



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION
OF NEW HAMPSHIRE, LOCAL 1984

Complainant

v.

STATE OF NEW HAMPSHIRE,
DEPARTMENT OF CORRECTIONS

Respondent

CASE NO. S-0376:5

DECISION NO. 96-109

APPEARANCES

Representing State Employees Association:

Ward Freeman, Chief Negotiator

Representing State of New Hampshire:

Thomas Manning, Manager

Also appearing:

Kevin E. Gathercole

Kate Gathercole

Lisa Currier, Department of Corrections

Dennis Murphy

John Vinson, Esq.

BACKGROUND

The State Employees Association of New Hampshire, S.E.I.U. Local 1984 (Union) filed unfair labor practice (ULP) charges against the State of New Hampshire, Department of Corrections (State), on September 4, 1996 alleging violations of RSA 273-A:5 I (h) and (i) resulting from the State's implementing an involuntary transfer in violation of a CBA side bar and past practice. The State filed its answer on October 4, 1996 after which this matter was heard by the PELRB on October 29, 1996.

FINDINGS OF FACT

1. The State of New Hampshire is a "public employer" of personnel employed at its Department of Corrections within the meaning of RSA 273-A:1 X.
2. The State Employees Association of New Hampshire, SEIU Local 1984, is the duly certified bargaining agent for various classifications of corrections officers employed by the State at its Department of Corrections.
3. The State and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 1995 through June 30, 1997. Article 2.1.2 reserves unto management the right to appoint, transfer, promote, assign, demote, suspend and discharge employees. Article 2.1.6 reserves unto management the right to take whatever actions may be necessary to carry out the mission of the department "in situations of emergency." "Emergency" is defined as "any condition or situation out of the ordinary which requires immediate action to avoid danger to life, property, or to protect losses affecting the Employer, the employee or the general public."
4. On September 29, 1987, Ronald L. Powell, then Commissioner of the Department of Corrections, wrote and signed a memo to Chris Henchey and Dennis Murphy at the State Employees Association purporting to memorialize agreements made between the parties in the Governor's Office on September 22, 1987. Paragraph 2 thereof said, "Any S.P.U. personnel, having been transferred from New Hampshire Hospital to the Department of Corrections on July 1, 1985, will not be involuntarily transferred to the State Prison, except in cases of emergency (and this has not occurred)." Also, "Disciplinary transfers from the Secure Psychiatric Unit (S.P.U.) to the State Prison will not occur (and have not occurred)." Dennis Murphy, one of the addressees of this memorandum, testified that it resulted after the New Hampshire Senate recalled a reorganization bill from the Governor's desk, the Governor intervened, and the parties "hammered out" the stated agreements. Murphy also testified that the agreements memorialized by Powell intended (1) that S.P.U. employees would only be transferred to the State Prison in the Department of Corrections

if they agreed to that transfer and (2) that this agreement would only apply to then-current employees of the S.P.U. which was being redesignated from Health and Human Services to Corrections. The State disputes that Powell's memorandum should be read as a contract or side bar to a contract or that Powell could make the commitments reflected therein extending beyond his term as commissioner.

5. Kevin Gathercole has worked for the State continuously since before 1985, being first employed in 1979 but having a break in service before 1985. He currently is a corrections officer/sergeant in the Department of Corrections. He was involuntarily transferred to the State Prison from first shift at S.P.U., both units now being part of the Department of Corrections, effective May 24, 1996 pursuant to notification he received on or about May 9, 1996. When Gathercole transferred to the Department of Corrections from Health and Human Services as part of the reorganization referenced in Powell's memorandum, he claims he was given assurances by Commissioner Powell that he and other employees like him, with similar employment circumstances and histories, would not be transferred or reassigned out of S.P.U. to the state prison unit as guards.
6. Gathercole was an employee of the State at the time Powell's memorandum was written and was in a position covered by its contents. He testified that other former mental health workers now in the S.P.U. portion of the Department of Corrections and who are now classified as corrections officers have not been involuntarily transferred or reassigned from that unit to the state prison unit.
7. John Vinson, counsel for the Department of Corrections, testified that the State took the position that it had reassigned Gathercole, not transferred him, because the move was between two segments of the Department of Corrections, rather than an inter-departmental transfer. He also stated that Gathercole was moved to the State Prison because he already had desirable mental health training and because there was a goal to get more sergeants on the shifts in the prison. He acknowledged that this could have been accomplished by promoting a correctional officer/corporal already assigned to the prison rather than transferring Gathercole.

DECISION AND ORDER

From the uncontroverted testimony presented to us from the Union, the Powell memo of September 29, 1987 either was, or has been treated as the equivalent of, a side bar agreement to the CBA. It appears to have been honored, without exception, since it was "hammered out" on September 22, 1987, until the present incident. Whether we treat it as a side bar or an established working condition, it is inappropriate for the State to deviate unilaterally from it some nine years after its inception. If there is continuing doubt about the effectiveness of the side bar agreement, the party seeking to change it should raise it in the present round of negotiations.

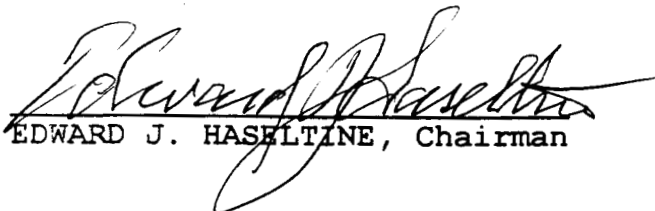
Likewise, if we were to accept this State's theory of a "reassignment" versus a "transfer," that would ignore both the underlying premise of the Powell memorandum as well as the unrefuted testimony of Murphy and Gathercole as to its purpose and as to what the accepted practice has been these past nine years. Regardless of the desirability of having more sergeants and/or personnel with Gathercole's specialized training at the prison, he was and is an appropriately covered employee under the provisions of the Powell memorandum given his dates of employment with the State.

Finally, we have been presented with no evidence of an "emergency" in this case such as to exclude Gathercole from the provisions of the Powell memorandum or to enable the State to invoke the provisions of Article 2.1.6 of the CBA.

The actions complained of constitute a ULP under the provisions of RSA 273-A:5 (h). The State is directed to CEASE and DESIST therefrom and to restore Gathercole to his previous position in SPU, inclusive of his former schedule, status and job functions.

So ordered.

Signed this 12th day of DECEMBER, 1996.


EDWARD J. HASELTINE, Chairman

By unanimous decision. Chairman Edward J. Haseltine presiding.
Members Richard Roulx and E. Vincent Hall present and voting.