Affirms PELRB
Decision No. 2017-108.

THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2017-0514

APPEAL OF STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, INC., SEIU, LOCAL 1984
(New Hampshire Public Employee Labor Relations Board)

Argued: May 9, 2018
Opinion Issued: October 12, 2018

Glenn R. Milner, general counsel, State Employees' Association of New Hampshire, Inc., SEIU, Local 1984, of Concord, on the brief, and Milner and Krupski, PLLC, of Concord (John S. Krupski orally), for the petitioner.

Gordon J. MacDonald, attorney general (Nancy J. Smith, senior assistant attorney general, on the brief and orally), for the State.

LYNN, C.J. The petitioner, the State Employees' Association of New Hampshire, Inc., SEIU, Local 1984 (Union), appeals an order of the New Hampshire Public Employee Labor Relations Board (PELRB) finding that the respondent, the State of New Hampshire, did not commit an unfair labor practice by prospectively eliminating salary enhancements for newly hired Sununu Youth Services Center (SYSC) employees under the parties' collective bargaining agreement (CBA). We affirm.

The parties stipulated to, or the PELRB found, the following facts. The State operates the SYSC. The Union is the certified and exclusive bargaining

representative for certain SYSC employees, including teachers. As part of a consent decree resolving a federal lawsuit filed in the late 1980s, the State was required to pay certain SYSC employees salary enhancements in addition to their base wages. The State continued paying the salary enhancements after the consent decree expired in July 2002.

Since 2014, the Union has filed a series of unfair labor practice complaints concerning the State's attempts to eliminate those enhancements. In 2014, the Union alleged that the State unilaterally eliminated the salary enhancements for current employees while the 2013-2015 CBA was still in effect. The Union argued that this conduct was improper because the enhancements had become a binding past practice and, thus, subject to mandatory bargaining under RSA chapter 273-A. The State took the position that its obligation to pay the enhancements expired in 2002, when the consent decree expired, and that its practice of paying the enhancements had never been memorialized in the CBA. In addition, the State argued that, even if the salary enhancements had become a binding past practice, it had "cancelled" this practice by rejecting the Union's proposal to include the enhancements in the 2013-2015 CBA.

In a July 2014 order, the PELRB found that paying the salary enhancements was a binding past practice and, thus, subject to mandatory bargaining. The PELRB was not persuaded by the State's contention that it had "effectively cancelled the practice at the end of the term of the contract which preceded the 2013-[20]15 CBA" by rejecting the Union's attempt to include the enhancements in the 2013-2015 CBA. The PERLB found that the Union's proposal was "nothing more than an attempt by the [Union] to have an existing past practice reduced to writing and expressly described in the contract." That the State's rejection of the proposal did not reflect its understanding that salary enhancements would not be part of the 2013-2015 CBA was demonstrated by the fact that, despite the absence of contract language specifically incorporating the salary enhancements, the State continued to pay such enhancements after the 2013-2015 CBA took effect.

The PELRB also rejected the State's assertion that "it could unilaterally discontinue a past practice covering a mandatory subject of bargaining like wages at the end of the preceding contract's terms" in part because: (1) the State "announced its plans to terminate" the enhancements in February 2014, which fell within the term of the 2013-2015 CBA; and (2) "[u]nder the State's plan, the past practice would continue during a portion of the 2013-[20]15 CBA term." The State was ordered to restore the salary enhancements and to negotiate any future changes to the practice with the Union. The State neither requested a rehearing nor appealed the PELRB's decision.

In November 2014, the Union proposed to include the salary enhancements in the 2015-2017 CBA. The State rejected the Union's proposal

without any substantive discussion. Thereafter, when the State and the Union were unable to come to terms on a new CBA, the parties declared an impasse and, in January 2015, entered into the mediation phase of bargaining. During that phase, the Union withdrew its salary enhancement proposal upon reaching a tentative agreement with the State.

On February 26, 2015, the State notified the Union that "the current practice of salary enhancements at the SYSC, which is not part of our collective bargaining agreement, shall come to an end on July 1, 2015, or, in the case of an evergreen situation, when a new contract is effective, whichever is later, unless memorialized in the collective bargaining agreement." However, the State indicated that the salary enhancements would remain in place for teachers who were subject to the PELRB's 2014 decision. On March 5, 2015, the Union ratified the tentative agreement. During the CBA's "evergreen" period,[1] the State continued to pay salary enhancements to newly-hired SYSC teachers. The 2015-2017 CBA took effect in October 2015 and did not include salary enhancements for newly-hired SYSC employees. On or about July 8, 2016, the State hired a new part-time Library Media Specialist for whom it did not pay a salary enhancement. Thereafter, the Union filed the unfair labor practice complaint that is the subject of the instant appeal.

Based upon the parties' briefs, exhibits, and stipulated facts, the PELRB first determined that the instant action is not covered by the 2014 order. Proceeding to the merits, the PELRB found that the State had not committed an unfair labor practice and, thus, dismissed the Union's complaint. The PELRB explained that it was "satisfied that the State ha[d] taken the steps necessary to terminate the new hire salary enhancement past practice upon the effective date of the 2015-[20]17 CBA." According to the PELRB, the State's February 26, 2015 letter sufficiently notified the Union as to the State's desire to eliminate salary enhancements for prospective SYSC employees, and "there was an opportunity between February 26, 2015 and March 5, 2015" for the Union to bargain. The PELRB reasoned that the Union "had the right to suspend the ratification process," which was still "underway, . . . and demand that the State reopen negotiations to bargain based upon the State's February 26, 2015 notice letter." "Instead, the [Union] took no action in response to the State's February 26, 2015 notice letter and completed ratification of the tentative agreement on March 5, 2015." In the PELRB's view, the Union waived its bargaining rights, thus entitling the State to "implement the termination of salary enhancements for new hires consistent with its February 26, 2015 notice letter." The Union's motion for rehearing was subsequently denied. This appeal followed.

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[1] An evergreen clause "purports to continue the terms of the contract indefinitely until the parties negotiate, and the legislative body ratifies, a successor contract." Appeal of Alton School Dist., 140 N.H. 303, 307 (1995).

"RSA chapter 541 governs our review of PELRB decisions." Appeal of Hillsborough County Nursing Home, 166 N.H. 731, 733 (2014); see RSA 273-A:14 (2010). "Pursuant to RSA 541:13 (2007), we will not set aside the PELRB's order except for errors of law, unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable." Appeal of Prof'l Fire Fighters of Hudson, 167 N.H. 46, 51 (2014). "The PELRB's findings of fact are presumed prima facie lawful and reasonable." Id.; see RSA 541:13. "In reviewing the PELRB's findings, our task is not to determine whether we would have found differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record." Fire Fighters of Hudson, 167 N.H. at 51. "We review the PELRB's rulings on issues of law de novo." Id.

On appeal, the Union advances three arguments. First, the Union asserts that the PELRB erred by ignoring its past decisions without discussion. Second, it argues that the PELRB erroneously applied the federal "Notice and Bargain" rule, which, it contends, conflicts with New Hampshire law. Third, it posits that even if the federal rule comports with New Hampshire law, the PELRB erred in applying that rule to the facts of this case. We need not address these arguments because we hold that, on the record before us, the elimination of the salary enhancements was the product of normal bargained-for exchanges that produced the 2015-2017 CBA. See Appeal of N.H. Dep't of Safety, 155 N.H. 201, 203 (2007) (sustaining board's decision on valid alternative grounds).

"It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith." RSA 273-A:3, I (2010). "Good faith negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter . . . ." Id. (quotation omitted). The statute explains, however, that "the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession." Id. Refusal by a public employer to negotiate in good faith constitutes an unfair labor practice. RSA 273-A:5, I(e) (2010).

According to the Union, as a mandatory subject of bargaining, the salary enhancements "can only be altered by mutual agreement of the parties," and there was no "opportunity, let alone a meaningful one, for [the Union] to bargain" over the salary enhancements prior to signing the 2015-2017 CBA. The Union is correct that an employer cannot unilaterally change a term or condition of employment. See Appeal of Hillsboro-Deering School Dist., 144 N.H. 27, 30 (1999). However, that is not what occurred here. The Union proposed to include the salary enhancements in the 2015-2017 CBA. After the State rejected the proposal, the Union had the opportunity to advocate for its inclusion in the CBA up to and including the time when the parties declared

impasse and entered into the mediation phase of bargaining. Instead, during mediation, the Union "withdrew the proposal . . . upon reaching a tentative agreement" with the State.

The Union's actions are significant, here, because in the context of collective bargaining, "an offer will remain on the table unless the offeror explicitly withdraws it or unless circumstances arise that would lead the parties to reasonably believe that the offeror has withdrawn the offer." N.L.R.B. v. Auciello Iron Works, Inc., 980 F.2d 804, 808 (1st Cir. 1992) (quotation omitted). The Union withdrew its proposal, which it knew the State had rejected, and agreed to a contract that did not include the salary enhancements. Indeed, "[i]n the face of a timely repudiation of" the salary enhancement practice, the Union chose to withdraw its proposal, rather than "have the practice written into the agreement." Richard Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements, 59 Mich. L. Rev. 1017, 1041 (1961). In light of the State's rejection and the Union's subsequent withdrawal of the proposal, it cannot "be inferred from the signing of the [2015-2017 CBA] that the parties intended the practice to remain in force." Id. at 1040-41. The State's February 2015 letter simply confirmed its understanding that the salary enhancements would not continue because they were not included in the 2015-2017 CBA. By contrast, in the 2014 action, while the State rejected the Union's proposal to incorporate the salary enhancements into the 2013-2015 CBA, it continued to pay the salary enhancements even after that CBA took effect. Thus, the PELRB's 2014 decision reflects the fact that it was the parties' "common understanding" that the salary enhancement practice would "be continued until changed by mutual consent" of the parties during future negotiations. Id. at 1036 (quotation omitted). Such a change is exactly what occurred during the bargaining for the 2015-2017 CBA.

Based on the record before us, we conclude that, as a matter of law, the Union's withdrawal of the proposal during the mediation phase that led to the adoption of the 2015-2017 CBA establishes that elimination of the salary enhancements was a bargained-for result of the new CBA. See 51A C.J.S. Labor Relations § 888, at 631 (2010) ("If the facts before the board were such that all reasonable minds must honestly draw one conclusion therefrom the question is one of law for the court rather than one of fact for determination by the board."). In light of our conclusion, we need not decide whether the February 2015 letter, by itself, would have been sufficient to end the past practice between the parties based upon the Union's ratification of the CBA.

Affirmed.

HICKS, BASSETT, HANTZ MARCONI, and DONOVAN, JJ., concurred.

NH Supreme Court affirmed this decision on 10-12-2018, Slip Opinion No. 2017-0514

STATE OF NEW HAMPSHIRE
Public Employee Labor Relations Board

State Employees' Association of NH, SEIU Local 1984

v.

State of New Hampshire,
Department of Health and Human Services

Case No. G-0148-7
Decision No. 2017-108

Appearances:

For the Complainant:

Glenn R. Milner, Esq.
State Employees' Association, SEIU Local 1984
Concord, New Hampshire

For the Respondent:

Nancy Smith, Esq., Senior Assistant Attorney General
Mary Beth Misluk, Esq., Attorney
Attorney General's Office, Concord, New Hampshire

Background:

On October 24, 2016, the State Employees' Association of NH, SEIU Local 1984 (SEA) filed an unfair labor practice complaint under the Public Employee Labor Relations Act (Act) against the State Department of Health & Human Services (State). This is the most recent in a series of cases the SEA has filed concerning Sununu Youth Services Center (SYSC), which is a part of the State Department of Health & Human Services Division for Children, Youth and

Families, Juvenile Justice Services.[1] In this case, the SEA complains that on July 8, 2016 the State hired a part-time Teacher I-Library Media Specialist (part-time Library Media Specialist) but failed to include a salary enhancement in the new part-time Library Media Specialist's compensation. The SEA contends inclusion of a salary enhancement is a longstanding past practice which was recognized in prior PELRB Decision No. 2014-184 and which the State cannot unilaterally eliminate. The SEA claims the State has violated RSA 273-A:5, I (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations); (h)(to breach a collective bargaining agreement); and (i)(to make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule). The SEA requests, among other things, that the PELRB find that the State committed an unfair labor practice, order the State to cease and desist from unilaterally reducing or eliminating salary enhancements, and order the State to restore the salary enhancements and to negotiate with the SEA over any changes to wages.

The State denies the charge. According to the State, it met the requirements necessary to end the provision of a salary enhancement to new hires because: 1) it provided the requisite notice to the SEA that the practice would be discontinued upon the effective date of the 2015-17 CBA; and 2) the SEA attempted to negotiate the inclusion of salary enhancements into the 2015-17 CBA without success.

The State has also filed a motion to dismiss because this case involves a probationary employee. The State argues that because probationary employees are excluded from the "public

[1] See PELRB Decision No. 2014-184 (July 31, 2014); PELRB Decision No. 2015-228 (October 8, 2015); PELRB Decision No. 2016-008 (January 27, 2016); and PELRB Decision No. 2016-172 (July 28, 2016) for the decisions in the earlier cases. These decisions are Joint Exhibits in the current case.

employee" definition in RSA 273-A:1, IX (d), the PELRB lacks jurisdiction and the case must be dismissed on that basis.

The SEA objects to the motion to dismiss and argues that under the State's personnel rules, the probationary period applies only to full-time employees and, therefore, part-time employees, like the part-time Library Media Specialist, are not probationary employees.

This case was originally scheduled for hearing on December 8, 2016. However, following the pre-hearing conference the parties agreed to submit this case for decision on stipulated facts, exhibits and briefs. Briefs and stipulations were duly filed. The parties' agreed statement of uncontested facts is set forth as Findings of Fact 3-18 below, and the decision in this case is as follows.

Findings of Fact

1. The State is a public employer within the meaning of RSA 273-A.

2. The SEA is the certified exclusive representative of certain employees who work at the SYSC, including employees in the positions of Teacher I, Teacher II, Teacher III, and Principal (the SYSC employees).

3. The PELRB issued a decision on July 31, 2014 (PELRB Decision No. 2014-184) finding that salary enhancements for current SYSC teachers was a mandatory subject of bargaining and could not be unilaterally eliminated without bargaining.

4. The State did not file a motion for rehearing of PELRB Decision No. 2014-184, thus making the matter final. The State did not appeal the decision to the New Hampshire Supreme Court.

5. Subsequent to the PELRB Decision No. 2014-184, the State began to post SYSC teaching personnel positions, some without salary enhancements.

6. The Association notified the State in regard to the incorrect posting, and the parties attempted a resolution to amend the positions in accordance with the PELRB's order. The State complied in part.

7. On November 18, 2014, the SEA's Division of Juvenile Justices Services (DJJS) sub unit team submitted a proposal on Article 35.18.1 to include SYSC Teachers Pay Enhancements into the academic salary. The State Team responded to the Article 35.18.1 proposal stating it is a money item and wanted it to be presented at the master level negotiations on the Executive Contract. The SEA agreed and the proposal was moved by mutual agreement.

8. On November 20, 2014, the DJJS proposal was moved to the Master Contract negotiations. The State rejected the proposal. The parties did not engage in any substantive conversation on the proposal.

9. Impasse was declared and the parties entered into the mediation phase of bargaining on or after January 15, 2015 (date of mediation ground rules, State Exhibit R). The SEA ultimately withdrew the proposal during the mediation phase of negotiations upon reaching a tentative agreement.

10. On February 26, 2015, the State Manager of Employee Relations notified the SEA, by letter, that "the current practice of salary enhancements at the SYSC, which is not part of our collective bargaining agreement, shall come to an end on July 1, 2015, or, in the case of an evergreen situation, when a new contract is effective, whichever is later, unless memorialized in the collective bargaining agreement."

11. The February 26, 2015 letter stated that the State intended to eliminate salary enhancements for prospective teachers hired on or after the effective date of the CBA, unless enhancements were memorialized in the CBA. The letter further indicated that enhancements would remain in place for employees subject to PELRB Decision No. 2014-184.

12. The SEA ratified the tentative agreement on March 5, 2015.

13. While the State was in evergreen, the State continued to pay enhancements to any newly hired SYSC teacher.

14. The 2015-17 CBA, which took effect on October 3, 2015, does not include salary enhancements for new hires at the SYSC like the part-time Library Media Specialist.

15. On June 10, 2015, the SEA filed an unfair labor practice (Case No. G-0148-4) alleging that the State committed an unfair labor practice by unilaterally eliminating salary enhancements for SYSC teaching personnel positions commencing July 1, 2015, or, in the case of an evergreen situation, when a new contract is effective, whichever is later. Since neither party requested a hearing or other relief[2], on January 27, 2016 the PELRB dismissed Case No. G-0148-4). See PELRB Decision No. 2016-008.

16. On or about July 8, 2016, while the parties awaited a decision from the Board in Case No. G-0148-5[3], the State filled position #TMPPT4906 (part-time Library Media Specialist), and it did so without an enhancement.

17. On July 28, 2016, the PELRB issued Decision No. 2016-172[4] in Case G-0148-5, dismissing the SEA's complaint because the State had not actually hired any new SYSC employees without providing the salary enhancements.

18. On October 24, 2016, the SEA filed the present case alleging that the State committed an unfair labor practice by unilaterally eliminating salary enhancement for the part-time Library Media Specialist.

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[2] As required by PELRB Decision No. 2015-228 (October 8, 2015).
[3] This case was filed on March 1, 2016.
[4] The parties submitted the case for decision on stipulations and briefs, which were filed on or before May 6, 2016.

Decision and Order

Decision Summary:

The State's motion to dismiss is denied since the relevant Personnel Rules only subject full-time employees to a probationary period. RSA 273-A does not, by itself, require or impose any probationary period on new hires, whether hired to fill a full or part-time period. The State did not commit an unfair labor practice by terminating salary enhancement for new hires because the State provided the SEA with notice and an opportunity to bargain. The SEA's complaint is dismissed.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6. In this case, the State has moved to dismiss for lack of jurisdiction based upon the argument that the part-time Library Media Specialist is in a probationary status and therefore is not a public employee. RSA 273-A:1, IX provides that:

> "Public employee" means any person employed by a public employer except:
>
> (a) Persons elected by popular vote;
>
> (b) Persons appointed to office by the chief executive or legislative body of the public employer;
>
> (c) Persons whose duties imply a confidential relationship to the public employer; or
>
> (d) Persons in a probationary or temporary status, or employed seasonally, irregularly or on call. For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more than 12 months or who has an individual contract with his employer, nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed.

The sub-section (d) probationary exclusion only applies if the employer assigns to new hires a probationary status. The duration of the probationary period is also determined by the employer, but for purposes of the Act is limited to a maximum of 12 months. The personnel rules cited in

the SEA's objection to the motion to dismiss indicate that the State only assigns a probationary period to full-time employees. Additionally, RSA 273-A does not, by default, assign to public employees a probationary period of any duration; it only limits the maximum probationary, as noted. Therefore, the Library Media Specialist is a public employee under the Act, and the State's motion to dismiss is denied.

Discussion:

The SEA argues that the State's failure to provide a salary enhancement to the Library Media Specialist violates the cited prior PELRB Decisions, and in particular the requirement that the State negotiate any change to the salary enhancement pay plan. The State disagrees, and maintains that the PELRB has not yet specifically decided whether they State can terminate the past practice salary enhancement for new hires by: 1) providing notice that the practice will be discontinued upon the commencement of a successor bargaining agreement unless the practice is expressly included in the successor agreement; and 2) bargaining over the inclusion of the practice in the successor agreement at the SEA's request. The State argues that the SEA chose to withdraw its bargaining proposal to include salary enhancements in the 2015-17 CBA "with the knowledge that the State intended to eliminate salary enhancements, *prospectively,* for teachers hire on or after the effective date of the CBA." State Opening Brief at p. 8. (emphasis in original).

We have reviewed the prior PELRB decisions, in particular PELRB Decision No. 2014-184 (July 31, 2014), and conclude that the current complaint is not covered by PELRB Decision No. 2014-084. Therefore we will evaluate, on the merits, the State's argument that it has taken the necessary steps to end the salary enhancement past practice for new hires.

The New Hampshire Supreme Court recently reviewed the basic parameters governing the establishment and duration of a past practice:

> 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)...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.
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> 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* __ U.S. __, 131 S.Ct. 458, 178 L.Ed.2d 282 (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). 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).

Appeal of New Hampshire Department of Corrections, 164 N.H. 307, 309 (2012)(quotations omitted). Although *Appeal of New Hampshire Department of Corrections* involved a dispute about whether the evidence supported the PELRB's finding of a past practice (it did not), and not its duration, the court did cite rules and principles that are relevant to past practice duration under the National Labor Relations Act. The court also cited *University System v. State*, 117 N.H. 96, 99 (1977) for the proposition that it is appropriate for the PELRB to "look to decisions of the National Labor Relations Board for guidance," which we will do in this case.

In *Sunoco, Inc.*, 349 N.L.R.B. 240, 244 (2007), the National Labor Relations Board (NLRB) affirmed an administrative law judge's (ALJ) rulings that Sunoco, Inc.'s effort to end a past practice was invalid under federal law. The past practice in question involved providing bargaining unit employees (drivers of fuel delivery trucks) the "opportunity to perform jet fuel deliveries before subcontracting such deliveries." *Id.* at 244. The ALJ noted that:

> "[a] decision to subcontract bargaining unit work is a mandatory subject of bargaining where the employer is, as in the instant case, merely replacing employees in the bargaining unit with employees of an independent contractor to do the same work under similar working conditions. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1979)."

In November or December of 2004 Sunoco informed unit employees, but not the Union president, that beginning in January of 2005 subcontractors would make the jet fuel deliveries instead of unit drivers. By January 2005, around the time when subcontractors began taking over all jet fuel delivery work, the Union president was aware of the subcontracting plan and stated to a human resource representative that "jet fuel work...that's our work you can't just do that. You have to bargain over that work..." *Sunoco, Inc.* at 242. The ALJ found that the Union had not waived its bargaining rights and had made a timely demand to bargain after receiving notice of the employer's intent to terminate the jet delivery past practice work. The ALJ concluded that Sunoco, Inc. had committed an unfair labor practice in violation of Section 8(a)(5) and (1) of the National Labor Relations Act[5] because "it made a unilateral change to terms and conditions of unit employees at the Tonawanda, Rochester, and Syracuse terminals by abandoning its established past practice of providing them with the opportunity to make jet fuel deliveries before subcontracting such deliveries. Respondent did so without providing the Union with notice and an opportunity to bargain with respect to this change." *Sunoco, Inc.* at 247.

There are also a number of arbitration decisions addressing employer termination of a past practice. Some require a change in the "underlying basis for the practice." See Elkouri & E. Elkouri, How Arbitration Works (7th Ed. 2012) Ch. 12, pp. 12-15.

> "Even absent any such change in the underlying basis of a practice, an impressive line of arbitral thought holds that a practice that is not subject to unilateral termination during the term of the collective bargaining agreement is subject to termination at the end of said term by giving due notice of intent not to carry the practice over to the next agreement; after being so notified, the other party must have the practice written into the agreement to prevent its discontinuance."

[5] "It shall be an unfair labor practice for an employer: (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; .....and (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. §§ 158 (a)(5) and (1).

Id. Together, *Sunoco, Inc.* and Elkouri provide the framework within which we assess the State's attempt to terminate the new hire salary enhancement past practice in this case. As described in the Findings of Fact, in late 2014 the SEA submitted a bargaining proposal to memorialize salary enhancements in the 2015-17 CBA.[6] There was no substantive discussion during negotiations about this proposal, and it was ultimately withdrawn during the course of bargaining impasse mediation, which commenced on or about January 15, 2015 based upon the date of the ground rules. Thereafter, by letter dated February 26, 2015, the State notified the SEA that it "intended to eliminate salary enhancements for prospective teachers hired on or after the effective date of the CBA, unless enhancements were memorialized in the CBA." On March 5, 2015 the SEA completed ratification of the 2015-17 CBA, which subsequently took effect on October 3, 2015. The 2015-17 CBA does not provide for the continuation of new hire salary enhancements.

We are satisfied that the State has taken the steps necessary to terminate the new hire salary enhancement past practice upon the effective date of the 2015-17 CBA. The State's February 26, 2015 letter is clear and meets the notice requirements. As to the bargaining requirement, there was an opportunity between February 26, 2015 and March 5, 2015 to bargain. Even though a tentative agreement had been reached, and the ratification process was underway, the SEA still had the right to suspend ratification and demand that the State reopen negotiations to bargain based upon the State's February 26, 2015 notice letter. The SEA then could have prevented the discontinuance of the new hire salary enhancement past practice by having it formally included in the 2015-17 CBA, by persuading the State to withdraw and rescind the February 26, 2015 notice letter, or by continuing in the status quo until such time as an agreement acceptable to the SEA was reached. Instead, the SEA took no action in response to

[6] The SEA submitted a similar proposal in bargaining over the 2013-15 CBA. See PELRB Decision No. 2014-184 (July 31, 2014)(Finding of Fact 16).

the State's February 26, 2015 notice letter and completed ratification of the tentative agreement on March 5, 2015. As a result, the SEA waived its bargaining rights, and the State is entitled to implement the termination of salary enhancements for new hires consistent with its February 26, 2015 notice letter.

In accordance with the foregoing the SEA's unfair labor practice complaint is dismissed.

So ordered.

Date: July 6, 2017

/s/ Peter Callaghan
Peter Callaghan, Esq., Chair

By unanimous vote of Alternate Chair Peter Callaghan, Esq., Board Member Carol M. Granfield, and Board Member Richard J. Laughton, Jr.

Distribution: Glenn Milner, Esq.
Nancy Smith, Esq.
Mary Beth Misluk, Esq.