State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, SEIU, LOCAL 1984 Complainant	:	
v.	:	CASE NO. S-0398:1
STATE OF NEW HAMPSHIRE, DIVISION OF PERSONNEL Respondent	:	DECISION NO. 1998-096

APPEARANCES

Representing State Employees Association of New Hampshire:

Thomas Hardiman, Director, Field Operations

Representing State of New Hampshire:

Douglas Jones, Esq.

Also appearing:

Stephen J. McCormack, State Employees Association
Virginia Lamberton, State of New Hampshire
Linda Chadbourne, State of New Hampshire
Jean Chellis, State Employees Association
Michael Reynolds, Esq., State Employees Association
Kate McGovern, State Employees Association
Thomas Manning, State of New Hampshire

BACKGROUND

The State Employees Association of New Hampshire, SEIU, Local 1984 (Union) filed unfair labor practice (ULP) charges on August 14, 1998 against the State of New Hampshire, Division of Personnel (State) alleging violations of RSA 273-A:5 I (a), (e), (g), (h) and (i) resulting from unilateral and unbargained for changes in working conditions by implementing certain changes to the administrative rules of the Division of Personnel. The State filed its answer on August 26, 1996 in the form of a Motion to Dismiss, a typographically corrected copy of which was provided to the PELRB and to the Union, in the first instance, when this matter was heard on October 20, 1998.

FINDINGS OF FACT

1. The State of New Hampshire is a "public employer" of personnel who operate and are employed in its various departments of state government, as defined by RSA 273-A:1 X. The Division of Personnel houses the office of the Manager of Employee Relations which, in turn, is responsible for the negotiation and administration of collective bargaining agreements for state employees.

2. The State Employees Association of New Hampshire, SEIU, Local 1984, is the duly certified bargaining agent for all state employees, with the exception of those state employees who are represented by the New Hampshire Troopers Association.

3. The State and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 1997 through June 30, 1999. (Union Exhibit No. 3.) Subjects such as holidays and floating holidays (Article IX), annual leave (Article X), sick leave, bonus leave and certification of use of sick leave (Article XI) are all component parts of the CBA, in the various contract articles annotated above. The CBA further binds the parties to apply its provisions "equally to all employees in the bargaining unit in accordance with state and federal law" and allows the State to "manage, direct and control its operations...subject to the provisions of law..." (Articles 1.5 and 2.1 of CBA.)

4. In addition to the CBA, there are circumstances where employees of the State are also covered by the administrative rules of the Division of Personnel. (Union Exhibit Nos. 2 and 3.) "Forms of Discipline" are covered under the Personnel Rules, PER 1000, (Union Exhibit Nos. 2 and 4) rather than under the CBA. The eight sub parts of Rule PER 1000 are: levels of discipline, dismissal during probationary period, written warning, withholding annual increment, suspension without pay, suspension with pay, disciplinary demotion and dismissal. (See PER 1001.01 through 1001.08 inclusive.)

5. In Appeal of the State of New Hampshire, 138 NH 716, 722-723 (1994) the New Hampshire Supreme Court said, "the mere existence of personnel rules does not require that the subject matter of the rules be excluded from negotiation...unless the subject matter is otherwise reserved to the *sole prerogative* of the public employer by statute." (Emphasis in original.) Likewise, it said, "In general, although not always, proposals by public employees that provide procedures for implementing the public employer's policy will [not fall within the managerial policy exceptions to the public employer's duty to bargain with public employees] while those [proposals] that propose to establish policy, standards or criteria for decision making will [be excluded under the managerial policy exception.]"

6. In July of 1997, the State notified the Union that it intended to modify, revise and readopt its personnel rules. Michael Reynolds, General Counsel for the Union, testified that the Union voiced objections to some of the changes proposed by the Division of Personnel. Records in Case No. S-0398, Decision No. 1997-117, indicate that at least one "meet and consult" discussion was held between the parties about proposed personnel rule changes on July 10, 1997. The ULP filed in that matter on October 17, 1997 was dismissed for the Union's failure to show that any bargaining unit member had been deprived of rights under the CBA or under RSA 273-A by the then proposed changes to the

administrative rules which had yet to be adopted or applied.

7. The revised "Personnel Rules" were adopted on April 21, 1998. (Union Exhibit No. 2) With the exception of PER 1001.08 (f) pertaining to pre-dismissal meetings by the public employer with the employee, the Union's ULP makes no specific reference to any other "new" personnel rule which has prompted the violations complained of in this action. The ULP does, however, make reference, without benefit of old or new rule number, to the need to list evidence to be used in a dismissal case ["old" rule PER 1001.08 (f) (4) since deleted by "new" rule PER 1001.08 (c) which now calls for a "discussion" rather than a listing] and to changes relating to "excessive unscheduled absences," formerly rule PER 1001.07 (a) (5) in Union Ex. No. 4 and now appearing as 1001.03 (a) (3), 1001.04 (a) (3), 1001.05 (a) (3) and 1001.07 (a) (3) (c), with the words "even if payment or approval for the leave is authorized" added, in Union Ex. No. 2. In no instance was there an allegation that a bargaining unit employee had been harmed or deprived of any right under the CBA by or through the application of the "new" Personnel Rules as adopted on April 21, 1998.

8. Union Field Representative Jean Chellis testified that the Union had won two grievance arbitration cases dealing with accrual of bonus leave (i.e, misapplication of Article 11.1.1 by the State, Arbitrator Arnold Zack, award dated April 2, 1992, Union Ex. No. 5) and accrual of a floating holiday while on authorized leave of absence without pay (i.e., misapplication of Articles 9.7 and 9.7.1 by the State, Arbitrator Richard Higgins, award dated May 5, 1993, Union Ex. No. 6). She further testified that the benefits conferred by these arbitration awards were invalidated by the adoption of "new" rule PERS 1205.02 (b) which provides that "no annual leave, sick leave, bonus leave or floating holidays shall be accumulated during a leave of absence without pay."

9. Virginia Lamberton, Director of the Division of Personnel, testified that the purpose behind the revisions to and adoption of the "new" Personnel Rules was to "recodify" them "to reflect the reality of what was going on in state government." By way of example, she cited the State's steadfast policy of following up on abusive use of sick leave when, after the fact of its being approved, there was a discovery that the individual concerned had not been sick and was using the time for purposes other than to recover from his or her sickness. Likewise, she said it was never the State's intention to have employees accrue bonus leave when they were absent from the work place while on approved leave without pay.

DECISION AND ORDER

This case differs from the complaint filed in Case No. S-0398 (Decision No. 1997-117, December 10, 1997) in one cogent aspect, namely, that the "new" Personnel Rules have now been adopted. With the exception of "new" rule PER 1001.08 (f), the pleadings failed to identify any newly adopted Personnel Rule as the cause of this complaint. Then, to the extent the complaint attempted explain how other newly modified and newly adopted Personnel Rules constituted an unfair labor practice, the circumstances alleged failed to establish that the newly adopted Personnel Rules had been applied or, if applied, that they deprived any bargaining unit members of rights conferred under the CBA or under RSA 273-A. Our assessment in State Employees Association v. State of New Hampshire, (Decision No. 1997-117, December 10, 1997) was appropriate, to wit: "When and if changes in the Personnel Rules are formally adopted and when and if their implementation deprives an employee(s) of rights under the CBA or under RSA 273-A, then the matter will be right for processing, either as a grievance or ULP, as the case may be." (Emphasis added.) Similarly, the instant case is premature for adjudication by the PELRB.

The parties in this case argued various aspects of Appeal of the State of New Hampshire, 138 NH 716 (1994), relative to how the negotiability requirements discussed therein should be applied to the circumstances of the proposal to modify and then the adoption of the "new" Personnel Rules. We agree with those

witnesses who tried to convince us that the proposed, and now adopted, Personnel Rules must be negotiated, especially as they apply to potential changes to contractually guaranteed benefits or procedures. Yet, throughout the history reiterated to us relative to the course of conduct complained of in this complaint, the record is bereft of any demand to bargain by either side on the other. Fortuitously, the parties are now entering the bargaining cycle for the next CBA which will commence July 1, 1999. To the extent there is a desire to bargain any changes in benefits or contractually guaranteed rights, the parties must do so, in accordance with the negotiability guidelines in Appeal of the State of New Hampshire, *supra*.

Our order in this case is that the ULP is DISMISSED with the parties being directed to bargain over the complained of changes in the "new" Personnel Rules in accordance with Appeal of State.

So ordered.

Signed this 3rd day of NOVEMBER, 1998.

EDWARD J. HASELTINE
Chairman

By majority vote, Chairman Edward J. Haseltine and Member William Kidder voting in the majority. Member E. Vincent Hall voting in the minority by concurring in part and dissenting in part.

Member Hall's concurring/dissenting opinion:

I concur with the majority in their assessment of Appeal of State and their directive to the parties to negotiate any complained of changes in the new Personnel Rules in accordance with its guidelines, particularly as to those matters which are more akin to "terms and conditions of employment" than to "broad managerial policy." I would, however differ with them on the issue of dismissing this case. On that matter, I dissent and would find violations of RSA 273-A:5 I (e), (h) and (i) relative to the uncontroverted testimony provided to the PELRB and reflected in Finding No. 8, above.

I am convinced by the evidence offered (Finding No. 8) that the adoption of rule PER 1205.02 (b) is evidence of bad faith bargaining and a *prima facie* violation of RSA 273-A:5 I (i). Once the arbitration awards (Union Exhibit Nos. 5 and 6) were rendered, they became the "law of the contract" unless they were either reversed or modified by competent authority or renegotiated by the parties. That has not occurred, as is especially conspicuous from the fact that the State did not begin its initiative to revise and readopt personnel rules until after the current CBA (Union Exhibit No. 3) became effective on July 1, 1997. While the changes complained of in the Personnel Rules may not have been applied to any bargaining unit personnel, the existence of conflicting authorities in the form of the arbitration awards and the subsequently adopted Personnel Rules unnecessarily confuses the effectiveness of the collective bargaining process and the fair and effective administration of the CBA.

I see the adoption of the new Personnel Rules, PER 1205.02 (b) in particular, to be a unilateral change in terms and conditions of employment, namely, the law of the contract as developed by the Zack award pertaining to bonus leave in 1992 and by the Higgins award pertaining to floating holidays in 1993. Those awards appear to have withstood, at a minimum, two CBA's between the parties from 1993 to 1995 and from 1995 to 1997. They also appear to have been honored by them in the meantime. We know from Appeal of Alton School District, 140 NH 303, 308 (1995) that "a unilateral change in a condition of employment is equivalent to a refusal to negotiate...and destroys the level playing field necessary for productive and fair labor negotiations." The same doctrine, and the same result, should apply in this case.

Maintaining a "level playing field" must mean, by way of remedy, that the public employer cannot adopt changes to its Personnel Rules whereby the Union must negotiate away from those changes. It is the *status quo* which must prevail. That means that the changes complained of cannot be unilaterally implemented and that it is the State's obligation, not the Union's, to seek bargaining since it is the State which is seeking to change the *status quo* through the adoption of new Personnel Rules. This Board has ruled against unions when they have attempted to obtain benefits through arbitration after they have been unsuccessful in obtaining those same benefits through bargaining or have relented

or withdrawn the proposal(s) prior to the conclusion of negotiations. (City of Keene v. Keene Police Officers, SEA Local 1984, Decision No. 1998-048, May 29, 1998.) When the actors are reversed, the same result should still apply. Management should not be able to accomplish by changes to its administrative rules that which it has not been able to accomplish at the bargaining table. To permit this to occur would make the provisions of RSA 273-A:5 I (i) meaningless.