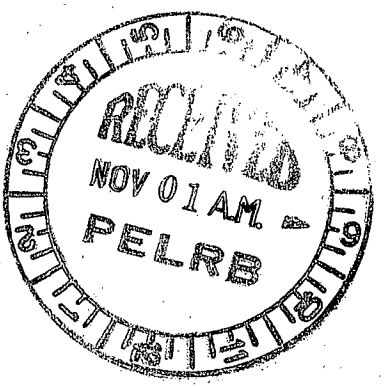
Reverses & remands PELRB Decision No. 2011-114



THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2011-639

APPEAL OF NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS
(New Hampshire Public Employee Labor Relations Board)

Argued: September 13, 2012
Opinion Issued: October 30, 2012

Nolan Perroni Harrington, LLP, of Lowell, Massachusetts (Kevin E. Buck on the brief and orally), for the petitioner.

Michael A. Delaney, attorney general (Lynmarie C. Cusack, assistant attorney general, on the brief and orally), for the respondent.

DALIANIS, C.J. The respondent, the New Hampshire Department of Corrections (DOC), appeals an order of the New Hampshire Public Employee Labor Relations Board (PELRB) finding that the DOC had a valid and binding past practice of compensating employees for their time spent completing a mandatory fitness test, and that by changing this past practice unilaterally, the DOC committed an unfair labor practice. We reverse and remand.

The PELRB found, or the record supports, the following facts. The dispute in this case relates to physical fitness testing requirements that apply to certain DOC employees. In December 2010, the petitioner, the New England Police Benevolent Association, Local 250 (Union), filed an unfair labor practice complaint against the DOC asserting that the DOC's directive that such testing

must be accomplished on the employee's own time without work release or compensatory time was a unilateral change of a binding past practice. The Union alleged that since 2001, the DOC had either allowed employees to complete the physical fitness test during their work shift or had awarded such employees compensatory time if the test was completed during the employee's non-work time. The Union averred that the change in the past practice constituted a change in a term and condition of employment. Accordingly, the Union asserted that by changing the practice unilaterally, the DOC breached its duty of bargaining in good faith. The PELRB found in the Union's favor, and this appeal followed.

To succeed on appeal, the DOC must show that the PELRB's decision is unlawful or clearly unreasonable. Appeal of City of Laconia, 150 N.H. 91, 93 (2003); see RSA 541:13 (2007). "We review for errors of law without deference to the PELRB's rulings. The PELRB's findings of fact are presumptively lawful and reasonable, but we require that the record support the PELRB's determinations." Appeal of City of Laconia, 150 N.H. at 93 (quotation and brackets omitted).

The DOC first argues that the record does not support the PELRB's finding of a past practice. We agree.

"An employer's practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of [union] employees' employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change." Sunoco, Inc., 349 N.L.R.B. 240, 244 (2007); see University System v. State, 117 N.H. 96, 99 (1977) (suggesting that newly created PELRB look to decisions of the National Labor Relations Board for guidance). "A practice need not be universal to constitute a term or condition of employment, as long as it is regular and longstanding." Sunoco, Inc., 349 N.L.R.B. at 244.

As the party alleging an established past practice, the Union had the burden of proof on this issue. Eugene Iovine, Inc., 353 N.L.R.B. 400, 400 (2008), petition for enforcement granted by 371 Fed. Appx. 167 (2d Cir.), vacated on other grounds by 131 S. Ct. 458 (2010). To meet this burden, the Union had to show that the alleged practice "occurred with such regularity and frequency that employees could reasonably expect [it] to continue or reoccur on a regular or consistent basis." Caterpillar, Inc., 355 N.L.R.B. 521, 522 (2010) (quotations omitted). In addition, "[i]t is implicit in establishing a past practice that the party which is being asked to honor it" – here, the DOC – "be aware of its existence." BASF Wyandotte Corp., 278 N.L.R.B. 173, 180 (1986).

"The record here falls short of such a showing." Caterpillar, Inc., 355 N.L.R.B. at 522. The Union's sole witness testified that he did not know how many DOC employees had been given time off to complete physical fitness testing or had been awarded compensatory time if such testing occurred during their non-work time. The Union also failed to present any documents to support its claims, such as leave slips. See Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, 59 Mich. L. Rev. 1017, 1022 (1961) (observing that when past practice is alleged, written records "may be the best possible evidence of what took place in the past"). By contrast, the DOC's witness testified that the DOC had no knowledge of a common practice under which employees were given time off to complete physical fitness testing or awarded compensatory time to do so.

Under these circumstances, we conclude that the Union failed to meet its burden of showing that the DOC regularly and consistently either allowed employees to complete physical fitness testing during their work shifts or awarded such employees compensatory time if the testing was done during the employee's non-work time. See Caterpillar, Inc., 355 N.L.R.B. at 522 (without evidence of specific circumstances surrounding prior changes in prescription drug program, including dates on which prior changes occurred, and the number of changes and their frequency, company failed to meet its burden of showing that it had a past practice of making such changes); Eugene Iovine, Inc., 353 N.L.R.B. at 400 (without evidence of when, or how frequently, or under what circumstances the asserted unilateral layoffs occurred, board could not conclude that employer had demonstrated that challenged layoffs were allowed as continuation of established past practice).

Having concluded that the PELRB erred when it found that a past practice existed, we need not address the DOC's alternative contention that the alleged past practice did not involve a mandatory subject of bargaining.

Reversed and remanded.

HICKS, CONBOY, LYNN and BASSETT, JJ., concurred.

NH Supreme Court reversed and remanded this decision on 10-31-2012, Slip Op. No. 2011-639.
(NH Supreme Court Case No. 2011-639)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

New England Police Benevolent Association, Local 250

v.

State of New Hampshire, Department of Corrections

Case No. G-0109-3

Decision No. 2011-114

Appearances: Kevin E. Buck, Esq. for the New England Police Benevolent Association, Local 250

Lynmarie C. Cusack, Esq. for State of New Hampshire, Department of Corrections

Background:

New England Police Benevolent Association, Local 250 (Union) filed an unfair labor practice complaint against the State of New Hampshire, Department of Corrections (DOC) on December 7, 2010. The Union claims that the DOC has unilaterally changed a binding term and condition of employment established by past practice without bargaining. The Union claims that since 2001 the DOC allowed employees completing physical fitness testing required by RSA 188-F:27 to do so during the course of their work shift or to receive compensatory time if the testing was done on an employee's non-work time. The Union asserts the DOC's current directive that physical fitness testing be accomplished on the employee's own time without work release or compensatory time is a unilateral and improper change of a binding past practice. The

Union requests that the Board find the DOC in violation of RSA 273-A:5, I (e)(to refuse to negotiate in good faith with the exclusive representative of any bargaining unit) and (g)(to fail to comply with this chapter or any rule adopted under this chapter). The Union requests that the Board order the DOC to cease and desist and return to the status quo, and order payment of costs, including attorney fees, incurred by the Union.

The DOC denies the charges claiming that, under Administrative Rules Pol 404.06 and 404.07, employees are responsible for the cost of physical fitness testing and that, although some employees were compensated in the past, the DOC has never formally adopted a policy authorizing work release or compensatory time for physical fitness testing. The DOC requests that the PELRB dismiss the complaint.

This Board held a hearing on the complaint on February 17, 2011 at the offices of the PELRB in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties filed post-hearing briefs and the Board's decision is as follows.

Findings of Fact

1. The New England Police Benevolent Association, Local 250 (Union) is the certified exclusive representative of the New Hampshire Department of Corrections' employees involved in these proceedings.

2. The State of New Hampshire Department of Corrections is a public employer within the meaning of RSA 273-A:1, X.

3. The dispute in this case relates to certain physical fitness testing requirements applicable to, among others, certain new Department of Corrections' employees beginning in 2001 per RSA 188-F:27. Under this law and relevant administrative rules set forth in Pol

404.06-07 these employees must meet certain physical fitness testing performance standards as a condition of continued employment. Under the rules, the "cost of the testing shall be the responsibility of the officer, unless the testing is paid for by the employer or another source."

4. DOC employees hired in 2001 who were subject to the continuing physical fitness testing requirement began the three year periodic testing in 2004, and every year since 2004 a certain number of DOC employees have been required to successfully complete the physical fitness testing as a condition of continued employment. Affected employees receive a written notice in January informing them of a December 31 deadline to complete the necessary testing.

5. The fitness testing takes place at different locations, depending on the DOC work site. DOC employees in Berlin have access to on site testing facility, and DOC employees in Concord have access to the Police Standards and Training testing facility, an off-site location.

6. DOC officers complete fitness testing during their scheduled work shift or during personal time. The fitness testing process, which involves a 1 ½ mile run, pushups, and sit ups, is generally completed in less than one and one-half hours. Since 2004 DOC employees have been released from duty without loss of pay to complete fitness testing or have received compensatory time if the fitness test was completed during off duty personal time.

7. At the DOC, employees holding the rank of Sergeant and above serve as shift supervisors, although Lieutenants and Captains are the preferred rank for shift supervisor if available. Sergeants have approved employee requests for compensatory time associated with the completion of fitness testing and have also allowed the completion of such testing during the course of the employee's work shift.

8. At least one DOC employee who suffered an injury during the course of completing fitness testing received workers compensation benefits.

9. DOC Commissioner Wren wrote a September 10, 2010 letter concerning a DOC employee grievance that had been filed complaining about the denial of compensatory time in connection with the fitness test. Commissioner Wren stated that the collective bargaining agreement had not been violated, but he also stated that:

> However, upon further consideration as to how other employees were released from their duty post to complete the physical agility test, I do recognize an inequity developed regarding the compensation of that time. Based upon the unfairness that resulted, I will allow you to receive payment as originally submitted for the time you had taken to challenge the physical agility test. However, my decision is based on the issue of fairness in this particular matter and is not intended to set a precedent of approving payment for any past or future time for taking the physical agility test.
>
> As we discussed, I will ask the Department's Director of Security and Training to look into the possibility of scheduling the three year agility test either during designated training periods (sic). However, there will be no authorization for release from a duty post or authorized overtime approved for this purpose in the future without a formal agreement to do so.

10. The two witnesses at the hearing on this complaint were DOC Corrections Officer Mark Jordan and Mindy Normandin. Corrections Officer Jordan is an eighteen year employee with service as a union steward and union chapter president.

11. Ms. Normandin is a payroll officer and human resources coordinator at the DOC in Concord. She is generally aware of and familiar with a 2006 legislative audit of time records for DOC employees relating to DOC budget analysis. However, she did not have any significant involvement in the audit, and her job responsibilities are such that she does is not particularly knowledgeable about or familiar with the process that has been followed in connection with fitness testing since 2004 as described by Corrections Officer Jordan and her testimony is therefore not particularly helpful to the board in deciding this case. She testified that there is no formally established policy authorizing DOC employees to complete fitness testing during the

course of a work shift or receive compensatory time for fitness testing completed during off duty time.

Decision and Order

Decision Summary:

The State of New Hampshire, Department of Corrections, committed an unfair labor practice in violation of RSA 273-A:5, I (e) and (g) because it improperly and unilaterally changed a binding term and condition of employment without negotiation, a breach of its obligation to bargain in good faith. The evidence establishes a binding past practice which cannot be changed except through the collective bargaining process.

Jurisdiction:

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

Discussion:

The Union contends the DOC has changed a term and condition of employment without bargaining contrary to RSA 273-A:5, I (e) and (g) because the DOC has allegedly discontinued an established and binding past practice pursuant to which officers are entitled to complete this mandatory testing during their shifts without loss of pay or at other times with an award of compensatory time. The DOC contends it is not under any current obligation to bargain whether officers will be compensated for time spent completing the physical fitness test and under the applicable law and rule the cost of such training remains the responsibility of the employees.

Under relevant Police Standards and Training Council rules, the "cost of the testing shall be the responsibility of the officer, unless the testing is paid for by the employer or another source." [1]

The concept of past practice has been addressed and described in a number of prior cases:

> There is a well understood factor that comes into play in labor relations and that is what is universally referred to in labor law as "past practice." The parties' actions are closely scrutinized by this board because of the important role "past practice" plays in the unionized workplace. All cases that involve a determination of this board as to whether a past practice existed between the parties are heavily fact driven. When faced with this question we seek to find (1) whether the parties had knowledge of the existence of the practice and, (2) whether the parties demonstrated their acceptance of that practice by their actions over a protracted period of time. We do not view past practice in the workplace as merely an interpretive device by which to examine the language the parties used in their CBA's. Past practice is often akin to a "gap filler" or implied term and condition of work between public employers and public employees who have had, or will have, many cycles of negotiations as long as the employees have an exclusive bargaining representative.

See Hampton Police Assoc. Inc. et al v. Town of Hampton, PELRB Decision No. 2010-029. Past practice is not mere prior conduct but is something of sufficient duration that is a "consistent, repeated, mutually understood and accepted practice which is binding upon the parties even though not contained within the parties' written collective bargaining agreement." *Exeter Police Association v Town of Exeter,* Case No. P-0753-17, Decision No. 2009-183. "In general, resort to past practice evidence is appropriate to clarify ambiguity" and to "establish a binding term and condition in situations where the collective bargaining agreement is silent..." *Derry Education Association/NEA-NH v. Derry Cooperative School District #1,*PELRB Decision No. 2009-152 (citation omitted). However, a past practice that "violates State law cannot be construed as a term and condition of employment subject to mandatory negotiation prior to its alteration or termination." *Appeal of New Hampshire Department of Transportation,* 144 N.H. 555, 558 (1999).

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[1] The "unless the testing is paid for by the employer" language recognizes that such an arrangement could be made and would be lawful.

When the fitness requirement was imposed the Union could have sought through impact bargaining[2] to address, for example, matters such as when and where testing would be done and employer contribution to the cost. While this did not occur, the Union has submitted evidence sufficient to establish a binding past practice developed as to such matters which cannot be altered or eliminated except through negotiation. The Board reaches this conclusion in part on the basis of Corrections Officer Mark Jordan's testimony, which establishes that since 2004 officers have either been allowed to complete mandatory testing during their work shift or at some other time, in which event they were entitled to compensatory time.

Although he could not cite specific numbers or provide documentation to support his testimony, Mr. Jordan's testimony was credible and was not diminished or contradicted by evidence submitted by the DOC. Mr. Jordan's testimony was also corroborated by Commissioner Wrenn's letter. The Commissioner's letter reflects his understanding that employees had been treated as Mr. Jordan claimed and it would be unfair to treat the employee referenced in his letter any differently. Commissioner Wrenn's commitment to do things differently in the future does not negate the legal significance of what has happened in the past, and does not cut off the Union's right to enjoy the continuation of the practice and the DOC's obligation to bargain any change to the practice. The Board also notes the absence of any testimony contrary to Mr. Jordan's from supervisory personnel.

The DOC did seek to counter Mr. Jordan's testimony through the testimony of Ms. Normandin, a payroll officer and human resources coordinator. Ms. Normandin was familiar

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[2] For a general overview of impact bargaining see *Laconia Education Associaiton/NEA-NH v Laconia School District, Case No. E-0060-1, Decision No. 2008-204 (impact bargaining effect of management decision to convert to block scheduling); Conway Administrator's Assoc/Teamsters Local 633 of NH v Conway School District, Case No. M-0622:4, Decision No. 93-33(impact bargaining effect of management decision to change manner, content and format of administrative evaluations);Appeal of the Town of Hampton, 154 N.H.132 (2006)(impact bargaining effect of decision to suspend private police details for balance of fiscal year 2005).*

with a legislative audit relating to the DOC's overtime budget but this did not give her any particular insight or knowledge that leads the Board to doubt Mr. Jordan's testimony. Ms. Normandin also emphasized her understanding that there was no established DOC policy in place concerning the matter in dispute, but such testimony does not establish the absence of a binding past practice, and it is offset by Mr. Jordan's testimony about what has actually occurred in the workplace since 2004 and Commissioner Wrenn's September, 2010 letter.

We conclude that there is a valid and binding past practice pursuant to which officers are entitled to complete the mandatory fitness test during their work shift or, if they complete the testing during personal time, they are entitled to receive compensatory time. The DOC has committed an unfair labor practice in violation of RSA 273-A:5, I (e) and (g) and shall cease and desist from implementing any changes to this binding past practice except those changes that are obtained through the collective bargaining process.

A copy of this decision shall be posted for thirty days in locations where affected employees work, and the DOC shall complete and file a certificate of posting with this Board.

So ordered.

April 19, 2011.

Doris M. Desautel, Alt. Chair

By unanimous vote of Alt. Chair Doris M. Desautel and Board Members Richard J. Laughton, Jr. and James M. O'Mara, Jr.

Distribution:

Lynmarie C. Cusack, Esq.
Kevin E. Buck, Esq.

NH Supreme Court reversed and remanded this decision on 10-31-2012, Slip Op. No. 2011-639. (NH Supreme Court Case No. 2011-639)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

New England Police Benevolent Association, Local 250

v.

State of New Hampshire, Department of Corrections

Case No. G-0109-3
Decision No. 2011-209

Order on Motion for Rehearing

The State has filed a motion for rehearing of PELRB Decision No. 2011-114. Motions for rehearing are governed by RSA 541:3 and Pub 205.02, which provides in part as follows:

> **Pub 205.02 Motion for Rehearing.**
>
> (a) Any party to a proceeding before the board may move for rehearing with respect to any matter determined in that proceeding or included in that decision and order within 30 days after the board has rendered its decision and order by filing a motion for rehearing under RSA 541:3. The motion for rehearing shall set out a clear and concise statement of the grounds for the motion. Any other party to the proceeding may file a response or objection to the motion for rehearing provided that within 10 days of the date the motion was filed, the board shall grant or deny a motion for rehearing, or suspend the order or decision complained of pending further consideration, in accordance with RSA 541:5.

In response to the State's motion the Board clarifies Decision 2011-114 by noting that the binding past practice in this case is a mandatory subject of bargaining which is subject to negotiation in accordance with *Appeal of New Hampshire Department of Safety,* 155 N.H. 201 (2007)(affirming *New Hampshire Trooper's Association v. New Hampshire Department of Safety, Division of State Police,* Case No. P-0754-15, PELRB Decision No. 2005-028).

Otherwise the State's motion for rehearing is denied.

So ordered.

August 6, 2011.

Doris M. Desautel, Alt. Chair

By unanimous vote of Alt. Chair Doris M. Desautel and Board Members Richard J. Laughton, Jr. and James M. O'Mara, Jr.

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