



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NEW HAMPSHIRE TROOPERS
ASSOCIATION

Petitioner

v.

NEW HAMPSHIRE DEPARTMENT OF
SAFETY, DIVISION OF STATE POLICE

Respondent

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CASE NO. P-0754-13

DECISION NO. 2004-014

APPEARANCES

Representing the New Hampshire Troopers Association:

James W. Donchess, Esquire

Representing the Division of Safety, State of New Hampshire:

Marta A. Modigliani, Esq.
Sarah Willingham, Human Resources Director

BACKGROUND

The New Hampshire Troopers Association (hereinafter "Association") filed an unfair labor practice complaint on October 10, 2003 alleging that the New Hampshire Department of Safety, Division of State Police (hereinafter "Division") committed an unfair labor practice when it undertook actions that resulted in certain detectives not working on two holidays, July 4, 2003 (Independence Day) and September 1, 2003 (Labor Day). The Association contends that the parties' collective bargaining agreement (hereinafter "CBA") prohibits the Division from changing work schedules in order to save holiday or overtime funds. It claims that the

Division's actions resulted in a change of detectives' work schedules and a loss in pay. Their claim of lost pay is alleged to result from management not scheduling them to work on the two holidays for which in the past had they worked they were paid at the rate of one and one-half their base rate for the hours worked. The Division's actions in this regard, as asserted by the Association, constitute a violation of the parties' CBA and also constitute a statutory violation for breach of contract. RSA 273-A:5 I (h). The Association seeks a PELRB order calling upon the Division to pay all the detectives that did not work on Independence Day as well as those who did not work on Labor Day the holiday pay and/or overtime pay each employee would have otherwise earned if they did work. The Association also seeks that the PELRB order the Division to cease and desist from any future attempts to save funds by not scheduling detectives to work on holidays.

The Division filed its answer denying the Association's charge on October 24, 2003. The Division contends, among other things, that managerial prerogative allows it to determine whether employees are needed to work on a holiday. Moreover, the Division denies that Section 6.4 of the CBA applies to the instant matter, in that no personnel were relieved from duty. It asserts that all affected employees, in addition to having the holiday off, received eight (8) hours of compensation at their regular rate in accordance with Article IX ("Holidays") of the CBA. The Division also maintains that the Association is not entitled to the claimed holiday pay because prior approval by the Commissioner of the Department of Safety, in accordance with Chapter 318, Laws of 2003 had not been obtained. The Division requests that the PELRB determine that the Division did not commit an unfair labor practice and dismiss the Association's complaint.

An evidentiary hearing was convened at the offices of the Public Employee Labor Relations Board in Concord on December 9, 2003 at which both parties were represented by counsel, presented witnesses and exhibits and had the opportunity to cross-examine witnesses. The Board reviewed all filings submitted by the parties and considered all relevant evidence. After closing the record upon the representation by counsel that they had concluded their cases, the Board determined the following:

FINDINGS OF FACTS

1. The State of New Hampshire through its Department of Safety, Division of State Police ("Division") employs individuals, including detectives form certain public safety services and therefore is a public employer within the meaning of RSA 273- A:1, X.
2. The NH Troopers Association ("Association") is the certified exclusive bargaining representative for sworn personnel employed by the Division of State Police up to and including the grade of sergeant.
3. The Division and the Association have been parties to collective bargaining agreements ("CBA") separate from those covering other state employees for the periods 1997-99

(Association Exhibit #1), and for the period 1999-2001 (Association Exhibit #2). They are also parties to a current agreement that became effective in 2001 and by its terms, "shall remain in effect through June 30, 2003, or until such time as a new Agreement is executed." (Association Exhibit #3, ARTICLE 22.1).

4. The current CBA provides that in the event there are "grievances and disputes arising with respect to interpretation or application of any provision of this agreement" the last step in the resolution process provides for final and binding adjudication by the PELRB. (ARTICLE 14.1 and ARTICLE 14.5.1)
5. The parties' CBA includes the following language relating to management rights:

"ARTICLE II

MANAGEMENT PREROGATIVES

2.1. The employer retains all rights to manage, direct and control its operations, subject to the provisions of law, personnel regulations and the provisions of this Agreement, to the extent that they are applicable. These rights shall include but not be limited. [sic]

2.1.2. Appointing, promoting, transferring, assigning, demoting, suspending, and discharging employees.

2.1.4. Maintaining the efficiency of governmental operations.

2.1.5. Determining the means, methods and personnel by which such operations are to be conducted."

6. The parties' CBA provides for certain "Management Prerogatives" including a consideration of emergencies, that in relevant part also appears in Article II of the current CBA (Association Exhibit #3)

"2.2 For purposes of this section 'emergency' is defined as any conditions or situation out of the ordinary which requires immediate action to avoid danger to life, property, or to prevent losses affecting the Employer, the employee or the general public."

7. Work hours and work periods are negotiated with the understanding that this is a public safety agency and subject to staffing needs required by emergencies.

8. The decision by the Division to have only essential personnel on duty for July 4, 2003 was made only a few days prior to that holiday and notice to the detectives that they were not to report for duty on that day was made during the later part of the preceding afternoon of July 3, 2003.
9. Notice of the decision by the Division to have only essential personnel on duty for September 1, 2003 was provided to the detectives later in the month of July 2003.
10. The parties' CBA includes the following language relating to work periods:

"ARTICLE VI
BASIC WORK PERIOD

- 6.1 The basic work period for bargaining unit employees, with due allowance for authorized holidays and leaves of absence with pay, shall be one hundred seventy one (171) hours in a twenty eight (28) consecutive day period. The Employer shall retain the schedule(s) existing on the effective date of this agreement.
 - 6.2 The Employer agrees to schedule unit employees for one hundred sixty (160) hours in the basic work period for which one hundred seventy one (171) hours of compensation shall be paid.
 - 6.3 All hours worked beyond one hundred sixty (160) hours during any work period as defined in section 7.1 shall be compensated, in addition to the one hundred seventy one (171) hours of compensation in 7.2., at one and one half times the regular hourly rate. Travel time to and from in-state training shall not be considered hours worked. If the training is out-of-state, then travel time shall be considered hours worked.
 - 6.4 The Employer may alter scheduled days off and the Employer may relieve a bargaining unit employee of duty during the employee's regularly scheduled shift hours for reasons of safety or effectiveness."
11. The normal work day for detectives is Monday through Friday from 8:00AM to 5:00 PM and rotating weekend coverage.
 12. The work schedule for detectives is comprised of five eight hour days followed by two days off that results in a scheduled one hundred and sixty hours over a twenty-eight day cycle.
 13. Mr. Manning testified that his belief was that the word "schedule" as used in Article 6.4 meant the configuration of 6 days on and 3 days off or 5 days on and 2 days off worked by Troopers and detectives. He further admitted that to the extent that the Division would try to unilaterally change that configuration, e.g. 5/2, that would be wrong. However, he also testified that he did not believe that the language the parties included in their CBA was intended to prevent the Division from altering duty days while maintaining the 5/2 system.

14. Mr. Manning believed that the reference to "effectiveness" in Article 6.4 was intended to relate to the effectiveness of the Trooper not overall effectiveness of the Division.
15. For each 28 day schedule cycle covering July 4th and September 1st, the detectives were paid for 160 hours.
16. Trooper Copponi, a long time Trooper and president of the Association, testified that for the past twenty years the 5 days on and 2 days off schedule resulted in the detectives always receiving holiday pay calculated at one and one-half time if they worked the holiday. For many years prior to the actions at issue here, the parties had operated on a duty schedule that provided detectives to work five consecutive days followed by two consecutive days off over the course of a twenty-eight day cycle and during which, with few exceptions, they worked a holiday if the holiday fell on one of the five "duty days" and they actually worked the holiday, they received holiday pay calculated at one and one-half time.
17. Troopers from several different units testified that they had always been paid holiday pay and always while on 5/2 schedule until July 4, 2003.
18. Unless the duty rosters (Association Exhibits #4 and #5) for the relevant cycles indicate a day off for another reason, The Division placed detectives on "holiday off" status for July 4, 2003 and September 1, 2003.
19. Detectives are able to request that the Division place them in the status of "holiday off" and not to report to duty on holidays. As an example, Troop commander of Troop B, Sgt. Steve Ford, was placed on "holiday off for September 1, 2003 (Labor Day) at his request.
20. The Division posted detectives throughout the Division to work July 4, 2003 (Independence Day) and September 1, 2003 (Labor Day) as a "duty day" and later, but prior to each respective day, reposted detective schedules to place the detectives on a "holiday off" status for each stated day.
21. Trooper Louis Copponi, testified that the purpose for the inclusion of Article 6.4 into the parties' CBA was to prevent situations that, without the 5/2 schedule, Troopers could be made to work all 160 hours within the first two weeks of a 28 day cycle and then be relieved from work for the next two weeks, resulting in an avoidance of payment for routine overtime. An additional purpose of the wording "for reasons of safety or effectiveness." appearing in Article 6.4 was to address a previous incident that involved a workers' compensation claim and the issues created by a prolonged continuous period of duty preformed by a Trooper.
22. Thomas Manning, the former Director of Personnel for the State of New Hampshire was the Division's Chief Negotiator for over twenty years and directly participated in the negotiations for the parties' CBA's. He agreed that the primary reason for the language in Article 6.4 was for the safety of Troopers and of the public.

23. Trooper Bruce Twyon testified that Article 6.4 was designed to prevent the rescheduling of hours to save overtime.
24. Trooper Copponi testified further, that the parties agreed that the Division did not intend to use this provision for financial reasons.
25. The provision 6.4 was first negotiated by the parties and included in their first separate CBA, effective 1997-99 and remains a provision of each of the subsequent provisions, including the current CBA.
26. As applied under the terms of the parties' CBA, hours taken as leave are considered hours worked for calculations of paid leave.
27. The parties' CBA relevant provision relating to holiday pay is as follows:

"9.1 If the calendar holiday falls on an employee's regularly scheduled day off, the employee shall receive pay for the day in an amount equal to the regular rate for eight (8) hours. If an Employee is required to work on a calendar holiday the Employee shall be paid eight (8) hours of compensation plus one and one-half (1 ½) times the regular rate for all hours worked with a guaranteed minimum of eight (8) hours compensation for hours worked."

28. Under the provisions of the parties' CBA, if a Trooper worked on a holiday, that Trooper would be paid at one and one-half the normal amount. If a holiday fell on a scheduled day off, then the Trooper would receive straight pay for the day pursuant to Article 9 Holiday Pay (See Association Exhibit #3).
29. If so-called "Road Troopers" of similar rank and tenure can work on a holiday and receive the one and one-half rate of pay and detectives do not have the opportunity to work the holiday and receive the premium increment of pay, it may provide a reason for Troopers not to aspire to become a detective.
30. Using detective Bruce Twyon's testimony as an example, a detective similarly situated would receive \$140.48 less for each holiday he was not assigned to work up to 12 designated holidays. The \$140.48 represents the additional one-half base hourly pay ($\$37.12/\text{hr.} \times \frac{1}{2} \times 8\text{hrs.}$) if the holiday was actually worked.
31. Detectives find that holidays are a good time to find and reach witnesses during the day as the witnesses are often home.
32. Colonel Sloper did not directly participate in any of the negotiations of the CBA's and has no personal knowledge of what was said in negotiations.
33. While Colonel Sloper stated that he recalled that the Major Crimes Unit of the Division might not have received the holiday premium pay in the "late 1980's", he conceded under cross-examination that it was a rarity in his 29 years of service.

34. The Division specifically reviewed the parties' CBA and Article 6.4 in contemplating its action in not scheduling detectives for duty on either holiday.
35. The Division was motivated by the fact that the final state budget had not been passed and that the Division was operating on a continuing resolution of the legislature. (See Respondent's Exhibit A). The continuing resolution continued beyond Labor Day.
36. Colonel Gary M. Sloper was the commander of the Division at the time the Division made its decision not to have detectives work on holidays. He testified that during the period leading up to July 4, 2003 there was uncertainty in state funding and that he was trying to "trim back" costs to keep Troopers on the road. He had been told by his superiors that only essential personnel were to work the holiday and that detectives were not considered "essential" for that purpose.
37. Col. Sloper testified that the Division's implementation of the policy not to schedule detectives for holiday duty was undertaken for reasons related to the fiscal management of the Division contributing to its effectiveness and not for reasons of safety.

ORDER

JURISDICTION

The PELRB exercises primary jurisdiction to adjudicate complaints between public employers and their employees or exclusive bargaining representatives that allege an improper labor practice caused by a party breaching a collective bargaining agreement ("CBA") as described in RSA 273-A:5 I(h) or II (f). In addition to this authority, jurisdiction 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". Section 14.5.1, Association Exhibit #3, Collective Bargaining Agreement 2001-2003.

DECISION

This case requires the PELRB to determine whether or not actions of the Division of Safety constituted a valid exercise of a management right. To do so, we apply the three part analysis of the so-called "negotiability test". we first find that there is no provision in our constitution, statutes or rules that reserves the establishment of holiday work schedules to the exclusive authority of the Division. We do not, however, find that the Division's actions "primarily" affect the terms and conditions of employment rather than manifest a matter of broad managerial policy. The Division's action was a valid exercise of management rights. Therefore, the Division did not commit an unfair labor practice when it proceeded to no longer assign detectives to work on all holidays that fell on a regularly scheduled work-day in their "5 on-2

off" schedule. We further find that in applying the "negotiability test" the issue of holiday duty assignments is a permissible subject for negotiations. The Association's complaint is dismissed.

DISCUSSION

At the time the Division undertook the actions complained of by the Association in this matter in July 2003, the parties' most recent CBA had expired effective June 30, 2003 and the parties' continued to be bound by the principle of maintaining the *status quo* until a successor agreement was achieved. At or about 2:00PM on July 3, 2003 the Division decided, based upon financial considerations, that it would no longer require detectives to report for duty on the Fourth of July holiday. Later in that same month of July, the Division extended the effect of its decision not to require detectives to work on a holiday when it notified detectives that they would be placed on "holiday off" status on the duty roster for the next scheduled holiday, which fell on September 1, 2003, Labor Day. The Division did not negotiate nor confer with the Association before undertaking either action. The question raised by the Association's complaint is "Did the Division have to negotiate the non-assignment of duty on either holiday?"

The Division contends that it did not have to negotiate its decision not to have Detectives to work on the holidays of Independence Day and Labor Day because that decision is an exercise of its managerial policy prerogative. This managerial prerogative springs from an exception contained in the definition of "terms and conditions of employment" in RSA 273-A:1, XI:

"Terms and conditions of employment means wages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer..."

That same statute explains that,

"The phrase 'managerial policy within the exclusive prerogative of the public employer' shall be construed to include but not be limited to the functions, programs and methods of the public employer, including ...the selection, direction and number of its personnel, so as to continue public control of governmental functions." *Id.*

The parties acknowledged the existence of management prerogatives in the agreed language appearing in Article II of their CBA (Association Exhibit #3), relevant provisions of which include:

"2.1. The employer retains all rights to manage, direct and control its operations, subject to the provisions of law, personnel regulations and the provisions of this Agreement, to the extent that they are applicable. These rights shall include but not be limited. [sic]

2.1.2. Appointing, promoting, transferring, assigning, demoting, suspending, and discharging employees.

2.1.4. Maintaining the efficiency of governmental operations.

2.1.5. Determining the means, methods and personnel by which such operations are to be conducted.”

The Association takes the position that the Division’s action constitutes a unilateral action that violates the terms of the parties’ CBA, specifically Section 6.4, that states,

“The Employer may alter scheduled days off and the Employer may relieve a bargaining unit employee of duty during the employee’s regularly scheduled shift hours for reasons of safety or effectiveness.”

The Association asserts its position because it maintains that the Division does not have the sole authority to determine whether detectives are required to perform duty on holidays.

The parties also disagree as to how the word “effectiveness” is to be applied. The Division would have us find that it is related to the overall effectiveness of the Division. The credible testimony of the witnesses, including one of its own witnesses, establishes to our satisfaction that the “effectiveness” intended in this provision relates to the performance of an employee who may lose effectiveness because he or she had served an exceptionally long work shift. We address this matter of interpretation because the parties have raised it and devoted considerable effort in presenting their respective cases on this point. However, after hearing their respective entire cases, we place little weight to this distinction in making our decision for the following reason.

This case involves the determination of whether or not the Division’s decision not to have detectives work on a holiday is negotiable. The court has provided us with a three-pronged test to resolve issues of negotiability. Appeal of State of N.H., 138 N.H. 716, 722.

“First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation.” *Id.* “Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy.” *Id.* “Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI.” *Id.*

“A matter that fails step one is a prohibited subject of bargaining. A matter that satisfies step one but fails either step two or three is a permissible topic of negotiations. A matter that satisfies all three steps is a mandatory subject of collective bargaining. Appeal of New Hampshire Troopers

Association, 145 N.H. 288, 292, citing Appeal of City of Nashua Board of Education, 141 N.H. 768, 774.

Applying step one of this analysis we first note that the court has previously rejected a public employer's "attempt to use the statutory managerial policy exception as the statute that determines the scope and applicability of the managerial policy exception." Appeal of Hillsboro-Deering School District, 144 N.H. 27, citing Appeal of City of Nashua, *Ibid.* 774. The Division's only other attempt to establish some statutory prohibition is reliance on budgetary legislation, including proposed House Bill 1-A (Budget) and House Joint Resolution 3 (Continuing Resolution) that the Division argues establishes a prohibition on the payment of holiday pay "without receiving the prior approval of the Commissioner or his designee." Chapter 212, Laws of 2003. (See Respondent's Exhibits A and B). To accept these legislative actions as satisfying the intended statutory prohibition requirement of our present negotiability test would make all collective bargaining meaningless. Such a broad financial restriction would allow the public employer to later disavow all financial obligations that arise through collective bargaining. Therefore, we do not find that the subject matter in this case, namely the non-assignment of duty to detectives on holidays, has been reserved to the exclusive managerial authority of the public employer by any provisions of the constitution, or of our statutes or administrative rules. Therefore, the parties are not prohibited from negotiating such an issue.

The second step in the analysis established by the court calls upon us to decide whether the Division's decision to not have detectives report to duty on holidays constitutes a proposal that "primarily" affects the terms and conditions of employment, rather than matters of broad managerial policy. There is no doubt in our minds that if detectives do not work on a holiday, they will not receive the same amount of pay as if they had worked the holiday. If they do not work on the holiday they are paid eight hours at straight base pay and if they do, they are paid fifty percent more for the hours worked.

For at least twenty years prior to the Division's action, the parties agree that, with few exceptions, Detectives would report to duty on the holidays designated in the CBA (See Article IX, § 9.2, Association Exhibit #3) if the holiday fell on one of the five consecutive duty days they would usually work and not on the following two consecutive days they were usually not scheduled for duty. Likewise, the assignment of duty of Detectives to this so-called "5 and 2" schedule has been in existence for many years. This specific schedule has not been negotiated into the parties' CBA. A review of the parties' CBA reveals that hours of work have been negotiated between the parties only to the extent that within a twenty-eight day period "the Employer agrees to schedule unit employees for one hundred sixty (160) hours in the basic work period for which one hundred seventy one (171) hours of compensation shall be paid." (Association Exhibit #3, § 6.2). The parties' CBA also provides, "*If an Employee is required to work on a calendar holiday the Employee shall be paid eight (8) hours of compensation plus one and one-half (1 ½) times the regular rate for all hours worked with a guaranteed minimum of eight (8) hours compensation for hours worked.*" (italics added) (Association Exhibit #3, § 9.1) This language has been negotiated by the parties and incorporated into their CBA's at least as far back as 1997 (See Association Exhibits #1 and #2). To us, the express contract language clearly reserves to the Division the authority to require a detective to report to duty on a holiday and commits the Division to pay a premium rate if they do require a detective to do so.

In Article II, MANAGEMENT PREROGATIVES, the parties agree that the Division "retains all rights to manage, direct and control its operations, subject to, among other things, "the provisions of this Agreement." (Association Exhibit #3, §2.1.). Further in that article we find that the parties agreed that the management rights include "assigning" employees (§2.1.2) and "[m]aintaining the efficiency of governmental operations." (§2.1.4). Also, we find the parties agreed that the Division retained its right to "[d]etermine the means, methods, and personnel" (§2.1.5) by which it would conduct its operations. Taking the parties' CBA as a whole, we cannot find any language that otherwise eliminates the Division's authority to require detectives to work on holidays or that would serve to share that authority through the negotiated terms of the parties' CBA.

Faced with what we believe to be clear language within the parties' CBA that the Division retained the prerogative to require detectives to report to duty on holidays, we find the reciprocal of that authority to be similarly valid, that is, to not require them to report to duty on holidays. We cannot conclude from the testimony of witnesses that detectives have worked the holidays in the past should cause us to ignore or subordinate the express language of the CBA to parole evidence. To conclude in that way would diminish the importance of the parties' expressed terms and their duty to reduce the terms of their agreement to writing.

The Division exercised authority within its managerial policy when it attempted to efficiently manage its operation to achieve the highest level of public safety on holidays by assigning more "Road Troopers" to holiday duty and decreasing the number of detectives working on holidays. Upon consideration of the testimony, we do not find that it did so for other than good faith policy considerations and not in contravention of any obligation arising under the agreed terms of the parties' CBA and *status quo* status. So while we recognize that detectives will receive less premium pay as a result of them not always being required to work on holidays, we conclude that the Division's decision not to have detectives work on designated holidays does not primarily affect the terms and conditions of employment, rather than matters of broad managerial policy. To find otherwise would be to conclude that the parties had without negotiations reached a mutual agreement that the Detectives had obtained a right to work on holidays. We do not think that the evidence demonstrates that they obtained this right.

Our determination that the Association's claim fails the second part of the "negotiability test" does not prohibit the parties from negotiating this issue. The parties have previously negotiated a twenty-eight day work cycle that included a work schedule addressing the aggregate number of hours detectives were to work within that designated cycle. (See Association Exhibit #3, Article VI). That scheduling issue seems to have been accomplished by the parties without interference "with public control of government functions contrary to the provisions of RSA 273-A:1, XI.", the third part of the "negotiability test". Given the long experience of negotiations between the parties on many topics that affect the public safety of the citizens of our state, we find that should the parties desire to further negotiate the issue of holiday duty to be performed by detectives it would not constitute a *per se* interference with public control of government functions contrary to RSA-A:1, XI. Applying all three parts of the test to this issue, we conclude that it would be a permissible topic for bargaining.

The Association's complaint is dismissed.

So Ordered.

Signed this 15th day of March, 2004



Jack Buckley, Chairman

By unanimous vote. Chairman Jack Buckley presiding with Board Members Seymour Osman and E. Vincent Hall also voting.

DISTRIBUTION:

James W. Donchess, Esquire

Marta A. Modigliani, Esq.

Sarah Willingham, Human Resources Director