covered by any one prior to the enactment of RSA 273-A, none have been bargained for since and none are covered under the provisions of RSA 273-A as public employees.

As to the other categories, the parties are in agreement as to the proper interpretation of order 82-53.

ORDER

The Board issues the following order:

Having ruled on the questions of the parties as to legal questions of coverage of its original order, the parties are directed to meet and to confer to determine the number and identity of those Class 50 employees covered by the Collective Bargaining Agreement, consistent with this order, and to submit a list of such employees to the Board within ten (10) days of the receipt of this order so that it can be conclusively determined which employees should have their benefits continued.



ROBERT E. CRAIG, Chairman

Signed this 24th day of February , 1983.

Chairman Robert E. Craig presiding. Members Hilliard and Mayhew also voting. All concurred. Board Counsel, Bradford E. Cook, also present.