State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, S.E.I.U. LOCAL 1984	:	
Complainant	:	
v.	:	CASE NO. M-0591:19
TOWN OF SEABROOK	:	DECISION NO. 1999-069
Respondent	:	

APPEARANCES

Representing State Employees Association of New Hampshire:

Teresa Donovan, Esq.

Representing Town of Seabrook:

Robert D. Ciandella, Esq.

Also appearing:

Cora Stockbrige, State Employees Association
Ray Perkins, State Employees Association
Robert Knowles, State Employees Association
Blanche Gove-Bragg, State Employees Association
Russ Bailey, Town of Seabrook

BACKGROUND

The State Employees Association of New Hampshire, S.E.I.U. Local 1984 (Union) filed unfair labor practice (ULP) charges on June 12, 1998 on behalf of certain employees of the Town of

Seabrook against the Town of Seabrook alleging violations of RSA 273-A:5 I (a), (e), (h) and (i) relating to refusal to bargain and unilateral changes in working conditions, namely, drug and alcohol policies and town vehicle policies. The Town of Seabrook (Town) filed an Answer and Motion to Dismiss on July 6, 1998. Thereafter, this matter was scheduled for and heard by the PELRB on September 17, 1998. That hearing resulted in Decision No. 1998-078 which reported the following stipulation of the parties:

a) The pending ULP shall be continued for a period of sixty (60) days.

b) the parties agree to address the two issues of (i) drug policy and (ii) vehicle use in the following manner:

- Drug Policy - Parties agree to meet during this sixty (60) day period and examine the policy to determine if there is agreement or address areas of concern.

- Vehicle Use - The Union has modified its request that vehicle use should be permitted for only bargaining unit employees on call. The Union will forward this request to the Town Manager with supporting information. The Town Manager agrees to recommend this to the Board of Selectmen.

c) Both parties have agreed to proceed in this fashion without prejudice to any claims and arguments presented to the PELRB.

The parties shall report the results of their efforts to the PELRB no later than November 20, 1998. If the matter has not been resolved, either party reserves the right to request further hearing, with said request being filed on or before November 20, 1998. If no request for further proceedings is filed on or before November 20, 1998, this matter shall be dismissed from the PELRB's Docket of cases.

On November 20, 1998, the Union filed a request with the PELRB seeking a hearing and announcing that the vehicle use issue had been resolved but that the drug and alcohol policy dispute remained unresolved. The PELRB scheduled this matter for hearing on January 20, 1999, said hearing being continued at the request of the parties, during the pendency of related "Right to Know" litigation in the Superior Court in Rockingham County and

arbitration proceedings before arbitrator James Litton. Thereafter, this matter was set for hearing and heard by the PELRB on June 10, 1999, at which time the parties made oral arguments on the drug and alcohol policy issues, submitted two exhibits (Joint Exhibit No. 1 and Union Exhibit No. 1) and agreed to file post-hearing briefs on or before July 16, 1999. Those briefs were received by PELRB on July 15, 1999 and July 16, 1999 respectively, after which the record was closed.

FINDINGS OF FACT

1. The Town of Seabrook is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Seabrook Employee's Association, an a affiliate of the State Employees Association of New Hampshire, S.E.I.U. Local 1984, is the duly certified bargaining agent for organized employees in the police, fire, water, recreation and highway departments and the town office in the Town of Seabrook.

3. The union and the Town are parties to a collective bargaining agreement (CBA) signed on August 2, 1995, ending March 31, 1998, and continuing under *status quo* provisions and under its own terms during negotiations for a successor agreement. The CBA contains provisions relating to work rules (Article 8) and a grievance procedure ending in final and binding arbitration (Article 10) pertinent parts of which appear below:

ARTICLE 8

WORK RULES

8.1 The Town may prepare, issue and enforce rules and safety regulations necessary for safe, orderly and efficient operations.

* * * * *

ARTICLE X

GRIEVANCE PROCEDURE

10.1. The purpose of this procedure is to provide an orderly

method for resolving grievances. A determined effort shall be made to settle any such differences at the lowest possible level in the grievance procedure.

10.2. For the purpose of this Agreement, a grievance is defined as those disputes involving the interpretation, application or alleged violation of any provision of this Agreement. Grievances shall be processed in accordance with the following procedures within the stated time limits.

* * * * *

10.9.2. The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He/she shall only consider and make a decision with respect to the specific issues submitted, and shall have no authority to make a decision on any other issue not so submitted. In the event the arbitrator finds a violation of the terms of this Agreement, he/she shall fashion an appropriate remedy. The arbitrator shall submit in writing his/her decision within thirty (30) calendar days following the close of the hearing or the submission of briefs by parties, whichever, is later, unless the parties agree to a written extension thereof. The decision shall be based solely upon his interpretation of the meaning or application of the express terms of this Agreement to the facts of the grievance presented. A decision rendered consistent with the terms of this agreement shall be final and binding.

4. On or about April 29, 1998, the Town Selectmen adopted a "Drug and Alcohol Free Workplace Policy," the preamble of which appears as Tab 1 to the Town's post-hearing brief. (See also Appendix A to ULP and Joint Exhibit No. 1 which includes the entire thirty pages of the policy.) The next to the last paragraph of the preamble or "policy statement" reads as follows:

> This statement of the Town's policy is not intended and does not impair, interfere, or otherwise modify provisions of collective bargaining agreements governing the matter in which employee discipline is to be administered, nor does it impair, interfere or modify any other provision of any existing collective bargaining agreement. The Town has adopted this policy to fulfill its management responsibility to the safety of the public and its workforce.

During the hearing before the PELRB, the Town represented, through counsel, that the 1998 Workplace Policy applied to all Town employees, whether unionized or not and that the foregoing paragraph was inserted into the policy statement to insure that organized employees, involving several different bargaining units, would be on notice that they had recourse to the grievance procedures in the various collective bargaining agreements in the event that they wished to contest or file a grievance about the application of the drug and alcohol policies or any discipline applied thereunder.

5. The Drug and Alcohol Free Workplace policy delineates between all "employees" generally and "covered employees," by definition to wit:

> "Employees" means all employees of the Town, full-time, part-time, temporary or otherwise.
>
> "Covered employee" means any Town employee who must have or obtain a CDL as a condition or employment or any applicant for such employment, supervisors of CDL employees, and employees who perform safety sensitive functions.

Likewise, these distinctions are used in determining the applicability of certain procedures or testing under the Workplace Policy, for example:

> III. Testing
>
> Pre-employment, reasonable suspicion, post-accident and random testing shall apply to all covered employees. Pre-employment reasonable suspicion, and post accident testing shall apply to all employees.
>
> * * * * *
>
> 4. Non-covered employees
>
> a) In the case of a non-covered employee (employee not in a safety sensitive position and therefore not subject to USDOT testing regulations), who exhibits impairment or being under the influence of alcohol or controlled substances, the supervisor shall require that the employee leave the facility or job site for the

remainder of the work day and will arrange suitable transportation. A non-covered employee suspected may request to be tested at the time he or she has been asked to leave.

* * * * *

C. Post Accident
All Employees

1. After an accident, any employee may be subject to testing and/disciplinary proceedings based on reasonable suspicion. Refer to reasonable suspicion procedures.

2. After any accident, either motor vehicle or on site with injury, a non-covered employee may be subject to the procedures set forth in Section III.B above if there is a "reasonable suspicion" that the employee was under the influence of or impaired by controlled sub stances or alcohol. Such procedures may result in the disciplinary action including suspension or termination from employment. Post accident testing of a non-covered employee is not mandated by USDOT regulations but is required by the Town of Seabrook.

Covered Employees

2. Testing is required of covered employees if an accident results in:

A) a fatality; or

B) moving violation citation of the Town driver.

* * * * *

D. Random (covered employees only)

The Town Provider will provide a list of randomly selected position numbers to the HSO. The Town provider is responsible for the random selection of covered employees for testing. Employees' position numbers will be drawn randomly and periodically. Random tests will be conducted on a monthly basis at threshold levels prescribed by the Town in accordance with USDOT requirements. Except for providing and updating the position numbers of affected employees to the

> provider, the Town Manager will not be involved in the random selection process.

6. The Union asserts that the adoption of the Drug and Alcohol Free Workplace Policy is/was negotiable and that negotiations to discuss and agree upon the content of such a policy were protected under a letter from Blanche Gove-Bragg to the Selectmen for the Town of Seabrook dated January 27, 1993. That letter, appearing as Attachment 1 to the 1995-1998 CBA, provided, in pertinent part:

> This letter will serve to notify you the Seabrook Employees Association is willing and prepared to appoint an appropriate number of union members to serve on a Inter-Union Drug Testing Study Committee at such time as the Board of Selectmen determines that it wishes to pursue such a study.
>
> * * * * *
>
> This letter is written in response to the Town's proposal for drug testing language in the SEA collective bargaining agreement which was presented on January 15, 1993.
>
> This letter shall remain in full effect until March 31, 1994, or such later date as the contract being negotiated on the date of this letter shall technically be due to expire, as cited in its duration article.

We find the terms of this letter to have expired.

DECISION AND ORDER

Our assessment of this case has been detailed and sometimes tortuous. We commend the delineation of personnel as "employees" and "covered employees." While, in some instances, this has been helpful, in other instances it has allowed certain policies to be applied with too broad a brush. Before we address that problem, however, we affirm two cogent and apparent actions by the Town.

First, we affirm the policy and regulations promulgated by the Town in accordance with federal mandate, namely, requirements imposed by the United States Department of Transportation (USDOT). This Board has spoken to a similar situation which involved Amalgamated Transit Union, Local 717 v. Manchester Transit Authority, Decision No. 93-66 (June 15, 1993). That case

involved the implementation of a drug testing program pursuant to Federal Motor Carrier Safety Regulations (FMCSR), as found in 49 CFR 390 *et seq.* That case held that "given that the implementation of [the] drug testing program was an imposed requirement and not merely a prerogative improperly and unilaterally implemented by management, there is no foundation for the Union's complaint...." The same holds true for this case. That portion of the policy which was implemented in response to and in order to comply with USDOT regulations or the FMCSR as they apply to "covered employees" is not violative of RSA 273-A or the obligations to bargain imposed thereunder.

Second, both in its policy document (Tab 1 to Town's post-hearing brief) and in representations before this Board, the Town has acknowledged that that document applies to all Town employees, organized and unorganized. Recognizing that difference, the Town has explained Article 10.9.2 of the CBA as containing the mechanism for organized employees to challenge the imposition of directives or discipline under the Workplace Policy. This is tantamount to extending the "workable grievance procedures" of RSA 273-A:4 to complaints concerning the administration and implementation of the Workplace Policy document (Joint Exhibit No. 1). By so doing, the Town has acknowledged and extended the same protections to provisions of the Workplace Policy as apply to issues concerning the interpretation and administration of the CBA. The bargaining unit employees cannot now say they have no avenue of redress nor can policy decisions about drug and alcohol issues be made unilaterally by the Town without the possibility that they may be challenged by the Union through the grievance procedure. Likewise, given the seriousness of reliance that may be placed on this avenue of redress through the grievance procedure, that process cannot now be unilaterally modified or withdrawn by one party without the consent of the other.

Generally, the foregoing has addressed "covered employees," mandates under USDOT and FMCSR, means of redress acknowledged under the CBA and the ability to formulate and implement policy when required by outside authority, presumably authority outside the realm of RSA 273-A. This leaves us with "employees" generally, because we have already addressed "covered employees."

In its post-hearing brief, the Town suggests that the Town was "mandated" by the Federal Drug-Free Workplace Act to revise its policies relative to drug and alcohol use and/or abuse in the

workplace in order to qualify to receive grants from a Federal agency, citing to 41 U.S.C. § 702 (a)(1). Neither party, however, elected to provide a copy of the FDFWA, 41 U.S.C. § 702 (a)(1), or of language which federal authorities require in order to be in compliance, *e.g.*, provisions concerning possession or use of a controlled substance, actions on or off the job, infractions not on-site or within control of the employer and whether compliance with the foregoing may be made a condition of employment. In essence, they neither established the existence of a mandate nor established, if there was one, what it is. Inasmuch as the parties have not raised these issues to us, we will not speculate how they might have been argued. Instead we will turn our last analysis to the extent to which any provisions of the Workplace Policy are offensive to the obligation to bargain as found in RSA 273-A:3.

RSA 273-A:3 obligates the parties to negotiate in "good faith...at reasonable times and places in an effort to reach agreement on the terms of employment." Thus, we look to the policy (Joint Exhibit No. 1) to see if any of the mandates of that document intrude into terms and conditions of employment, particularly if those intrusions are more akin to "terms and conditions of employment" than to "matters of broad managerial policy" as discussed in Appeal of the State of New Hampshire 138 N.H. 716 at 722 (1994) and Appeal of City of Nashua Board of Education, 141 N.H. 768 at 774 (1997). Such an examination is also consistent with Article 8 of the CBA (Finding No. 3) where the parties have agreed that the Town may "issue and enforce rules and regulations...for safe, orderly and efficient operations," distinguishing "safety and order" from "terms and conditions" of employment as addressed elsewhere in the contract.

We take the term "employees" to mean "all employees" generally from which the category of "covered employees" is carved out as an exception. We have addressed "carved out" or "covered employees," above. Our analysis here applies to "employees" generally, such as are referenced in Finding No. 5, above. [See for example, "post-accident testing shall apply to all employees" in Section III of the policy; "Post accident testing of a non-covered employee is not mandated by USDOT regulations but is required by the Town of Seabrook" in Section III, (c)(2); and "reasonable suspicion for all other employees shall result in an investigation, possible testing and referral for assessment and/or disciplinary action, including termination" in Section III, (B).] When the Workplace Policy addresses such

items as the imposition of discipline and the potential for termination of non-exempt or "non-covered" employees, it becomes "close and personal" and rises to the level of a "term and condition of employment" when contrasted to being a matter of "broad managerial policy."[1] Compliance requirements and the imposition of discipline not mandated by higher authority, as discussed above, but imposed by the Town at its option must be negotiated under Appeal of State, *supra*, because these topics are not reserved to the sole prerogative of the public employer, primarily affect terms and conditions of employment and do not interfere with the public control of governmental functions. Translated to the circumstances of this case, the Town has the authority to promulgate the Drug and Alcohol Free Workplace Policy as a matter of safety or efficiency in accordance with rights under RSA 273-A:1 XI relative to its methods, programs, organizational structure and the direction of its personnel. It must, however, negotiate over the imposition of discipline, a working condition, that may result from the promulgation of that policy.

The Town's refusal to bargain over workplace policy relating to the imposition of discipline, as detailed in the previous paragraph, is violative of RSA 273-A:5 I (e). All other charges of unfair labor practice are dismissed. The parties are directed to negotiate in good faith consistent with this decision.

So ordered.

Signed this 18th day of August, 1999.

BRUCE K. JOHNSON
Alternate Chairman

By unanimous decision. Alternate Chairman Bruce K. Johnson presiding. Members Seymour Osman and E. Vincent Hall present and voting.

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[1] Note the *dicta* in Appeal of State, 138 N.H. 716 at 722 (1994) which employs the analogy of the negotiability of personnel rules.