State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, S.E.I.U. LOCAL 1984	:	
Complainant	:	CASE NO. S-0401:1
v.	:	DECISION NO. 1999-033
STATE OF NEW HAMPSHIRE	:	
Respondent	:	

APPEARANCES

Representing State Employees Association of N.H.:

Dennis Martino, Executive Assistant

Representing State of New Hampshire:

Douglas Jones, Esq.

Also appearing:

Kate McGovern, State Employees Association, Local 1984
Virginia Lamberton, Division of Personnel
Thomas F. Manning, Division of Personnel
Patricia Gruttemeyer, Department of Environmental Services
Sara Johnson, Department of Environmental Services
O.J. Duff, State Employees Association
John Scully, State Employees Association
Dick Jay, State Employees Association
Bethann McCarthy, Department of Environmental Services

BACKGROUND

The State Employees Association of New Hampshire, S.E.I.U. Local 1984 (Union) filed unfair labor practice (ULP) charges against the State of New Hampshire (State) on December 21, 1998 alleging violations of RSA 273-A:5 I (e), (h) and (i) for refusal to bargain and breach of contract by (1) refusing to meet in accordance with the collective bargaining agreement over terms and conditions of employment for certain part-time employees, (2) refusing to provide a list of part-time workers in conformity with PELRB Decision No. 1998-82, and (3) by implementing unilateral changes in holiday pay and shift differentials for certain part-time employees. The State of New Hampshire filed responsive pleadings in the form of a Motion to Dismiss, with four exhibits attached, on January 5, 1999. Thereafter, this matter was heard by the PELRB on March 18, 1999 after being continued from an earlier hearing date. The record was closed upon receipt of post-hearing briefs from the parties on March 30 and April 1, 1999, respectively.

FINDINGS OF FACT

1. The State of New Hampshire employs personnel in the course of operating state government and, thus, is a public employer within the meaning of RSA 273-A:1 X.

2. The State Employees Association of New Hampshire, SEIU Local 1984, is the duly certified bargaining agent for all organized state employees at the departments of Environmental Services and Transportation, about which testimony was offered in these proceedings.

3. The State and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 1997 through June 30, 1999 (Union Exhibit No. 2). That document contains provisions pertinent to these proceedings, to wit:

RECOGNITION and UNIT DESCRIPTION

1.1 Recognition: The Employer recognizes the Association which shall serve as exclusive representative of all classified employees in the bargaining unit with the exception of those classified employees excluded from the definition of public employee under the provisions of RSA 273-A:1, IX. The Associa-

tion recognizes the responsibility of representing the interest of all employees in the unit without discrimination for the purpose as set forth in this agreement.

* * * * *

3.2 Member and Employee Reports: The Employer agrees to provide payroll deduction information to the Association on a computer disk or other mutually agreed format at least biweekly for the administration of dues deductions and Association programs.

In addition, the Employer shall notify the Association of all newly hired employees, the names and business addresses of all permanent unit employees, and employees who have terminated state service at least monthly on a computer disk, or other mutually agreed format.

These reports shall include, at least, the following:

- employee's name
- employee's home address for Association members only
- employee's state identification number for Association members only
- employee's payroll number
- employee's labor grade and step
- employee's salary schedule
- employee's business address
- employee's job classification
- employee's date of employment

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CONSULTATION and LABOR MANAGEMENT COMMITTEE

4.1 Consultation:

4.1.1 - Obligation to Meet: The parties recognize their mutual obligation to meet and confer regarding problems arising out of the employment relationship.

4.1.2 - Matters for Consultation: It is agreed and understood that policies and procedures related to terms or conditions of employment are appropriate matters for consultation between the Parties, providing however, that neither Party waives or relinquishes their right to negotiate mandatory subjects of collective bargaining providing, however, that the Parties may mutually agree to discuss any subject matter not otherwise included in 4.2.

4.1.3 - Requests: Consultation shall be requested by either

Party in writing, stating the reason for the meeting and the agenda or topic of consultation. Consultation requests by the Association shall be made to the Bureau of Employee Relations or to the appropriate agency by either the Executive Director, or designee, of the Association. Consultation requests by the Employer shall be made to the Executive Director of the Association.

4.1.4 - Meetings: A mutually agreeable meeting date shall be established providing that such date shall be within fifteen (15) work days of receipt of the written notice. The time limit may be extended by agreement.

4.1.5 - Attendees: An Association staff member shall represent the bargaining unit alone, or with not more than five (5) employees. The association will state the names and work areas of the employees, if any, who are to attend the meeting. Representatives of the Employer shall meet with the Association representatives. The Manager of Employee Relations will attend such consultations whenever feasible providing that his/her attendance may be specifically requested and complied with by notice of either the Association or the Employer.

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HOLIDAYS

9.1 Eligibility: Employees shall be entitled to all holidays prescribed by law or the chief executive with approval of council, provided the employee is on pay status on the employee's next regularly scheduled work day preceding and subsequent to the holiday, and employees shall be compensated as provided herein for work performed on these days.

9.2 Holidays Listed: The following days are holidays:

New Year's Day
Washington's Birthday
Memorial Day
Fourth of July
Labor Day
Veteran's Day
Day after Thanksgiving
Christmas

4. RSA 273-A:1 IX provides as follows:

IX. "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; and

(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.

5. **Administrative rules for the Division of Personnel of the Department of Administrative Services were adopted/ readopted in 1992 and again on April 21, 1998. (State Exhibits G and H.) In each instance the language cited below was the same:**

Per 1302.04 Part-time Employees Who Work Calendar Holidays.

(a) Part-time employees involved in the care of persons in the state mental health system, the division for children and youth services, the state prison, the secure psychiatric unit, and the veterans' home shall be entitled to holiday pay for hours worked on the following calendar holidays:

(1) New Year's Day
(2) Memorial Day
(3) Fourth of July
(4) Labor Day
(5) Veterans Day
(6) Thanksgiving Day
(7) Day after Thanksgiving
(8) Christmas Day

(b) To be eligible for holiday pay, the part-time employee shall have worked both:

(1) The scheduled work day before the calendar holiday; and
(2) The scheduled work day after the calendar holiday.

The 1998 readoption of this provision prompted numerous memoranda from supervisors and managers to announce that "effective April 21, 1998, part-time employees will not be paid for any holidays unless they work the holiday." (See Memo from Sandra Platt to DHHS Directors, Managers, Supervisors, April 24, 1998, Union

Exhibit No. 3; Memo from Doris Lachance, Environmental Services, Union Exhibit No. 14. and Memo from Marie Lang to John Yarmo dated July 2, 1998, part of Union Exhibit No. 3.)

6. Prior to the readoption of the administrative rules on April 21, 1998, Dennis Martino conferred with Fran Buczynski, Human Resource Administrator for the Department of Transportation on or about March 23, 1998. ON March 30, 1998, Buczynski wrote Martino saying that eligibility for holiday pay did not extend to "spare toll attendants" since the matter had been referred to the Attorney General's office which said RSA 98A-6:B [sic] applied only "to those classifications and conditions contained in the text of the law for eligibility for holiday pay." (Exhibit 4 to ULP). RSA 98 A:6-b, also found as "Exhibit A" to the State's answer, says:

> 98-A:6-b HOLIDAY PAY. Notwithstanding any agreement, law, or rule to the contrary, state employees involved in the care of persons in the state mental health system, the division for children and youth services, the state prison, the secure psychiatric unit or the veteran's home on a part-time basis who work on New Year's Day, Memorial Day, July 4, Labor Day, Veterans Day, Thanksgiving Day, the day after Thanksgiving, or Christmas Day, shall be entitled to holiday pay for the hours worked, provided that such employees shall be required to work the scheduled day before and the scheduled day after such holidays.

7. On March 16, 1998, Kate McGovern, Field Representative for the Union, wrote to Helen Champa at Administrative Services to request that part-time state employees be included in the monthly report which is provided periodically (Exhibit 5 to ULP), presumably under Article 3.2 of the CBA. This issue was not resolved by the time the Union filed ULP charges on June 30, 1998 (PELRB Case No. S-0401) which resulted in PELRB Decision No. 1998-082 on October 1, 1998 which, in part, directed an exchange of the requested data within thirty (30) days. (Exhibit 8 to ULP.) That information exchange did not occur within the time prescribed but has since been accomplished.

8. PELRB Decision No. 1998-082 also directed the parties to meet at least four (4) times after the exchange of

information referenced in Finding No. 7. The parties were to have completed those negotiations by January 1, 1999 and this matter was to be dismissed from the PELRB's docket if neither side refiled the subject matter of the pending ULP before January 1, 1999. The Union refiled December 21, 1998.

9. Bethann McCarthy is a regularly-scheduled part-time employee of the Department of Environmental Services who works 6 hours a day for four days a week. Before April of 1998, she received "holiday pay" for a holiday taken and not worked so long as she worked the work days immediately before and after the holiday. This benefit ceased after the issuance of a memo which, in turn, was precipitated by the re-adoption of the Personnel Rules on or about April 21, 1998. McCarthy testified she is considered a "regular part-time" worker because she works 975 or more hours per year. As such, she qualifies for certain benefits under RSA 98-A:6, namely, a cash payment for certain accumulated annual leave on her employment anniversary.

10. Patricia Gruttemeyer has worked for Environmental Services since June of 1994 on a 6 hours per day, 5 days per week schedule. She had consistently received holiday pay until she found a memo on her desk one week before Memorial Day, 1998, saying that holiday pay would be discontinued.

11. Sara Johnson works an eight hour day, four days a week, also at Environmental Services. Since she works more than 30 hours per week, she is eligible for, and gets, health and dental benefits under RSA 98-A:6-a. Because she must work at least 30 hours a week to qualify for these benefits, she has to be constantly aware of her schedule and has to juggle days to insure that she meets the 30 hour minimum for those work weeks when there is a scheduled holiday. (See Union Exhibit No. 15.) Before May of 1998, she used to receive holiday pay if the holiday occurred on one of her regularly scheduled work days.

12. Richard Joy characterized himself as a "regular spare" toll attendant for the Turnpike. He is routinely scheduled to work twenty-nine (29) hours per week and is fully utilized for those 29 hours because the

Turnpike is "short handed." Joy has worked for the Turnpike as a toll attendant for 6 years during which time he has seen his hours decreased so they are now (and have been for two years) less than 30 hours per week which, coincidentally, is the threshold for benefits under RSA 98-A:6-a, appended as Exhibit A to the State's answer. Joy testified that he used to receive holiday pay until this was reduced from double time and a half to time and a half in August of 1996 and from time and a half to straight time in late summer of 1997, it being his testimony that he last received premium pay for Labor Day of 1997.

13. Virginia Lamberton has been Director of Personnel since 1987 and was Human Resource Director for New Hampshire Hospital from 1975 to 1987. She testified as to the chronology which led to paying holiday pay to nurses and direct care employees, originally authorized in 1989 and now found at RSA 98-A:6-b. This benefit was exclusive to "care givers" in the facilities listed in the statute but was the source of confusion. Thus, when the Personnel Rules were readopted in 1992, the language of PER 1302.04 was inserted. See Finding No. 5, above. Lamberton explained the inconsistencies in the Department of Transportation pay policies as being attributed to their operation and management of their own payroll system until they were brought into the GHRS (Governmental Human Resource System) in 1995. She testified that DOT has been instructed to stop paying part-time holiday pay in 1992, but that this was not corrected until a consistent state-wide payroll plan was in place. Lamberton also denied that regular part-time employees have always received holiday pay, claiming that the CBA does not apply to part-time employees but that some of those part-time employees do enjoy benefits conferred by statute.

14. Thomas Manning has been Manager of Employee Relations since 1984. He testified that the various CBA's between the State and the Union since 1977 have all contained the same language in the recognition clause, with the exception that the "exclusionary" language was added approximately ten years ago, namely, "...with the exception of those classified employees excluded from the definition of public employee under

the provisions of RSA 273-A:1, IX." He has never considered the CBA to cover part-time classified employees because they receive no annual leave, sick leave, overtime or insurance benefits under it. If received, these benefits are derived from statute. Manning also confirmed that he had received an inquiry from DOT in 1992 about holiday pay for part-time Turnpike employees. He responded by saying there was no authority for such payments. He also testified that benefits for part-time employees were proposed by the Union in the course negotiations for the 1997-1999 CBA. They were not directed separately or specifically at holiday pay. They also did not become part of the CBA. (See State Exhibit "I".)

DECISION AND ORDER

As presented, this case involves a multitude of issues, both procedural and substantive, emanating from the original ULP in June of 1998, Decision No. 1998-082 resulting therefrom, subsequent allegations of violations thereof and, finally, the ULP filed by the Union on December 21, 1998 and the State's response thereto on January 5, 1999. Because of the number of issues and the parties having addressed those issues more generally than specifically in their negotiations and discussions, we will address the issues individually and particularly for purposes of clarity and disposition.

The instant ULP complained that the State failed to adhere to the requirements of Decision No. 1998-082, Item 4 (c) by failing to exchange data on the identity and other characteristics of part-time employees in a timely manner. Pursuant to Finding No. 7, above, we find that to have been the case, to have been a momentary manifestation of bad faith bargaining, to have been remedied by a subsequent exchange of the required information and, now, not to require any remedy to be mandated by this board because of the subsequent, albeit late, compliance with the applicable portion of Decision No. 1998-082.

Next, the ULP alleged a breach of contract and an impermissible unilateral change in working conditions in that certain employees had been deprived of holiday pay/shift differential benefits. Allegedly, part-time toll attendants/collectors employed by the Department of Transportation, Turnpikes Division, were so impacted. The Union offered the testimony of one such employee, as reflected in Finding No. 12, above. Our review of the evidence offered

relating to part-time or "regular spare" toll attendants suggests that they are routinely, if not regularly, scheduled to work (i.e., they work at least one shift per pay period) and that they are an indispensable labor commodity to the operation of the turnpike system because they fill the gaps in the schedule which cannot otherwise be staffed or filled by the regular full-time toll attendants employed by the State. Notwithstanding this, we find that the complained of alterations to their holiday pay benefits occurred approximately in August of 1996 and again, and lastly, in August of 1997. Any claim asserted on behalf of this group or "class" of employees is time barred under RSA 273-A:6 VII if, according to the dates referenced in the testimony offered to us, the actionable ULP was filed on or after March of 1998, six months or more after the cessation of holiday pay benefits on or about Labor Day of 1997. Thus, we dismiss the ULP with respect to claims asserted by the Union on behalf of toll attendants employed by the State through its Department of Transportation.

The other group of employees whose holiday pay benefits have allegedly been reduced or eliminated are all employed by the Department of Environmental Services (DES). See Finding Nos. 9, 10 and 11. Unlike the toll attendants, the discontinuance of benefits about which they are complaining, as a class, occurred for the pay period which covered Memorial Day of 1998. It was the subject of the Union's ULP filed on June 30, 1998 (Case No. S-0401) and, thus, was timely filed.

The State has argued that holiday pay for part-time employees is extended to and is only appropriate for those categories of employees enumerated in RSA 98-A:6-b, found in Finding No. 6, above. We agree with the concept that RSA 98-A:6-b is a statutory extension of benefits to certain groups of employees; we do not concur with the notion that it is, and always has been, the only way in which holiday pay benefits have been conferred on certain part-time employees of the State. The testimony of the witnesses, as recounted in Finding Nos. 9, 10 and 11, successfully refutes that.

When we compare the testimony of the witnesses offered in Finding Nos. 9, 10 and 11 with the Recognition Clause of the CBA (Finding No. 3), we conclude that holiday pay benefits were, indeed, conferred upon the individuals, and the class of employees which they represent, at DES. While RSA 98-A:6-b recites certain statutorily conferred benefits, Article 1.1 of the CBA reflects the parties' agreement as to the composition of the bargaining unit and sub-units. Even with the "exclusionary" language referenced in the Manning testimony (Finding No. 14), the parties have only agreed to

exclude classified employees of the state who do not meet the definition of a public employee under RSA 273-A:1 IX. RSA 273-A:1 IX excludes from the definition of "public employee" under the act those employees elected by popular vote, certain appointees, confidential employees and employees "in a probationary or temporary status, or employed seasonally, irregularly or on call." The DES employees who testified before us exhibited none of those characteristics. To the contrary, they are regularly employed, regularly scheduled part-time employees whose regular work weeks do not exceed 37.5 hours. They, thus, are not excluded from being bargaining for under the CBA or receiving the fruits of those negotiations.

With that in mind, we believe it is inappropriate, a refusal to bargain and a breach of contract to deprive the DES employees, and other employee of that department who are so situated, of holiday pay benefits, whether sanctioned by amendment or readoption of the personnel rules or otherwise. To have done so is collectively violative of RSA 273-A:5 I (e), (h) and (i). These employees have earned and enjoyed these benefits from their employer. They have existed over the term of two or more collective bargaining agreements between the State and the Union and, over that duration, cannot now be claimed to have been error. They have become and are *bona fide* past practices under the CBA, and, as such, cannot be unilaterally altered or eliminated. If they are to be changed, that change must be the result of collective negotiations between the parties. To allow them to be altered by the adoption or readoption of administrative rules would make the negotiations process, as well as the provisions of RSA 273-A:5 I (i), meaningless and the paper on which the contract is written worthless. Stated another way, it is tantamount to a unilateral change in working conditions and "a unilateral change in a condition of employment is equivalent to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations." Appeal of Alton School Dist., 140 N.H. 303, 308 (1995).

The concept of past practice is not new to this board. It was part and parcel of Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960) [accepted and cited for other principles in Appeal of Westmoreland School Board, 132 N.H. 103 (1989)] which proclaimed that the "source of law is not confined to the express provisions of the contract, as is the industrial common law....the practices of the industry and the shop...is equally a part of the collective bargaining agreement although not expressed in it." See also Elkouri and Elkouri, How Arbitration Works (5th ed., Washington, BNA, 1997) p. 632 and Roberts' Dictionary of Industrial Relations

(4th ed., Washington, BNA, 1994) p. 573. When we examine the testimony of the DES witnesses, we find this practice of holiday pay to have existed since at least 1994 (Finding No. 10), under the 1993-95, the 1995-97 and the 1997-99 CBA's. An open and acknowledged practice of such long standing cannot now be said to be anything less than a "past practice" as defined by commonly accepted labor-management standards.

In addition to dispositions noted and made earlier in this decision, we affirm our finding of the commission of a ULP with respect to the class of employees represented by witnesses from DES, inclusive of violations of RSA 273-A:5 I (e), (h) and (i). The State is directed to CEASE and DESIST from refusing to pay "holiday pay" benefits to the class of DES employees who complained in this case and to employees at DES who are similarly situated and who were similarly deprived of holiday pay contemporaneously with the witnesses who gave testimony in these proceedings. The State shall forthwith restore the *status quo* to the DES personnel so deprived of holiday pay. We make no order and direct no remedy for regular part-time employees of other departments of state government as the evidence presented failed to show that they had been similarly deprived of holiday pay benefits, whether for the times, purposes or reasons stated to us in these proceedings or otherwise. Inasmuch as general contract talks between the Union and the State have recently reopened, the subject matter of this ULP, such as was found to be in violation of RSA 273-A:5 I, shall be a part of those negotiations, at the master contract or sub-unit levels, as is appropriate.

So ordered.

Signed this 3rd day of May, 1999.

Bruce K. Johnson

BRUCE K. JOHNSON
Alternate Chairman

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