State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, LOCAL 1984 Complainant	:	
v.	:	CASE NO. S-0398:1
STATE OF NEW HAMPSHIRE, DIVISION OF PERSONNEL Respondent	:	DECISION NO. 1999-064 (Rehearing)

APPEARANCES

Representing State Employees Association of New Hampshire, Local 1984:

Thomas Hardiman, Director Field Operations

Representing State of New Hampshire:

Douglas N. Jones, Esq.

Also appearing:

Virginia Lamberton, Director of Personnel
Jean Shellis, State Employees Association
Stephen J. McCormack, State Employees Association
Kate McGovern, State Employees Association
Michael Reynolds, Esq., State Employees Association

BACKGROUND

The State Employees Association of New Hampshire, S.E.I.U. Local 1984 (Union) filed unfair labor practice (ULP) charges on August 14, 1998 against the State of New Hampshire, Division of

Personnel (State) alleging violations of RSA 273-A:5 I (a), (e), (g), (h) and (i) resulting from unilateral and unbargained changes in working conditions by implementing certain changes to the administrative rules of the Division of Personnel. The State filed its answer on August 26, 1996 [sic] in the form of a Motion to Dismiss, a typographically corrected copy of which was provided to the PELRB and to the Union when this matter was heard by the PELRB on October 20, 1998.

The PELRB issued its decision in this matter on November 3, 1998, with both majority and minority opinions. The Union filed a Motion for Reconsideration/Rehearing on December 3, 1998. The State filed objections thereto on December 9, 1998. The PELRB unanimously granted the Union's Motion for Rehearing on February 9, 1999 (Decision No. 1998-105) after which this case was reheard by the PELRB on June 15, 1999 following an intervening continuance sought by and granted to the parties.

FINDINGS OF FACT

1. No testimony was offered on rehearing; the parties proceeded with oral arguments on their respective positions without presenting additional witnesses or new evidence.

2. Because there was neither new evidence nor additional testimony offered on rehearing, we find no cause to warrant reversal of or modifications to the PELRB's findings of fact in Decision No. 1998-096 dated November 3, 1998. Therefore findings numbered 1 through 9, inclusive, in Decision No. 1998-096 are hereby reaffirmed and incorporated by reference.

3. The parties stipulated that their arguments on rehearing would stand on the evidence submitted in the prior hearing from which Decision No. 1998-096 subsequently issued.

4. The Union's request for rehearing claims, *inter alia*, that Decision No. 1998-096 ignored the consequences of unilateral implementation of certain administrative rules of the Division of Personnel in contravention of protections conferred by RSA 273-A:5 I (i), that the implementation of the "new" "Personnel Rules" as of April 21, 1998 "negated" several arbitration decisions which had interpreted bonus leave provisions

and the accrual of floating holiday time as had been grieved and won by the Union, that the "new" Personnel Rules "directly impart[sic] several[unspecified] provisions of the parties' 1997-99 collective bargaining agreement (CBA), and that, by adopting the "new" Personnel Rules, the Director of Personnel "unilaterally imposed changes" in mandatory subjects of bargaining. See Union Request for Reconsideration, filed December 3, 1998.

5. The State's response to the Union's request for reconsideration was filed on December 9, 1998 in the form of an Objection to Motion for Reconsideration. It stated that the Union's request should be denied because it contained no information which was not previously presented to the PELRB and because the PELRB had found [by a majority] that the "amended" Personnel Rules" did not materially alter any expressly bargained for right of the SEA's members or materially alter any past practices of the parties." See State's objection filed December 9, 1998.

DECISION AND ORDER

We begin by affirming that part of the majority and concurring opinions in Decision No. 1998-086 which speaks to the fact that "personnel rules must be negotiated, especially as they apply to potential changes to contractually guaranteed benefits or procedures" and with the directive to bargain over the complained of changes in the "new" Personnel Rules in accordance with Appeal of State, 138 NH 716 (1994). We disagree, however, with the majority's conclusion in Decision No. 1998-086 that this ULP should have been dismissed.

Our two primary areas of concern are the arbitration decisions referenced in Member Hall's concurring/dissenting opinion in Decision No. 1998-086. It is undisputed that the subject matter of the Zack award (Union Exhibit No. 5 dated April 2, 1992) was bonus leave accrual and that the subject matter of the Higgins award (Union Exhibit No. 6 dated May 3, 1993) was floating holiday accrual. Under Appeal of State, *supra*, there is a three part test to determine whether a subject is negotiable: first, the subject matter must not be reserved to the exclusive managerial authority of the public employer; second, the subject matter must "primarily affect the terms and conditions of employment rather than matters of broad managerial policy;" and

third, if the proposals were incorporated (both were in both the current and prior CBA's) into a negotiated CBA, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to RSA 273-A:1 XI. Both bonus leave and floating holiday accrual meet the three part test, both in the abstract and in practicality inasmuch as both provisions have been in at least three CBA's, have been grieved and have had grievance decisions go unchallenged for 5 or more years, all as evidenced by the dates of both the Zack and Higgins awards.

We next look to the fact that the parties appear to have lived with and by both the Zack and Higgins decisions as valid interpretations of the applicable contract language until the 1998 adoption of the "new" personnel rules changed the outcome mandated by both of these decisions. Neither side presented any evidence of a demand to bargain away from the two respective interpretations offered by Arbitrators Zack and Higgins under the final and binding grievance processions of the CBA, as represented by Article 14.5.2 of the current agreement. Since a reading of either the Zack or Higgins award indicates a contract violation on behalf of the State, now that the State seeks to deviate from the content of those decisions, it is the State's burden to seek changes to whatever provisions it wishes to modify. This must be done by collective negotiations, not by the adoption or amendment to the administrative rules of the Division of Personnel, in order to be in compliance with the requirements of RSA 273-A:5 I (e) and (i).

In contract grievance matters, it is a long-standing and basic principle that:

> a party should not be allowed to relitigate or rearbitrate a matter that it has already had an opportunity to litigate or arbitrate. As applied to labor arbitration, the doctrine of claim preclusion recognizes that a purpose of grievance arbitration is not only to do substantial justice but also to bring an end to controversy. The doctrine permits parties to rely on arbitration decisions in conducting their affairs, and it prevents the force of arbitration decisions from being undermined.
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> "Contracts and Prior Proceedings" in Labor and Employment Arbitration, Bornstein; Gosline and Greenbaun, Editors, Matthew Bender & Company (1999)

Thus, the subject matter of the Zack and Higgins decision is and has become the "law of the contract" between the Union and

the State, and, for that matter, has been so for at least five years. That law of the contract should not now be abrogated by the adoption of administrative rules to the contrary. To do so is tantamount to a violation of RSA 273-A:5 I (e) on duty to bargain, (h) on breach of contract as it has become through the referenced arbitration decisions and (i) by adopting rules pertaining to terms and conditions of employment which would invalidate existing practices under the CBA.

We know from Appeal of Alton School District, 140 NH 303, 308 (1995) that "a unilateral change in a condition of employment is equivalent to a refusal to negotiate...and destroys the level playing field necessary for productive and fair labor negotiations." The same doctrine, and the same result, should apply in this case.

Maintaining a "level playing field" must mean, by way of remedy, that the public employer cannot adopt changes to its Personnel Rules whereby the Union must negotiate away from those changes. It is the *status quo* which must prevail. That means that the changes complained of cannot be unilaterally implemented and that it is the State's obligation, not the Union's, to seek bargaining since it is the State which is seeking to change the *status quo* through the adoption of new Personnel Rules. This Board has ruled against unions when they have attempted to obtain benefits through arbitration after they have been unsuccessful in obtaining those same benefits through bargaining or have relented or withdrawn the proposal(s) prior to the conclusion of negotiations. City of Keene v. Keene Police Officers, SEA Local 1984, Decision No. 1998-048, May 29, 1998.) When the actors are reversed, the same result should still apply. Management should not be able to accomplish by changes to its administrative rules that which it has not been able to accomplish at the bargaining table. To permit this to occur would make the provisions of RSA 273-A:5 I (i) meaningless.

We find the State's actions in adopting administrative rules for the Division of Personnel which are contrary to either the language or established practices utilized under the CBA to be violative of RSA 273-A:5 I (e), (h) and (i). By way of remedy we direct that the parties revert to and adhere to the *status quo* as represented by "law of the contract" as formulated, interpreted and practiced under the Zack and Higgins awards, respectively. The working conditions represented by the Zack and Higgins awards shall remain in effect until modified or eliminated by the

collective bargaining process or until modified or vacated by this board or a court of competent jurisdiction.

So ordered.

Signed this 20th day of July, 1999.

BRUCE K. JOHNSON
Alternate Chairman

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