



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION OF
NEW HAMPSHIRE, LOCAL 1984,
SEIU

Complainant

v.

STATE OF NEW HAMPSHIRE,
DEPARTMENT OF CORRECTIONS

CASE NO. S-0376:10

DECISION NO. 1999-119

APPEARANCES

Representing State Employees Association of
New Hampshire, Local 1984:

Thomas Hardiman, Director of Operators

Representing State of New Hampshire,
Department of Corrections:

Thomas F. Manning, Director of Personnel

Also appearing:

Richard Gerry, New Hampshire Department of Corrections
Stephen J. McCormack, State Employees Association
Stephen K. Rogers, Sr., Department of Corrections
Dennis Parker, State Employees Association
Lisa Currier, New Hampshire Department of Corrections
John Vinson, Counsel for Department of Corrections

BACKGROUND

The State Employees Association of New Hampshire, Local 1984, S.E.I.U. (Union) filed unfair labor practice (ULP) charges on September 7, 1999 against the State of New Hampshire, Department of Corrections (State) alleging violations of RSA 273-A:5 I (a), (c), (e) and (i) resulting from a refusal to bargain and the unilateral implementation of a no smoking policy in the workplace. The State

filed its answer, inclusive of a motion to dismiss, on September 22, 1999 after which this matter was heard by the PELRB on October 26, 1999.

FINDINGS OF FACT

1. The State of New Hampshire employs personnel in the operation of its Department of Corrections and is a "public employer" within the meaning of RSA 273-A:1 X.
2. The State Employees Association of New Hampshire, Local 1984, S.E.I.U. is the duly certified bargaining agent for corrections officers and other personnel employed by the Department of Corrections.
3. The State and the Union are parties to a master collective bargaining agreement (CBA) for the period July 1, 1999 to June 30, 2001; however, at the time this ULP was filed, the parties had not reached agreement on all sub-unit negotiations, including those for the Department of Corrections. The Union asserts that one of its proposals deals with "smoke free" facilities within the Department of Corrections (Exhibit No. 1 to ULP) which is still on the bargaining table. (ULP, pleadings, Item 2)
4. On or about June 17, 1999, the Union sent a letter to then DOC Commissioner Henry Risley claiming that smoking in prisons is controlled by statute, RSA 155:67 VII, that rules controlling smoking are controlled by RSA 155:71 and RSA 541-A, and that a proposal had been advanced by the Union in the course of sub-unit negotiations which are controlled by RSA 273-A (Exhibit 2 to ULP.) On June 25, 1999, Risley responded by letter to SEA's Director of Operations, Thomas Hardiman, saying that he was forwarding Hardiman's letter of June 17th to the smoke-free environment committee convened by a prior warden and that he, Risley, had not instituted any new smoking policies at the State Prison in Concord (NHSP-M) so there were none for him to rescind. (Exhibit 3 to ULP.)
5. Notwithstanding Finding No. 4, on May 21, 1999, John Martin, Unit Manager at the DOC in Concord (Medium Custody North) sent a memo to other managers and to Paul Cascio of the Union stating that he and Mike Beadle had been tasked with creating a committee "to facilitate the implementation of a Tobacco-free Institution Policy by September 1, 1999" and calling

the first meeting of that committee for May 28, 1999 (Union Exhibit No. 4) That correspondence said, "Suggestions, alternatives and criticism are encouraged, but September 1 will be the implementation date."

6. On September 1, 1999, a smoking ban was implemented on the grounds (i.e., applying to both the building and grounds) of the prison in Concord. According to Richard Gerry, Administrator of Security, this caused "very little problem" because there was a long lead time between when the ban was announced and when it became effective. Steve Rogers, a corrections officer and member of the DOC sub-unit negotiating team, confirmed the policy of no smoking on the grounds, by anyone. Notwithstanding that cigarettes have been declared to be contraband, he said he continues to see inmates smoking on the prison grounds.
7. John Vinson, counsel for DOC, testified that the smoke-free decision, as opposed to its implementation, was made in January of 1999, before the Union brought its smoke-free discussion committee proposal to the table in March of 1999. Vinson explained that once smoking was banned for inmates, it also had to be banned for staff because of the contraband issue. The Union responded with an argument that staff smoking has been permitted in the past outside the buildings or when confined to the employees' vehicles.

DECISION AND ORDER

Despite the multitude of information presented by the parties, this is a case relating to working conditions of DOC personnel at the prison. Determination of this issue is consistent with our responsibilities under RSA 273-A generally and the obligation to bargain specifically under RSA 273-A:3 and 273-A:5 I (e). Conversely, this is not a case where we are required, obligated or have any jurisdiction to address the impact of the smoking ban on inmates, the efficacy of DOC's procedures in adopting rules to implement that ban or the implications of RSA 155 as it pertains to smoking in areas such as prisons.

Article 13.1 of the parties' CBA indicates that the State has obligated itself contractually to "make every reasonable effort to provide and maintain safe and healthy working conditions." As a bilateral document, the CBA provides a means of recognizing the parties' negotiated obligations to each other. For that matter, given the grievance process found at Article XIV of the CBA, a disgruntled

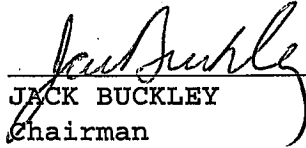
employee who believes he is being subjected to unhealthy working conditions, supposedly from secondary smoke, could grieve the matter. The contract suggests that it is the State's responsibility to maintain "healthy working conditions." One might ask, rhetorically, if this was what the State was attempting to accomplish by imposing the smoking ban, especially since Vinson testified that there were already three law suits against the State for second hand smoke claims.

We need not decide this case on speculation, however. The crux of the matter is whether smoking is a "term and condition of employment" or a matter of managerial policy, as both are discussed in RSA 273-A:1 XI. Under the conditions of this case, the scales tip in favor of managerial prerogative for three reasons. First, the smoking ban applies to everyone on the grounds of the prison, inmates and employees alike. It cannot be said to be an issue exclusive to the employer-employee relationship. Second, as discussed in Appeal of State of New Hampshire, 138 N.H. 716 (1994), the smoking ban, since it involves all personnel on the premises of the prison whether employees or otherwise, acquires the patina more of a broad managerial policy than a matter "primarily affecting terms and conditions of employment." Smoking is, thus, analogous to the extra curricular program decision cited as an example in 138 N.H. 722 (1994). Third and finally, this Board has recognized the particularized problems associated with a prison environment in its earlier decisions. By way of example, in AFSCME, Local 3657 v. Hillsborough County, Department of Corrections, Decision No. 1999-073 (July 28, 1999) we recognized that the CBA did not countenance a situation where an alleged protected practice (certain posting rights) would be permitted when it posed "a potential threat to the good order and discipline of the jail." To create a situation where there is a non-smoking inmate population and the potential for at least some smokers in the employee population could "foment unrest between the prison population and the staff" and is to be avoided.

The ULP is DISMISSED.

So Ordered.

Signed this 10th day of November, 1999.


 JACK BUCKLEY
 Chairman

By unanimous decision. Chairman Jack Buckley Presiding. Members E. Vincent Hall and Richard Roulx present and voting.