



**STATE OF NEW HAMPSHIRE**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**Eric Johnson, Petitioner**

v.

**Case No. G-0097-4**  
**Decision No. 2010-060**

**New Hampshire Department of Safety,  
Division of State Police, Respondent**

Appearances:

Jon Meyer, Esq., Backus, Meyer and Branch, LLP, Manchester, New Hampshire for the Petitioner.

Marta A. Modigliani, Esq., New Hampshire Department of Safety, Concord, New Hampshire for the Respondent.

**BACKGROUND**

Eric Johnson is a retired New Hampshire State Trooper and in September, 2009 he filed a Petition for Enforcement claiming that the New Hampshire Department of Safety, Division of State Police (State) is obligated to restore his annual and sick leave in accordance with the order for relief contained in *New Hampshire Troopers Association v. New Hampshire Department of Safety, Division of State Police*, PELRB Decision No. 2005-028. This PELRB decision was affirmed following an appeal. *See Appeal of N.H. Department of Safety*, 155 N.H. 201 (2007). Mr. Johnson requests that the board: 1) direct the State to implement the PELRB's prior decision by compensating him for hours improperly deducted from his annual and sick leave time with interest; 2) order the State to provide similar relief to other unnamed retired troopers; and 3) order the State to pay his reasonable attorney's fees and expenses.

The State objects to Mr. Johnson's petition. The State contends that Mr. Johnson lacks standing to enforce the PELRB's order, that the PELRB lacks jurisdiction over his claims, that his claims are precluded by the doctrine of laches, and that in any event the State has reached a settlement with the New Hampshire Troopers Association (Association) which addresses and resolves the State's obligations under PELRB Decision 2005-028. The State requests that the PELRB dismiss or deny the petition and declare that the settlement between the Association and the State settled all claims of all troopers.

The parties agreed to submit this matter for decision on stipulated facts, exhibits and briefs. Mr. Johnson filed his affidavit with three attachments with his opening brief, and the State filed the affidavit of Colonel Frederick Booth and two exhibits with its opening brief. These filings are considered part of the agreed upon record for decision, since neither party has objected to their submission. The parties' stipulations and submissions are reflected in the Findings of Fact set forth below. The board's decision is as follows.

#### FINDINGS OF FACT

1. The Association is the exclusive bargaining representative of certain New Hampshire State Troopers.
2. The State hired Mr. Johnson as a probationary Trooper on April 23, 1993. The State appointed Mr. Johnson a Trooper on April 23, 1994.
3. The Association filed an unfair labor practice complaint against the State on or about September 9, 2004. This prior case involved a dispute about how the State was calculating the number of hours used when Troopers took sick leave or annual leave.

4. On March 16, 2005 the PERLB found that the State's action constituted an unfair labor practice and ordered the State to restore annual leave and sick time to "those members affected by the change." *See* PERLB Decision No. 2005-028.

5. The New Hampshire Supreme Court affirmed the PELRB's order on April 17, 2007. *See* 155 N.H. 201 (2007).

6. Mr. Johnson retired from the State effective July 1, 2007.

7. On June 17, 2008 Mr. Johnson sent an e-mail to Claude Ouellete at the Department of Safety regarding adjustment to vacation hours he would receive.

8. On June 17, 2008 Mr. Ouellette responded that "the adjustments made were only for current employees as they were given comp time which would serve no purpose for you. There is no cash payout available only time off in the future for employees."

9. The Association and the State entered into a Settlement Agreement on July 16, 2008 which did not contain any compensation for the petitioner or other troopers who had retired prior to the settlement date.

10. The Settlement Agreement includes the following content:

The New Hampshire Department of Safety (the "NHDS") and the New Hampshire Troopers Association (the "NHTA") agree to implement the remedy required by the Public Employee Labor Relations Board Decision No. 2005-028 and New Hampshire Supreme Court decision Appeal of Department of Safety, 155 N.H. 201 (2007) for certain troopers who worked more than eight hours shifts during the period between July 1, 2004 and June 30, 2007, as follows:

1. For each employee of the NHDS listed in Exhibit 1 (hereinafter "Trooper"), the NHDS will add the total number of annual leave and sick leave hours indicated on Exhibit 1 to such Trooper's comp time accrual and will be designated separately than any other comp time accrued that is not subject to this Agreement. The NHDS will use its best efforts to add such hours to the comp time accruals of each Trooper in the pay check for the first pay period in August, 2008, if not sooner.

2. Each Trooper who is credited with comp time pursuant to Paragraph 1 hereof will have three (3) years from the date comp time hours are added to his/her accrual to

use such comp time. At the end of three (3) years time, any and all comp time hours remaining in accordance with this Agreement will be reduced to a zero balance and will be considered utilized. If such Trooper retires before he/she has used the comp time hours added to his/her comp time accrual pursuant to Paragraph 1 hereof, at retirement he/she will be paid an amount equal to the number of such accrued comp time hours multiplied by his/her base pay hourly rate at the time of retirement.

11. Trooper Doyle, a bargaining unit and Association member, advised Mr. Johnson by email of August 19, 2008 that the “Union will not be taking your grievance and has deferred (sic) you to the retired Troopers Association.”

12. On or about November 3, 2008 Mr. Johnson wrote to John Barthelmes, Commissioner of Safety, requesting clarification.

13. Commissioner Barthelmes responded by letter dated November 19, 2008. In this letter Commissioner Barthelmes wrote:

I am pleased to report that the NHTA and the Department were able to agree and enter into a settlement agreement for the implementation of a remedy for all the active NHTA members affected. The remedy was the restoration of comp time (as opposed to the actual leave time) to be used within a three year window. Because this settlement agreement reflects the parties’ intent for the final and fair resolution of the remedy that was due as a result of the Court decision, I am unable to assist you in the manner you have requested.

14. On February 12, 2009 Mr. Johnson’s attorney sent a letter to Commissioner Barthelmes.

15. On March 4, 2009 Attorney Modigliani responded on behalf of the Commissioner providing a copy of the “settlement agreement.”

16. On June 17, 2009 Mr. Johnson’s attorney sent a letter to Richard E. Molan, the current attorney for the Association.

17. Attorney Molan responded on July 20, 2009 stating “[s]ince we were not counsel at the time of the prosecution of this grievance, I am really in the dark on it but will endeavor to provide you with the answer as soon as I can.

18. On August 4, 2009 Attorney Molan sent a follow-up letter stating “I am told by the representative of the Troopers Association that at the time they entered into this settlement of claims they did so only on behalf of those persons who continued as active members. Based upon advice from their then-counsel, they did not include any retired Troopers in their settlement. It would seem to me that based on both the Board’s and the Court’s decision, your client may still be entitled to receive credit but I will let you draw your own conclusions.”

19. This petition was filed on September 4, 2009.

20. PELRB Decision 2005-028 provided in part that:

[J]urisdiction in this matter is also vested in the PELRB by the prior assent of the parties as expressed in the grievance procedure of their CBA that an alleged breach of the parties’ CBA is to be submitted to the PELRB by either party and that the PELRB’s decision is “final and binding”. §14.5.1, Respondent’s Exhibit #15, Collective Bargaining Agreement 2001-2003.

21. Article 14 of the 2001-2003 Collective Bargaining Agreement (2001-03 CBA)<sup>1</sup> contains the contractual grievance procedure. The final step is as follows:

14.5 STEP IV - Public Employees Labor Relations Board

14.5.1 If subsequent to the Director’s decision the Association feels that further review is justified an unfair labor practice complaint may be submitted to the Public Employees Labor Relations Board. A copy of the complaint must be sent to the Employer at the same time. The decision of the Public Employees Labor Relations Board shall be final and binding.

22. A notice of hearing in this matter was posted on September 28, 2009 at Troop Barracks A-F and at Headquarters. The Association did not intervene or otherwise participate in these proceedings.

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<sup>1</sup> The 2001-03 CBA is included in the certified record of the underlying PELRB proceedings.

## DECISION AND ORDER

### DECISION SUMMARY

The board concludes that the Association had exclusive authority on behalf of bargaining unit employees, including Mr. Johnson, to file, maintain, and resolve the underlying unfair labor practice complaint by agreement with the State at any stage, including subsequent to the conclusion of the appeal proceedings. The board further finds that only the Association, and not current or former individual Troopers, has authority or standing to maintain proceedings at the PELRB seeking enforcement of PELRB Decision No. 2005-028. Finally, the board determines that the Association and the State intended to resolve all claims against the State which might arise out of PELRB Decision 2005-028 when they entered into the July 16, 2008 Settlement Agreement. Accordingly Mr. Johnson's Petition for Enforcement is dismissed.

### JURISDICTION:

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I.

### DISCUSSION:

The two main issues in this case are whether Mr. Johnson, a retired Trooper, is entitled to maintain his petition and, if so, whether the Settlement Agreement precludes any claim to enforce PELRB Decision No. 2005-028. For the following reasons the board concludes that Mr. Johnson is not entitled to maintain his Petition for Enforcement of the underlying PELRB decision nor is he otherwise entitled to the relief he has requested.

It is the Association, and not individual current or former employees, who has general responsibility by statute and under the 2001-03 CBA to represent the bargaining unit and employees in general and in particular in the areas of collective bargaining and employee

grievances. The Association's statutory authority is reflected in part by the provisions of RSA 273-A:11, I which states that an exclusive representative of a bargaining unit has:

(a) The right to represent employees in collective bargaining negotiations and in the settlement of grievances. An individual employee may present an oral grievance to his employer without the intervention of the exclusive representative. Until the grievance is reduced to writing, the exclusive representative shall be excluded from a hearing if the employee so requests; but any resolution of the grievance shall not be inconsistent with the terms of an existing agreement between the parties.

(b) The right to represent the bargaining unit exclusively and without challenge during the term of the collective bargaining agreement. Notwithstanding the foregoing, an election may be held not more than 180 nor less than 120 days prior to the budget submission date in the year such collective bargaining agreement shall expire.

Likewise, under Article 14 of the 2001-03 CBA the Association has the power to manage and control the extent to which employee grievances are pursued beyond the third step to the fourth and final step. Grievances will not proceed to the fourth step unless the Association "feels that further review is justified." The fourth step is an unfair labor practice complaint like the one which gave rise to the underlying proceedings.<sup>2</sup> The board notes that the Association's authority to proceed with an unfair labor practice complaint to resolve a contractual dispute necessarily includes the right to maintain the case on the PELRB docket, present evidence and argument to support the complaint, file appeals with the court, and resolve the underlying complaint by mutual agreement with the State at any stage of the proceedings, including after the completion of any appellate activity. A settlement made after the completion of appellate activity can legitimately address, among other things, disputes about how relief awarded by the PELRB is to be implemented, as was the situation in this case. The board concludes that these rights also

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<sup>2</sup>Ordinarily the PELRB does not have jurisdiction to hear contractual disputes when, for example, such matters are required to be addressed through the statutorily required grievance process that includes final and binding arbitration as the final step. *See Appeal of Hooksett School District*, 126 N.H. 202 (1985). However, the PELRB does have jurisdiction over an unfair labor practice complaint filed following the completion of a contractual grievance process that concludes in advisory arbitration or where the parties have agreed that the final step of the contractual grievance process is the filing of an unfair labor practice complaint. *Id. and Appeal of Hooksett School District*, 126 N.H. 202 (1985).

include the Association's authority, as the complaining party, to seek enforcement of any relief either awarded by the PELRB in such proceedings or obtained under a settlement of such proceedings. Mr. Johnson's assertion that he enjoys what may be termed concurrent enforcement rights is incompatible with and is an intrusion upon the Association's rights to exercise judgment and control over these matters. This is true even though in some cases the Association's failure to prosecute a Petition for Enforcement might be viewed, at least from the perspective of certain current or former employees, as detrimental to their individual interests.

Further support for the conclusion that only the Association can maintain an enforcement action in the present case can be found in Pub 304.03, which addresses several ways in which the PELRB can address compliance with its decisions:

(b) If the board finds that an unfair labor practice has been committed or if the unfair labor practice complaint is uncontested, it shall issue a cease and desist order and shall order such relief as necessary to eliminate the consequences of the unfair labor practice. The board shall not be limited to the prayer for relief contained in the complaint. When warranted by the circumstances of a case, the board shall take continuing jurisdiction in that case, requiring periodic reporting of compliance under RSA 273-A:6, VI or RSA 273-C:7, VI.

(c) Circumstances warranting continuing jurisdiction shall include but not be limited to:

(1) The need to insure compliance with a board order; or

(2) The existence of future contingencies that might effect the performance of the board's order.

(e) If, after issuing a decision and order in a case, the board receives pleadings from a complaining party alleging non-compliance with that decision and order, which decision and order has not been appealed within the time limits of RSA 541:6, and after investigation and/or hearing, determines that there is substance to the allegation of non-compliance, the board shall petition the superior court for the county in which the party sought to be enjoined is principally located for such order of the court as determined necessary to compel obedience with its order, as contemplated by RSA 273-A:7 or RSA 273-C:8.



The first section of this rule is inapplicable here since the board did not retain continuing jurisdiction in this case as outlined in Pub 304.03 (b). This still leaves the issue of whether Mr. Johnson qualifies as a “complaining party” under Pub 304.03(e). The board concludes that the term “complaining party” means the complaining party in the underlying proceedings, which in this case was the Association, not Mr. Johnson. Accordingly, Mr. Johnson cannot rely upon this rule to establish a right to maintain his petition.

Additionally, even assuming that Mr. Johnson is entitled to maintain a Petition For Enforcement his claims would be barred by the Settlement Agreement, which precludes any proceedings against the State to obtain the relief awarded in Decision No. 2005-028. This interpretation is consistent with Commissioner Barthelmes’ understanding of the purpose of the Settlement Agreement, which was to reach a final agreement about how the relief ordered under PELRB Decision No. 2005-028 would be implemented. The Settlement Agreement provides the State and the Association’s acknowledgement that the ordered relief would apply only to the Troopers named on Exhibit 1 to the Settlement Agreement and the relief would be distributed to such employees in the manner outlined in the Settlement Agreement.

Given these findings the board does not address the State’s objections to Mr. Johnson’s petition based upon the timeliness of his filing. In accordance with the foregoing Mr. Johnson’s Petition for Enforcement is dismissed.

So ordered.

March 23, 2010.

/s/ Charles S. Temple  
Charles S. Temple, Esq., Alternate Chair

By unanimous vote. Alternate Chair Charles S. Temple, Esq. presiding with Board Members Richard J. Laughton and James M. O’Mara, Jr. also voting.

Distribution: Jon Meyer, Esq., counsel for Petitioner  
Marta Modigliani, Esq., counsel for Respondent