



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**State Employees' Association of New Hampshire, Inc.,
SEIU Local 1984**

v.

State of New Hampshire, Liquor Commission

**Case No. G-0202-2
Decision No. 2014-089**

Appearances:

Richard E. Molan, Esq., Molan, Milner and Krupski, PLLC, Concord, New Hampshire, for the Complainant

Rosemary Wiant, Esq., Assistant Attorney General, and Michael K. Brown, Esq., Senior Assistant Attorney General, Office of the Attorney General, Concord, New Hampshire, for the Respondent

Background:

On December 6, 2012 the State Employees' Association of New Hampshire, Inc., SEIU Local 1984 (Association) filed an unfair labor practice complaint claiming that the Commission of New Hampshire, Liquor Commission (State) violated RSA 273-A:5, I (a), (d), and (g) when it took certain allegedly discriminatory actions against four¹ Association Stewards in retaliation for their union activity. The Association requests that the PELRB order the State to cease and desist from violating RSA 273-A:5, I (a), (d), and (g).

The State denies the charges and asserts that its actions were justified and were in accordance with written procedures. The State filed a motion to dismiss asserting that the Association's claims are moot because the issues between the employees and the State had been

¹ The Union withdrew the charges concerning Chris Russell, one of the Association Stewards, at the beginning of the first day of adjudicatory hearing on March 28, 2013.

allegedly resolved. The Association objected to the motion to dismiss.

An adjudicatory hearing was originally scheduled for January 16, 2013 but, at the Association's assented to request, was continued. The first day of hearing was held on March 28, 2013 at the Public Employee Labor Relations Board (PELRB) offices in Concord. The second day of hearing was originally scheduled for April 4, 2013 but, at the parties' requests, was continued twice and was ultimately held on July 1, 2013. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. At the conclusion of the final day of adjudicatory hearing, the Association indicated its intent to file a written motion to amend its complaint by adding claims for violations of RSA 273-A:5, I (b), (h), and (i) to conform to the evidence presented at hearing and a request that the PELRB order Mr. Perras to be made full for his use of additional sick leave not required by the CBA. The Association filed its motion to amend on July 3, 2013 and the State objected to this motion on July 18, 2013. The Association's motion to amend was granted. See Hearing Officer Decision No. 2013-129. On September 27, 2013 the Board denied without prejudice the State's Pub 201.05 Motion for Review of Hearing Officer decision. See PELRB Decision No. 2013-178.² The parties submitted post-hearing briefs on September 30, 2013; and the decision is as follows.

Findings of Fact

I. Background

1. The State is a "public employer" as defined by RSA 273-A:1, X.
2. The Association is the certified bargaining representative of classified employees of the New Hampshire Liquor Commission exclusive of employees of the enforcement division.

See Stipulated Facts at B.

3. There are 77 stores in the NH Liquor Commission system.

² The Board stated that the State's motion was premature and that the "State may raise the issue, if necessary, as part of any Pub 205.01 motion for review the State may file following the issuance of the hearing officer's decision on the merits." See PELRB Decision No. 2013-178.

4. The State and the Association were signatories to a collective bargaining agreement with effective dates of July 1, 2011 through June 30, 2013. See Stipulated Facts at C.

5. The parties' 2011-13 CBA contained a grievance procedure consisting of the following steps: Step I - employee and immediate supervisor; Step II - employee and intermediate supervisor (in writing); Step III - employee and agency head; and Step IV - final and binding arbitration. Either employee or his/her Steward can initiate a grievance procedure.

6. Article 14.5.2 of the 2011-13 CBA, titled Arbitrator's Powers, provides as follows:

... To the extent that a matter is properly before an arbitrator in accordance with this provision, the arbitrator's decision thereon shall be final and binding providing it is not contrary to existing law or regulation nor requires an appropriation of additional funds, in either of which case it will be advisory in nature.

The Parties further agree that questions of arbitrability are proper issues for the arbitrator to decide.

See Joint Exhibit 1.

7. CBA Article 12, Section 1 provides that the Employer agrees to recognize Stewards duly authorized by the Association and further permits employees of the Liquor Commission to have seven (7) stewards. The Association has appointed five (5) stewards. Of the five (5), there are four (4) individuals who serve as stewards for the Liquor Commission employees, including Cynthia Sanborn-Dubey, Chris Russell, Anthony Perras, and Richard Gulla who are subjects of the Association's complaint.³ As Stewards, they have advocated on behalf of employees of the Liquor Commission. See Stipulated Facts at D.

8. CBA Article 14.1.2, titled Investigations, provides as follows:

The Steward, when requested by one or a number of employees whom that Steward represents, may investigate the basis for any dispute arising under this Agreement and may, at any stage, assist the employee(s) in seeking resolution of such dispute through the

³ The Union withdrew the charges concerning Chris Russell. See Footnote 1 above.

grievance procedure provided herein...

See Joint Exhibit 1.

9. CBA Article 12.2, titled Non-discrimination, provides that the "Employer agrees there shall be no discrimination against any Steward because of his or her duties as an Association official or member." See Joint Exhibit 1.

10. CBA Article 12.3, titled Use of Work Time, provides as follows:

The Employer shall authorize a reasonable amount of time during the regular working hours without loss of time or pay, and make reasonable adjustments to the Steward's workload, to permit the Steward to carry out their responsibilities in accordance with the provisions of this Agreement. The Association shall guard against the use of excessive time in handling such responsibilities. Each Steward, before carrying out his/her responsibilities in accordance with the provisions of this Agreement, shall first obtain the consent of his/her immediate supervisor which shall not be unreasonably withheld...

Joint Exhibit 1.

11. Article 3 of the CBA, titled Association Rights, provides in part:

3.3. Association Business: The internal business of the Association shall be conducted by full-time and regularly scheduled part-time employees during their non-duty hours.

3.3.1. Association chapters may utilize the Employer's messenger service and, to the extent that they do or may exist, electronic mail system(s) for the duration of this Agreement for internal Association business, provided that said mailings are clearly identified as the property of the Association.

...

3.5. Access To Employees: Staff representatives of the Association shall be allowed to visit work areas of employees during working hours and confer on conditions of employment to the extent that such visitations do not disrupt the work activities of the area being visited. Prior to entering the work area, the representative shall receive permission from the appropriate department head or his/her designee stating the reason(s) for such visitations. Permission shall not be unreasonably denied.

3.6. Administrative Leave: SEA members shall be allowed a cumulative total of sixty (60) days off per contract year without loss of time or pay for the purpose of attending meetings, conventions or conferences relative to labor relations or Association affiliations. Time off shall be limited to five (5) days per member for each such request. All requests shall be submitted to, and approved by, the Bureau of Employee Relations for timely notification to the Employer that the leave has been approved and shall be awarded.

3.6.1. The time limits set herein shall be extended by mutual agreement between the

Employer and the Association. The Association shall reimburse the Employer for the prorated wage and benefit cost for each applicable member.

See Joint Exhibit 1.

12. The Labor Management Committee (LMC) is a joint committee with the State and the Association equally represented: 5 management representative and 5 Association representatives. The LMC works on settlement of grievances and interprets the CBA as necessary. It also reviews applications for supplemental sick leave. Article 4 of the CBA, titled Consultation and Labor Management Committee, provides in part as follows:

4.1.1. Obligation to Meet: The Parties recognize their mutual obligation to meet and confer regarding problems arising out of the employment relationship between the employer and full and part-time employees.

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.

...

4.2. Labor Management Committee:

4.2.1. Composition: The Parties agree to establish a Labor Management Committee consisting of not more than five (5) representatives of the State Negotiating Committee, one of whom shall be the Manager of Employee Relations, and not more than five (5) representatives of the Association's Master Bargaining Team...

4.2.2. Meetings: The Committee shall meet as frequently as may be necessary to carry out its purpose and responsibilities as set forth in this Agreement.

4.2.3. Purpose: The purpose of the Committee shall be to ensure the application, clarification and administration of this Agreement...

Joint Exhibit 1. The LMC usually meets twice a month (on first and third Mondays).

13. Matthew Newland has been employed by the State as the Manager of Employee Relations for over 2 years. His responsibilities include contract negotiations and management of grievances at Step 4. He is a member of the LMC.

14. Kelly Mathews has been the Liquor Commission Human Resources (HR)

Administrator since October, 2010. As HR Administrator, she oversees all personnel transactions and enforcement of the CBA and of the State and Federal laws and rules.

15. Article 11.4 of the CBA, titled Sick Leave, provides in relevant part:

11.4. Certification: An employee may be required by the Employer to furnish the Employer with a certificate from the attending physician or other licensed health care practitioner when, for reasonable cause, the Employer believes that the employee's use of sick leave does not conform to the reasons and requirements for sick leave use set forth in this Agreement. Such certificate shall contain a statement that in the practitioner's professional judgment sick leave is necessary. In addition, the Employer may, at state expense, have an independent physician examine one of his/her employees who, in the opinion of the Employer, may not be entitled to sick leave. The time related to such examination shall not be charged to the employee's leave.

The CBA does not require employees to submit Medical Release to Return to Work form. Joint Exhibit 1.

16. On February 2, 2011 HR Administrator Mathews sent the following email to all store and all supervisors:

Please note: Whether an employee is part time or full time and the employee obtains an injury in or out of the workplace which can be defined as the following:

*Serious Medical Conditions: Any medical condition that prevents employees from performing one or more of their essential job functions.

The employee must have his/her medical provider complete a NH Liquor Commission Medical Release to Return to Work form which must be completed and submitted to Human Resources prior to the employee returning to the workplace. I strongly recommend that the employees Job Description is attached to the Medical Release form in order to educate the Medical Provider about the employee's essential job functions. (The Return to Work Forms is [sic] located on the Intranet, HR, and Medical Release) I have also attached one for your conveyance [sic].

No Supervisor/Manager is allowed to determine an employee's work modification if need be. Only a Medical Provider is able to determine whether an employee is able to Return to the Workplace or not, and HR is responsible for determining if a modification can be made or not.

Employees are also expected to maintain ongoing contact with their manager/supervisor and Human Resources through the duration of the absence.

Process:

Medical Release to Return to Work

The Employee must submit a completed Medical Release to Return to Work form to HR prior to returning to the workplace.

1. Once HR receives this form, HR is responsible for notifying the Manager/Supervisor of the employee's readiness to return to work.

a. Any restriction or limitations imposed by the health care provider are discussed.

2. When the employee is unable to return to their regular duty, HR will notify the Manager/Supervisor to determine an appropriate alternative duty assignment if available.

3. Managers/Supervisors are responsible for notifying employees of their assignment and the date and time to report to work.

4. Medical Release to Return to Work forms will continue to be submitted to the HR until the employee is able to return to a full duty status.

5. Upon completion of the employee's medical event, all medical forms received by HR will be filed in the Employee's Health File.

See State Exhibit Q (emphasis added.)

17. Liquor Commission Policy number P-106, titled Reporting Work Injuries and dated March 28, 2011, provides as follows:

I PURPOSE:

To provide direction for the reporting and filing of documentation for work-related injuries as prescribed by the New Hampshire Department of Labor and Workers' Compensation Commission RSA 281.

II APPLICABILITY

To all staff.

III POLICY

It is the policy of the Liquor Commission to require that each employee must report all work-related accidents or injuries. This includes injuries that may not necessitate medical intervention as well as those that do. In all cases the reporting process is to begin when the injury occurs and is subject to time constraints. Employees failing to follow this policy may face disciplinary action up to dismissal.

IV DEFINITIONS

A. Work-related injury: Any trauma, illness, or exposure to disease that is sustained by an employee in the course of performing their work duties.

...

V PROCEDURE

- ...
- A. Employee Responsibilities
 - 1. Whenever employees sustain injuries while at work they must report that injury to their Supervisor at the time the injury occurs by submitted a Notice of Employee Accident or Injury Report...
 - ...
 - b. Complete the narrative, describing the cause of or how the injury occurred, nature of the injury (cut, sprain, etc.), and the body part injured (remember to indicate left or right sides).
- C. Regular Supervisor's Responsibilities
 - ...
 - 3. When the employee is ready to return to work:
 - ...
 - b. Instruct the employee to obtain a medical release to return to work (*Worker's Compensation Medical Report Form*) from their health care provider and submit it to Human Resources after each appointment...

See State Exhibit P (emphasis added).

18. Article II of the CBA, titled Management Prerogatives and Rights, provides in part:

2.1. Rights Retained: The Employer retains all rights to manage, direct and control its operations in all particulars, 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 to:

2.1.1. Directing and supervising employees;

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

2.1.3. Laying off unnecessary employees due to lack of work, for budgetary reasons or for other like considerations;

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;

2.1.6. Taking whatever actions may be necessary to carry out the mission of the department in situations of emergency, the determination of such situations to be the prerogative of the Employer.

2.2. "Emergency" Defined: For purposes of this section "emergency" is defined as any condition 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.

Joint Exhibit 1.

19. Personnel Rule Per 602.01 provides:

(a) Upon written notice to the director, the appointing authority may fill any vacancy with the transfer of an agency employee from any position within the same class title to a vacant position with the same class title. (b) The appointing authority may determine when it is in the best interest of the agency to transfer employees.

See State Exhibit U.

20. CBA Article 16.11, titled Notice of Transfer, provides as follows:

The Employer agrees to provide a thirty (30) day notice to a unit employee who is to be involuntarily and permanently transferred from that employee's work location to a work location that would require an additional commute of thirty (30) or more road miles one way from that employee's current home location.

Joint Exhibit 1.

21. CBA Article 16.6, titled Changes to Job Specifications, provides as follows:

All employees shall be notified in writing of any changes in his/her job specifications and duties upon receipt of said changes from the Division of Personnel, and/or from directives from the Commissioner/Agency Head or any of his/her designated representative.

Joint Exhibit 1.

22. Personnel rule 1003 allows the State to issue a non-disciplinary discharge if an employee is unable to perform duties for medical reasons. Per 1003.01 provides:

The purpose of this rule shall be to provide for the removal of a full-time employee for non-disciplinary reasons, when:

(a) The employee is physically or mentally unable to perform the essential functions of the position to which appointed;

(b) The employee's physical or mental condition creates a direct threat or hazard for the employee, the employee's co-workers or clients of the agency which cannot be eliminated except by removing the employee from the position;

(c) The employee's presence in the workplace, because of the medical condition, is deleterious to the employee's health; or

(d) The employee is a qualified individual with a disability who, with or without a reasonable accommodation, is unable to perform the essential functions of the position to which appointed.

23. Personnel Rule Per 1003.03 provides in part:

(a) An appointing authority shall not remove a full-time employee under the provisions of Per 1003.01 until the appointing authority has obtained medical assessment information indicating that the employee is physically or mentally unable to perform the essential functions of the position...

c) Prior to removal of a qualified employee with a disability under the provisions of Per 1003.01, the appointing authority shall determine if any of the following adjustments can be made to allow the employee to avoid removal for non-disciplinary reason(s):

(1) Amend the duties of the position to accommodate the employee's known medical disability, provided, however, that such amendment does not alter the essential duties and responsibilities of the employee's position;

(2) Transfer the employee to a position for which the employee is qualified, with or without reasonable accommodation, which will not require removal under the provisions of Per 1003.01; or

(3) Demote the employee to a position for which the employee is qualified, with or without reasonable accommodation, which will not require removal under the provisions of Per 1003.01.

(d) If the appointing authority is unable to make a reasonable accommodation which will allow the employee to remain in a position within the agency, the appointing authority shall advise the employee in writing that the employee is being removed from the position for non-disciplinary reasons.

24. Article 16.9 of the CBA, titled Layoff Procedures, provides as follows:

An appointing authority may lay off an employee only when layoff becomes necessary because of the following reasons:

1. Abolition of a position;
2. Change in organization;
3. Decline in agency work load;
4. Insufficient funding;
5. Change in state law; or
6. Change in federal requirements.

Joint Exhibit 1. The CBA does not address non-disciplinary discharge for medical reasons.

25. Article 11.9 concerns Supplemental Sick Leave and provides as follows:

The Employer is authorized to provide additional sick leave to an employee under the following conditions:

- a. A request for additional sick leave shall be forwarded to the Bureau of Employee Relations by the employee or the Employer stating the reason(s) for the request and the amount of additional sick leave requested.
- b. The Bureau of Employee Relations shall request a recommendation from the Employer of the requesting employee/agency. The recommendation shall be made known only to those who will act upon the request.
- c. The request and recommendation shall be forwarded to the Labor Management Committee established by Article IV, Section 4.2, who shall approve or deny the request in whole or in part.
- d. The response to the request shall be transmitted to the requester by the Bureau of Employee Relations.
- e. If the request is approved, the Manager of Employee Relations shall direct the Employer to solicit donations from employees within the requesting employee's agency who wish to contribute unused sick leave up to the amount of the authorization. Contributed sick leave shall not be counted against time accumulations as provided in Article 11.1. If the request is not approved, no further action shall be taken by the parties or by the requesting employee or Employer on that request.
- f. No request shall be approved for more than ninety (90) days, although nothing shall prohibit additional requests.

Joint Exhibit 1.

26. Instructions to the Supplemental Sick Leave Request form provide in part:

An employee must exhaust, or expect to exhaust, all paid leave prior to receiving supplemental sick leave. Paid leave includes sick leave, annual leave, floating holidays, bonus days, and compensatory time.

...

Leave donations by employees on behalf of other employees are not authorized until solicited. Solicitation may not take place until after an approval has been issued by the Labor Management Committee (LMC)...

If a request is granted, leave donations may be solicited...

Supplemental sick leave will only be granted for serious or life-threatening illnesses, injuries, impairments, or mental or physical conditions that have caused, or are likely to cause, the employee to take leave without pay. Supplemental sick leave will not be granted for common or minor illnesses, injuries, impairments or physical or mental conditions.

See Union Exhibit 14.

27. The completed supplemental sick leave request forms are sent to Mr. Newland. Mr. Newland brings all requests from Association bargaining units to LMC meetings. It's the first time anyone looks at the requests. Usually, between 15 and 25 supplemental leave requests are reviewed at each meeting.

28. The Liquor Commission has recently undergone major reorganization which included hiring new people for management positions, policy changes, including payment policy, numerous employee transfers and demotions, and work schedule changes.

29. On August 28, 2012 HR Administrator Mathews sent the memorandum to all retail store employees regarding the changes extending operating store hours to Sundays and Holidays. The memorandum provides as follows:

Over the past year the State of NH Liquor Commission has implemented many changes. The Commission made the decision to extend operating store hours and all stores are now open seven (7) days a week to include Sunday. These changes were made in order to provide exceptional customer service to the state of New Hampshire citizens and visitors... One of the concerns brought forward is how are the employees being compensated when they perform work on a Sunday and/or Holiday. Below you will find reference to the relevant statutes, rule and agreement language:

State of NH RSA 177:5 Sunday and Holiday Openings: - Notwithstanding any other provision of law, the commission may, in its discretion, open for business on any Sunday or legal holiday any state liquor store located in a main route where traffic is heavy; provided, however, that no state liquor store may be opened for business at any time on Easter or Thanksgiving day, whenever appointed, and Christmas day. Although full-time employees shall be given the option of working, no such employee shall be required to work on such days. The commission may employ part-time employees, subject to the rules of the director of personnel, to staff stores open on Sundays or holidays. Any full-time employee who works on such days shall be paid 1-1/2 times the employee's regular rate of pay for the actual number of hours worked.

...

SEA-CBA Article 9.4 Holidays Worked:- When a full-time or * regularly scheduled part-time employee works on a calendar holiday, he/she shall receive payment of the holiday at the regular rate and in addition, at the discretion of the Employer, (1) be paid at the rate of time and one half for hours actually worked on the holiday or (2) be given compensatory time off equal to one and one half the number of hours actually worked...

*Definition: A regularly scheduled part time employee is not scheduled irregularly or on an on-call basis.

SEA-CBA Sub-Unit 39.10:- Work performed by retail store employees on any Sunday or holiday will be voluntary ...

...

- The Manager in Charge of Liquor Store shall staff employees according to the stores staffing needs on a Sunday.
- By statute, Sunday is a voluntary to work day, therefore it is not part of the regular forty hour work week.

...

- A part time Retail Store Employee who works on a Sunday and/or Holiday will be paid at the employee's regular rate of pay.

...

Managers, if you are in need of assistance in order to staff your stores on Sundays or Holidays please contact your Supervisor. ...

The changes extending operating store hours to Sundays and holidays became effective September 4, 2012. See State Exhibit E (emphasis in original).

30. CBA Article 39.10 provides as follows:

Work performed by retail store employees on any Sunday or holiday will be voluntary and employees who volunteer to perform such work shall be paid at the rate of time and one-half for all hours worked...

See Joint Exhibit 1.

31. In the past, Liquor Commission administration had regular meeting with Association Stewards. These meetings stopped after January, 2012. According to Ms. Mathews, the meetings stopped because of the changes in process and legislative meetings.

II. Cynthia Sanborn-Dubey

33. Cynthia Sanborn-Dubey is a Clerk II at the store 54 in Glen. She has been working for the Liquor Commission for 16 years. She previously held the following Liquor Commission positions: Laborer, Cashier, Manager I, Manager II, Supervisor I, and Supervisor II. She worked as the Acting Manager of the Conway liquor store for 6 years. She worked at the liquor store in Glen from 1998 to 2005. She used to be a Glen store Supervisor.

33. As a Supervisor, Ms. Sanborn-Dubey supervised 11 stores, including Lincoln store, and had knowledge of these stores. After all supervisors were demoted as part of

reorganization, they were transferred to different stores. She has been demoted to Clerk II position and assigned to the Glen store.

34. Ms. Sanborn-Dubey has been an Association Steward for 14 years. She was also on Association's Master Bargaining team and on a "sub-unit" bargaining team.

35. During her first 13 years as a Steward, she has not processed any grievances.

36. Recent reorganization/changes caused some Liquor Commission employees to file grievances. Fifteen to twenty grievances have been filed since March, 2011. The grievants requested Ms. Sanborn-Dubey to represent them in her capacity as a Steward and to attempt to resolve issues and disputes. In her capacity as a Steward, she works with HR Administrator Kelley Mathews.

37. According to Ms. Sanborn-Dubey, she had discussions with many people regarding employee morale and other problems, such as employee transfers. The tenor of meetings with the management was not pleasant as the management appeared to be "talking down" to employees.

38. On May 21, 2012 Ms. Sanborn-Dubey sent an email from Store 54 to stores 2, 48, 15, 8, and 72, titled "steward day," stating as follows:

We want to get together for a steward day sometime in June (this counts as a work day for you) I have put some dates below, please let me know what works for all of you. Please come up with a list of items you would like to discuss at this meeting and send that along as well. We will hold the meeting at the union HQ...

See Union Exhibit 31.

39. Keith (Tony) Burns has been a Liquor Commission retail area manager/supervisor since March, 2011. He ensures that stores are staffed properly, provide adequate customer service, and make money. He supervises 31 stores including the Glen store where Ms. Sanborn-Dubey works although Mr. Burns is not Ms. Sanborn-Dubey's immediate supervisor. He visits each store at least once every 2 months. During his visits, he makes sure that the store is staffed

appropriately, has merchandize and is clean and that the State law is followed. Among other things, he reviews store records and staffing schedules. According to Mr. Burns, during his store visits, he uses a store computer (PC). All 77 NH Liquor stores have at least one PC. Until recently, each store had a store email account available to all employees of the store. When Mr. Burns uses a PC, what he normally sees on a screen is the MS Outlook. If it is on the screen, he checks how many emails have not been read and how many unread emails have been deleted. According to Mr. Burns, it is important because stores receive emails from other stores with requests for stuffing help and with his orders/instructions. He expects every full time employee to check email at least twice a day.

40. On May 24, 2012 Mr. Burns visited the Glen store. At that time, Ms. Sanborn-Dubey was in Concord processing grievances in her capacity as a Steward. At some point, he used the store PC. The MS Outlook account was open and he saw that many emails were unread and many emails were deleted. While working at the PC, Mr. Burns noticed an email message with the words "Union Business" in the subject line. He opened and read this email, which related to the scheduling of the Association Stewards' meeting. He then forwarded the "Union Business" email to Assistant Director of Marketing Frank DeLuca and Ms. Mathews with the following message: "Going through emails and I find they also have this coming up." Ms. Mathews responded to Mr. Burns and Mr. DeLuca on the same day stating: "I am looking into it, and I will give you some direction shortly." See Union Exhibit 31.

41. Mr. Burns forwarded the "Union Business" email to Mr. DeLuca and Ms. Mathews because he believed that many union activities were conducted at the store and he wanted directions and clarification as to how much union business can be conducted at work. He believes that, according to CBA Article 12, the immediate supervisor must be informed regarding any union business being conducted. According to Mr. Burns, during the relevant time period, the Association held numerous meetings that took place in Concord causing staffing

concerns while union members attended meetings. In Mr. Burns' opinion, union business was not conducted only during breaks and he wanted to make sure that Mr. Mathews and Mr. DeLuca were involved.

42. Mr. Burns claims he did not target Ms. Sanborn-Dubey, that she is a good employee, and that he performs the same email check at all stores. Mr. Burns has not seen "Union Business" emails at other stores.

43. On May 24, 2013 Mr. Newland called Association Representative Cicirelly to discuss the process for requesting and scheduling training days for union stewards. See State Exhibit S.

44. On May 25, 2012 Mr. Cicirelly sent the following message to Mr. Newland:

... It turns out that Ms. Sanborn, a Liquor Commission steward, was simply doing some preliminary organizing, however your call brought to our attention the possibility of the Liquor Commission targeting a steward for union activities.

We have learned that the district supervisor searched the liquor store computer while Ms Sanborn was in a grievance meeting with Ms Mathews. This supervisor then forwarded union email correspondence to Ms. Mathews. ...[A]ny potential targeting of union leaders for union activity is a serious concern for us and we are planning to request a formal consultation with the Liquor Commission to discuss this issue.

See State Exhibit S.

45. On May 26, 2012 Mr. Burns sent the following communication to Ms. Mathews and Mr. DeLuca:

There are many questions that are up in the air with regard to what a union steward can and cannot do along with when and where they can do it. I just want to put my version of events down as they unfolded while fresh in my memory.

1. There have been numerous discussions concerning Cindy and the amount of time she seems to be spending conducting union business while "on the clock" for the LC. The questions have been asked and you have indicated that they are being looked into.

2. On May 24, 2012, I performed a store visit at Store 54. The schedule indicated Alex was off, Cindy was in Concord and Nate (PT/FT) was in charge of the store. Cindy's schedule for this work week (May 18-24) showed Tuesday the 22nd for 6 hours in Concord and Thursday the 24th for 12.5 hours in Concord with a note that she would be back by 3 p. She also worked a 12.5 hour day on Saturday the 19th.

...

5. I then went to the office PC to check my email via Outlook Web [sic] Access as I normally do at any store I visit. The Outlook inbox was currently displayed on the screen. Reading through the inbox subject lines, I noticed an email from Store 72 concerning a "Steward Day". *I opened it and read it. I forwarded this email to you both as I had a question as to it being authorized by the LC. I then scrolled through the subject lines in the In box, Sent box and Deleted items and noticed many subjects dealing with the union.* I read my OWA email, signed out and took no further actions in the office. I said good-bye to Nate and left.

6. Cindy phoned me at 4:41 PM that afternoon indicating that she was told of my visit and if there was anything I needed to tell her. I talked about the full case in displays starting next month and that I had some topics to discuss with Alex on Friday the 25th.

7. Cindy sent an email to all stores at 5:08 PM stating that she had an official union email address for them to use to contact her.

8. On Friday the 25th, I made another visit to Store 54 to talk with Alex and to give him his evaluation. I informed him that the schedules posted were not in accordance with LC policy and that they would need to be changed immediately. I stated this was my opinion as I was construing them as "flex" schedules. He stated that he would have Cindy change them. The conversation was tense as he was questioning everything. I made a passing comment that *I would like to see his firmness when dealing with Cindy, because it appeared that she was running the store.* He stated that he felt intimidated by her.

9. I then went to the office to check my OWA email. The store Outlook was on the screen and I immediately noticed items had been changed. I checked the sent box and all items had been deleted prior to the evening of May 24th. The same was true with the delete folder. After checking my email, I mentioned to Alex that I found it strange that all sent and delete items had been removed. He indicated that Cindy had done this. I explained that this was not a good idea because he now had no way to produce items sent from the store via email concerning any subject. He seemed indifferent.

...

Because there is *nothing yet on what stewards can do*, I am in agreement with a meeting. It is very evident that numerous hours at various times are being used by Cindy at the store to conduct union business. *I have not checked to see the business she is conducting out of the store.*

Please advise...

See State Exhibit S (emphasis added). Alex is the manager of the Glen Store and Ms. Sanborn-Dubey's immediate supervisor.

46. On June 27, 2012, Mr. DeLuca called Ms. Sanborn-Dubey to inform her that she was being permanently transferred to the Lincoln store effective June 29, 2012; and that she would not be paid mileage. The Lincoln store is located approximately 50 miles away from the

Glen store. When she asked for reasons for the transfer, Mr. DeLuca said that her expertise was needed at the Lincoln store. She told him that she did not want to be transferred.

47. Mr. Burns says that he was not a part of a decision to transfer Ms. Sanborn-Dubey; he did not know that Ms. Dubey specifically would be transferred; but he knew that someone would have to be transferred to Lincoln because a Lincoln employee was on medical leave.

48. According to Richard Gerish, the Director of Sales and Marketing and Mr. DeLuca's supervisor, employee transfers are common and Ms. Sanborn-Dubey was transferred to Lincoln because of her experience as a manager.

49. When Ms. Sanborn-Dubey was transferred, her work schedule was changed.

50. The transfer to the Lincoln store caused Ms. Sanborn-Dubey significant hardship. According to Ms. Sanborn-Dubey, there is no easy way to get to the Lincoln store from her residence in Madison, NH as she had to travel over the fairly dangerous Kancamagus Highway to get there; it took her 2 extra hours to get there; she had to borrow money to buy gas to be able to drive to the Lincoln store; and there are several stores closer to Lincoln, including Littleton and Woodsville stores. There were two full time employees in Lincoln, one of whom was on leave. Ms. Sanborn-Dubey testified that there was nothing to do at the Lincoln store while she worked there.

51. Ms. Sanborn-Dubey was replaced with part-time employees at the Glenn store.

52. On June 29, 2012 Ms. Sanborn-Dubey emailed Union Representative Charles McMahon stating that she wished to file a grievance because her work schedule has been changed without 3 week notice. Mr. DeLuca and Ms. Mathews were copied on this email. Shortly after, Mr. DeLuca sent the following email to Ms. Sanborn-Dubey: "I need for you to perform your store duties as a Retail clerk 2 at the Lincoln operations. Let the UNION handle the grievance if one exists." See Union Exhibit 1.

53. Mr. Newland received a call from Association President Diana Lacey regarding Ms. Sanborn-Dubey's transfer. According to Mr. Newland, Ms. Lacey, who appeared angry, demanded that Ms. Sanborn-Dubey be returned to the Glen store and stated that otherwise the Association would picket the store.

54. According to Ms. Lacey, she called Mr. Newland because she was briefed by Ms. Sanborn-Dubey and was given an email trail regarding steward day organizing activity and believed that Ms. Sanborn-Dubey was transferred in retaliation for her union activity. Ms. Lacey talked to Mr. Newland during her call about the inadequacy of a 48-hour notice of a permanent and distant transfer. She also mentioned that Ms. Sanborn-Dubey was a low paid worker and a single mother with sick children and that there were dozens of other employees within 30 minute drive from the Lincoln store.

55. After the conversation with Ms. Lacey, Mr. Newland called the Liquor Commission. According to Mr. Newland, he had a solution the same day. On June 29, 2012 Ms. Sanborn-Dubey was informed that her transfer was temporary and that she will be paid mileage.

56. On June 29, 2012 Mr. DeLuca sent the following letter to Ms. Sanborn-Dubey:

We are providing you official notice that due to staffing circumstances within the New Hampshire Liquor Commission, your position number #14229, Retail Store Clerk II is being temporarily transferred to the Lincoln Store #47. Your transfer will be effective Friday, June 29, 2012. Mileage sheets reflecting the difference in mileage from your home to the Glen store and your home to the Lincoln store must be submitted on a weekly basis to the Accounts Payable office each Friday morning...

Please be advised that this reassignment is in no way a reflection of your service to the agency, and your personnel file will reflect that action was the direct result of the needs of the Commission to appropriately staff this store.

See State Exhibit T.

57. Ms. Sanborn-Dubey worked in at the Lincoln store for one month but did not receive mileage payments for her commute to the Lincoln store until 4 weeks after she was transferred back to the Glen store.

58. According to Ms. Mathews, mileage payment was delayed because it is uncommon to pay mileage from home to the place of temporary transfer and because, in the State system, payments are always two weeks behind.

59. State Exhibit U the State contains 42 letters of Notice of Transfer of an Employee Within an Agency [Per 602.01]. The letters indicate where employees are being transferred to but not where they are transferred from. On many of the letters "the loss of store operations positions" was given as a reason for the transfer. Six of the letters have a blank space in place of the effective date of transfer. Fifteen notices have April 22, 2011 as the effective date of transfer indicating major organizational changes. Most notices were given between 8-24 days prior to the effective date of transfer. This exhibit is not probative as it is unclear from the letters whether these employees were involved in union activity; whether they were union stewards, bargaining unit employees or temporary or seasonal employees who are not subjects of the Association's complaint; and whether their transfers caused as much hardship as was true in Ms. Sanborn-Dubey's case.

III. Anthony Perras

60. Anthony Perras is a Retail Store Manager II at store 8 in Claremont. He has been employed by the Liquor Commission for 26 years and has been a Manager for 6 years, prior to which he worked as Clerk II. He is a full time employee. Previously, he worked at the West Lebanon, Lebanon, and New London store locations. As a Store Manager, Mr. Perras is responsible for sales, scheduling, keeping books in order, staffing, and ensuring that the store opens as scheduled. Mr. Perras' job is physically demanding as he is required to be able to lift up to 60 lb.

61. Mr. Perras has been an Association Steward for 13 years. Prior to 2011, he never had to process a grievance as a Steward because he was always able to settle disputes.

62. In late summer – early fall of 2012, an issue arose regarding the Sunday schedule. Management sent a letter directing Mr. Perras to staff the store on Sundays. It was not voluntary. See Union Exhibit 6.

63. Mr. Perras does not schedule himself to work on Sundays.

64. On September 4, 2012 Manager of Store #24 Leslie Sampson sent the following message to all stores and all supervisors: "... Due to recent policy changes we find ourselves without anyone to open/close our store for this coming Sunday and beyond. Is there anyone out there that would like to come run our store on Sundays?" Assistant Director of Marketing DeLuca responded to this email as follows: "As a Clarification – the Commission has NOT; I repeat has NOT made any POLICY CHANGES. In fact, the opposite has occurred, it was brought to our attention and we have revisited the Regulations of the current policy ..." Mr. Perras responded to Mr. DeLuca as follows: "This was past practice for the 25 plus years I have worked for the state Frank. I can see where it will be difficult if almost impossible to staff some stores on Sundays." See State Exhibit F (capitalization in original).

65. On September 6, 2012 Mr. Perras send the following email regarding Sunday staffing to all stores:

Store 8 is in urgent need of someone who can run the Store on Sundays starting Sunday 23 september [sic] and most likely ever [sic] Sunday after that. This is due to the e-mail from Concord stating that people will no longer get Manager fill in pay on that day. This is an urgent request for anyone that can help out.

See State Exhibit G.

66. On September 15, 2012 employee of Store #8 in Claremont Jacque Giarrusso informed Mr. Perras that she was unable to work on Sunday, September 30, 2012 because she was going away for the weekend. On the same date, Mr. Perras' Supervisor, Christine Keefe, sent the following message to Ms. Mathews:

I spoke to [sic] soon about Store #8. I got a call from Jacque today, Saturday Sept 15th.

She is concerned that Tony is going to "bully" her into working every Sunday or he would fire her because she is the Temp.

She has requested the 30th off and he has already alluded to her that she might have to work.

See State Exhibit I.

67. On September 17, 2012 Mr. Perras responded to Mr. Giarrusso as follows: "Jacque you did not check with me you went ahead and made plans and figured you would have it off. I will do my best to give you off [sic] but do not plan on it for sure." He copied Ms. Keefe on this email. On September 18, 2012 Mr. DeLuca asked Ms. Keefe via email whether Jacque Giarrusso was saying that Mr. Perras was harassing her into working by threatening to fire her if she refused. Ms. Keefe responded in the affirmative. Mr. DeLuca then sent an email to Ms. Mathews stating as follows: "Kelly we have an issue here." See State Exhibit I.

68. On September 19, 2012 Division Director of Marketing Gerrish sent the following email to Liquor Commission Supervisors and Store Managers, including Mr. Perras, regarding Sunday and Holiday Staffing:

...I want to bring up a point of clarification about Sundays and Holidays. Sundays and Holidays are voluntary for Full Time Employees, and if worked, you will be paid at Time and ½. It is not voluntary for Part Time Employees; it can be scheduled and they are paid at their regular rate of pay. Because all Stores are not open on Sundays and Holidays, some Full Time Employees feel they are being forced to work; you are not. However as the Store Manager, you are responsible to open your store location on the hours approved by the Commission! Although it is voluntary it is still your responsibility to make sure your store is staffed and open for every hour of operation. This is not a change but has been the practice for decades. Sundays and Holidays are a regular shopping day for all retail businesses these days, and will continue to be a day of operation for all Liquor and Wine Outlet stores going forward... As in the past, if your Store does not open for any reason during its regularly posted hours of operation, employees are subject to disciplinary action up to termination.

See Union Exhibit 6.

69. According to Mr. Gerish, although working on Sundays is voluntary for bargaining unit employees under the CBA, if a manager can find no one to work on Sunday, the manager has to work to keep the store open; and if a store did not open on Sunday, a manager

would receive a letter of warning.

70. On September 20, 2012 Ms. Keefe forwarded the following email to Mr. DeLuca and Ms. Mathews:

I spoke to Tony about this today. He does have 2 leads on coverage. He was hoping to hear from one of them today... Tony feels that he can 'force' Jacque to work because she is a temp Clerk II according to him it's in her job description. In his words 'I would hate to have to force her to work'

Can he do that?

I strongly suggested that he work really hard on finding coverage.

See State Exhibit I. Working Sundays is not voluntary for temporary employees.

71. Before the reorganization, store managers hired part time help when necessary. After the reorganization, the hiring of part time help can be done only by management in Concord.

72. Mr. Perras had concerns regarding Sunday staffing as he needed two employees to operate the store. Mr. Perras talked to part time employees about working on Sundays. They were not available. He expressed his concerns to the management and was told to go to Concord where he had met with Joe Collins, who was in charge of Store Operations at the time, Mr. DeLuca, Chris Keith, and HR employee Nancy Valpey. He was told that he had to make employees work on Sundays. He asked if he could fire employees who refused to work on Sundays but received no clear answer.

73. On September 28, 2012, the day after the meeting with the management, Mr. Perras felt chest pains and emailed his supervisor Ms. Keefe that he had to leave to see a doctor about the chest pains. He had part time employees cover the shifts. Mr. Perras also filled out a Notice of Accident/Injury form stating as follows: "Started having chest pains at around 9:45 a.m." He checked off the box "Do not process as worker's comp claim at his time." See Union Exhibit 2.

74. Ms. Keefe forwarded Mr. Perras' email to Ms. Mathews and Mr. DeLuca. Ms.

Mathews then sent the following message to HR employees Deborah Buivid and Nancy Valpey: "Please reach out to Mr. Perras about his medical condition and the NHLC process." See State Exhibit K.

75. Mr. Perras' physician told him that he was suffering from stress and not a heart attack. The physician issued a note stating that Mr. Perras had been under his care for chest pains since September 28, 2012 and was able to return to work on October 2, 2012. The physician wrote at the end of the note that Mr. Perras "[m]ay return to full duty." See Union Exhibit 3. In the past, the management accepted this type of note as sufficient.

76. When Mr. Perras attempted to return to work, he was not allowed to work. The HR Technician informed him that the physician's note was not sufficient and asked him to fill out a Medical Release to Return to Work form, even though he was not claiming that he was injured at work.

77. On October 2, 2012 HR Technician Deborah Buivid sent workers compensation paperwork to Mr. Perras with the following note: "I thought you could fill out this paperwork, while we wait for Dr. Brooks to complete the return to work form. Fill out the papers that pertain to illness." See State Exhibit M.

78. In the past, Mr. Perras once called the HR and asked if he needed to require an employee to obtain a doctor's note for sick leave and was told that it's up to a manager whether to require it.

79. The HR sent a Medical Release to Return to Work form to Mr. Perras' physician. The form contained a list of the following special qualifications: have direct contact with public; tolerate interpersonal conflicts; exercise sound judgment; walk; run; climb stairs or ladders; stand; sit; reach (especially overhead); grasp; push; pull; bend; twist; lunge; pivot; squat/crouch; kneel; crawl; drive, etc. The HR Technician circled a space to fill out titled "May lift/carry up to a maximum of _____ lbs" and "may lift or carry frequently maximum of _____ lbs." The job

descriptions were attached to the form sent by the HR to Mr. Perras' physician at Dartmouth Hitchcock Medical Center. The job description lists the following under Physical Demands of the position:

Requires medium work, including continuous strenuous activities such as frequent reaching, bending, or lifting as well as performing work activities which require fine manual dexterity or coordination in operating machines or equipment.

Supplemental Job Description for Retail Store Manager II position includes the following "Special Qualification": "Frequent physical effort required in continuous lifting of material up to 25 pounds with frequent lifting of cases of liquor weighing up to 60 pounds." See Union Exhibit 5 and State Exhibit M.

80. As a result of having to submit a Medical Release to Return to Work form completed by a physician, Mr. Perras was required to utilize 2 more sick leave days. Mr. Perras did not request or receive worker's compensation.

81. On October 3, 2012 Association Representative Cicirelly sent the following email message to Kelly Mathews:

Before we file a grievance for what we believe is a violation of Tony Perras' rights to return to work, I wanted to reach out to you for an explanation.

Tony had an anxiety experience, for which his doctor wanted to take no chances. Tony went through a rigorous examination, after which his medical provider cleared him for full return to work. Tony provided this clearance.

With what authority is Tony prevented from returning to work? This seems to be a clear violation of the basic workweek provision of the CBA, a violation of 1003.03 of the Personnel Rules, and a possible violation of the ADA.

See State Exhibit N.

82. Ms. Mathews responded to Mr. Cicirelly as follows:

Since Tony reported his medical condition while at the workplace and left work due to his medical condition we are requesting a NH Liquor Commission Medical Release to Return to Work form filled out by his Medical Provider because the Medical Note that was submitted to us did not have sufficient information on it in order to return Tony to work.

It is very important for the Medical Provider to be informed of what Mr. Perras does for work so that he/she is able to return him to his work according to his medical needs and job duties.

...

This NH Liquor Commission Medical Release is to protect Tony and the NH Liquor Commission.

Once we have this form completed we will be able to work with Tony based on what his Medical Provider states.

Please note that this form is used all the time, this is not something new for the Commission as we need to protect the employees and the Commission...

See State Exhibit N.

83. On October 4, 2012 Mr. Cicirelly sent the following message to Ms. Mathews:

I don't think that this is right and will recommend that we file a grievance on behalf of Tony. He left work sick. Are all employees who leave work using sick leave required to jump through these hoops to return to work?

We also don't understand why Tony cannot get this paperwork completed, if it is indeed necessary, while he remains at work.

Ms. Mathews responded as follows:

It is important that you know that once Tony sends in the NH Liquor Form and it is sufficient for Tony to return to work he will return to work.

This is a NHLC practice whereas in order for employees to return to work we must have our form filled out and Tony left work with a potential severe medical condition and the Medical note that he supplied is not sufficient whereas we have a right to ask for sufficient medical documentation in order to protect him and the Commission.

In response, Mr. Cicirelly stated as follows:

I am not sure what you're trying to protect him from, Kelly. Tony does not have a severe medical condition – the medical provider and Tony made it clear. He left work not feeling well, provided a clearance from his medical provider even though one is not necessary, and is still being kept from work.

If other employees are not required to have this form filled out after leaving sick from work (which would also be a violation of the CBA), Tony is going to win this grievance.

He was out sick for 1 ½ days. The grievance will be for all other time guaranteed to him by 6.1 of the CBA.

In response, Ms. Mathews stated as follows:

... Tony is not being denied the use of his sick time and he will be returned to work as soon as the NH Liquor Commission Form is completed and a determination is made.

This is a practice for all employees.

See State Exhibit N.

85. In the October 5, 2012 Medical Release to Return to Work form, the physician indicated that Mr. Perras had no restrictions to perform any duties/qualifications listed on the form. He also indicated that Mr. Perras may lift/carry up to a maximum of 60 pounds and may lift/carry frequently maximum of 25 pounds. He indicated that Mr. Perras is released to return to work on October 5, 2012. See State Exhibit O. Mr. Perras returned to work on October 5, 2012.

85. According to Ms. Mathews, if an employee leaves work because he is not feeling well, no medical release or doctor's note is required. Ms. Mathews testified that Mr. Perras was required to submit a Medical Release to Return to Work because his condition was potentially serious considering physically strenuous requirements of his position. According to Ms. Mathews, she required Mr. Perras to provide completed Medical Release form before he could return to work because she had no proof that Mr. Perras did not have a heart attack.

86. No evidence was submitted as to Ms. Mathews' qualifications to diagnose or determine "potentially serious" conditions, such as heart attacks.

87. State Exhibit R contains numerous completed Liquor Commission Medical Release to Return to Work forms. The names of the employees on the forms are redacted allegedly due to privacy concerns. The earliest form is dated May, 2011. This evidence is not probative because it is unclear from this exhibit whether the employees required to complete the forms were union stewards, the treatment of whom is at issue in this case, or whether they were temporary or other employees not covered by the CBA. It is also unclear what types of injuries or medical conditions were involved in these cases or whether these cases involved worker's compensation claims. See State Exhibit R.

IV. Richard Gulla

88. Richard Gulla is the Store Manager III at the store #72 in Concord. His has worked for the Liquor Commission for 15 years and has been a Manager for 5 years. In the past, he worked as a Clerk II, Assistant Manager I, and Regional Store Supervisor I and II.

89. Mr. Gulla has been an Association Steward for 11 months and is a member of the Association's Board of Directors. He attended at least 3 LMC meetings. As an Association Steward, he attended a meeting in June of 2012 concerning policy changes. According to Mr. Gulla, the atmosphere at the meeting was very tense.

90. On July 9, 2012 Mr. Gulla went on sick leave because of a diabetic blister on his right toe that took long time to heal. He presented a note from his physician. On July 12, 2012 Mr. Gulla completed a Liquor Commission Employee Status Change Request requesting FMLA leave from July 9, 2012 to September 7, 2012, with change in status to 4 hours a day for one week upon return to work. See State Exhibit V. He provided physician's notes on weekly basis.

91. The form, titled Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act) - U.S. Department of Labor and completed by Mr. Gulla's physician, stated that Mr. Gulla was unable to perform any of his job functions due to his condition and that Mr. Gulla had a diabetic ulcer and must be "non weight bearing." The physician also indicated that Mr. Gulla would be incapacitated for a single continuous period due to his medical condition for a period of minimum one week. See State Exhibit W.

92. Mr. Gulla's available leave was expected to be exhausted on August 14, 2012. Mr. Gulla requested 13 days of supplemental sick leave on August 8, 2012. In Part II of Mr. Gulla's application for supplemental sick leave, Mr. Gulla's physician indicated that he was not able to return to work at less than full duty and that he was unable to put weight on his foot. The physician also indicated that this illness would not permanently prevent Mr. Gulla from returning to work. Mr. Gulla had not previously filed requests for supplemental sick leave nor had he been

counseled or disciplined for unsatisfactory attendance during 12 months prior to his request for supplemental sick leave. See State Exhibit X.

93. Supplemental leave benefit involves soliciting donations from other employees.

94. Ms. Mathews indicated on Mr. Gulla's application for supplemental sick leave that she did not recommend his request for approval. See State Exhibit X.

95. Mr. Gulla was released to work on September 7, 2012. On the Medical Release for Return to Work form, Mr. Gulla's physician indicated that Mr. Gulla could work 4 hours a day without any restrictions on performance of his duties including lifting; and that Mr. Gulla's illness caused no permanent impairment. See State Exhibit Y.

96. Mr. Gulla's first request for supplemental sick leave was denied by the LMC on September 11, 2012. Mr. Newland sent the following letter to Ms. Mathews on behalf of the LMC:

Richard Gulla of your agency has applied to the Labor Management Committee for supplemental sick leave.

The Labor Management Committee has reviewed the application materials and has decided to deny the request for supplemental sick leave. Based on the documentation supplied to us, we have determined that Mr. Gulla's physician will need to submit more information regarding his prognosis and treatment plan specific to why he is unable to work.

Please be advised that, in accordance with the Collective Bargaining Agreement, no further action shall be taken regarding this request.

See State Exhibit X. After receiving this letter, Mr. Gulla contacted his physician for supplemental information.

97. The HR Technician told Mr. Gulla that he could not re-apply for supplemental leave. The Association informed him that he could re-apply.

98. On September 18, 2012 Mr. Gulla sent the following communication to Ms. Mathews:

I am writing this letter to request that you place me back to work per my physicians requirements, as outlined and stated to you in the commissions return to work form. As you are aware I am recovering from a serious medical condition;..

I am asking the commission to immediately comply with federal law as outlined in the American Disability Act [sic] and accommodate a modified work schedule until such time that my physician returns me to full duty...

In response to Mr. Gulla's request for accommodation, Ms. Mathews sent Mr. Gulla a request for accommodation form and informed him that she will need a written statement from his physician indicating whether the request for accommodation is temporary or permanent and, if it is temporary, the end date. Ms. Mathews also indicated that Mr. Gulla has exhausted his FMLA entitlement. See Union Exhibit 8 & 10 & State Exhibit AA.

99. On September 19, 2012 Mr. Gulla's physician provided the following note:

Richard Gulla ... has been under my care for a slow-healing diabetic ulcer on his right foot. He was seen in my office today for a recheck and it is estimated that this should be healed in two to three weeks time. From my standpoint, Richard is able to work in the interim for a maximum of four hours each day, but must wear the pneumatic walking boot while doing so.

See State Exhibit Z.

100. On September 20, 2012 Mr. Gulla completed a Request for Reasonable Accommodation form requesting a modified work schedule indicated by his physician for approximately two to three weeks. See Union Exhibit 9 & State Exhibit AA.

101. On September 21, 2012 Mr. Gulla sent the following communication to Ms. Mathews:

I was surprised to learn in your email response to my request for a modified work schedule yesterday; that my FMLA entitlement had been exhausted.

Please let this letter serve as notice that I am requesting a leave of absence effective immediately for approximately two to three more weeks until I can return to full duty based on my physician's prognosis. (See attached letter.)

Hopefully, this will be unnecessary and my request for a modified work schedule will be granted under the ADA.

See Union Exhibit 11.

102. Following Mr. Gulla's request for accommodation, he was transferred to store #66, located in one of I-93 rest areas, to work a 4-hour 5-day a week schedule. According to Ms. Mathews, Mr. Gulla was transferred to a bigger store to accommodate his reduced schedule and to allow him to have more help around him. See State Exhibit BB.

103. On October 9, 2012 Mr. Gulla sent Ms. Mathews a letter requesting a leave of absence effective October 11, 2012 for approximately two to four weeks until he could return to duty based on his physician's prognosis. See Union Exhibit 12.

104. According to Mr. Gulla, his request for leave of absence was neither granted nor denied. He was told that the administration did not receive it.

105. On October 9, 2012 Mr. Gulla sent Ms. Mathews the following request for supplemental sick leave:

Due to an unexpected illness I am requesting 48 days and 4 hours of supplemental sick leave. This request is for the time that I exhausted my leave before returning back to work part-time and for the duration of my healing process. I truly hope I will not have to use all this time and return to work sooner than later. I am a type II diabetic and have a diabetic ulcer that had formed due to a blister on my right toe.

While I am a slow healer, my prognosis is good. I expect to heal fully and return to work in the next four to six weeks...

This letter was accompanied with a cover letter intended to serve as notice that Mr. Gulla was requesting a leave of absence effective October 11, 2012 for approximately two to four more weeks until he could return to duty based on his physician's prognosis. See Union Exhibit 13 & State Exhibit CC.

106. In his Application for Supplemental Sick Leave, dated September 18, 2012, Mr. Gulla requested 48 days of supplemental sick leave. Part II of the form was completed by Mr. Gulla's physician on October 10, 2012. See Union Exhibit 14. Ms. Mathews indicated in Part III of the form that she did not recommend that this application be approved. According to Ms. Mathews, she did not recommend granting Mr. Gulla's request based on medical information

and prior history.

107. Mr. Gulla's application was accompanied with a detailed letter summarizing his condition, treatment, prognosis, and reasons for work restriction/limitation, prepared by Mr. Gulla's physician, which stated in part:

... Any ulceration in a type 2 diabetic is a significant concern and can easily lead to infection and limb loss, thus the necessity for aggressive treatment... The key to healing any diabetic foot ulceration is to reduce the pressure on the area. Thus, the patient was to have strict nonweightbearing. This made him unable to work as he would be unable to perform his duties, which require him to stand. He was treated with a steady, but slow progress of his wound. The wound continued to close, and this period lasted throughout the summer. At the beginning of September the wound had shown significant improvement that we felt it would be appropriate for him to try to return to work. Thus, on 09/08 the patient was given permission to return to work on a 4-hour basis with limited weighbearing on his foot. When he followed up the next week, it was determined that the wound was still not showing progress, thus we needed to modify his nonweightbearing status. We placed him into a removable walking boot, which would off-weight bear the area and told that he could return to work with this walking boot as a protective manner for his foot.

The patient's wound continues to remain open... Currently, the wound is not closed... We are making adjustments to his weighbearing status, making wound care adjustments to try and get this wound to heal. However, this prognosis is uncertain. Any diabetic ulceration can easily lead to infection and again amputation. As the wound is on his right great toe, any loss of his great toe would be a significant detriment to his balance and his ability to function long term...

See State Exhibit DD.

108. On October 10, 2012 Mr. Gulla's physician issued an addendum concerning the treatment plan which stated as follows:

Mr. Gulla suffers from a chronic medical condition, diabetes, however his ulceration is an acute process. In order to prevent this from becoming a chronic condition, we are currently contemplating an intervention to heal his wound. Mr. Gulla's wound has made limited progress over the past month, thus we are currently in process of modifying the treatment plan.

The current plan is for him to receive a second opinion from the Wound Care Specialist in the Nashua Dartmouth Hitchcock Clinic. After this meeting, we will come up with a plan for his problem. Any process to heal this wound will require the patient to be off his foot for an extended period of time. We may try another healing modality or minor procedure to close the wound. In either case, he will require a minimum of 6 weeks off his foot. It also may take another 2 to 3 months for this wound to fully be healed. The

nature of this process does not allow me to give any more specific information as each case is different.

See State Exhibit DD.

109. On October 25, 2012, management notified Mr. Gulla of its intent to initiate a non-disciplinary dismissal. The letter, signed by Director of Marketing Gerish, also notified him of the right to provide information indicating that he could return to full duty and perform his job functions. The letter stated in part as follows:

... you were place [sic] on FMLA from July 9, 2012 to September 7, 2012 which exhausted your FMLA entitlement.

On September 7, 2012 you returned to the work place on a less than full duty (40 hours) schedule. Your medical provider released you to work twenty (20) hours per week with no restrictions other than wearing a boot on your foot, and these restrictions were in effect for one week. After one week we were not able to accommodate you any longer at your assigned store since you were not able to return to a full duty (40) hour per week schedule, therefor you were placed out of the workplace.

On September 18, 2012 Ms. Mathews received a request from you for an accommodation under ADA. This request was for you to work a 20 hour a week schedule for 3 weeks. At this time other alternatives were being sought in regards to accommodating your needs.

On September 21, 2012 Ms. Mathews was able to re-assign you to a larger store in order to temporarily accommodate your less than full duty schedule...

...

On October 10, 2012 we received two (2) medical notes form David Court, DPM one stated that you will be out of the workplace for two (2) to four (4) weeks and the other one stated that you suffer from diabetes, which is a chronic medical condition and that the plan is to seek a second opinion from the Would Care Specialists in the Nashua Dartmouth Hitchcock Clinic. Also stated on this medical note was that you would not be able to be on your feet for six (6) weeks and it may take another two (2) to (3) months for this would to be fully healed.

No additional information was able to be given at this time and as of the date of this letter we do not have any subsequent medical information regarding your medical condition and the expected date for you to return to workplace in order to full fill [sic] the essential functions of your position.

I am sending you this letter to notify you of my intent to proceed with the steps to initiate non-disciplinary dismissal as an employee with the NH Liquor Commission as provided in the Administrative Rules of the New Hampshire Division of Personnel, paragraph Per 1—3.03 (a) (b) due to the following: On October 10, 2012 we received a medical note about your chronic medical condition and you are not able to perform your job; You have

exhausted your FMLA entitlement benefit; and you have exhausted all of your leave time balances therefor you have been placed on a leave without pay status.

At this time I am also extending you an opportunity to provide the Commission with any current information that refutes your ability to return to full duty and perform your bona fide occupational duties. Please submit this medical documentation to Kelly Mathews, Human Resources Administrator ... no later than November 9, 2012. If we do not receive written notification that there is a change in your ability to perform your essential duties as a Retail Store Manager III by that date, I shall issue a letter of non-disciplinary dismissal. Please note that a non-disciplinary dismissal does not reflect discredit on your service with the NH Liquor Commission and does not impact your eligibility to pursue Workers' Compensation or retirement provisions with the State of New Hampshire.

I am also extending an invitation to you to set up a meeting with us in order to discuss your medical condition. If you are interested in a meeting, please contact Ms. Mathews prior to November 9, 2012. Please note that at this time there are no positions available within the Commission that you can transfer or demote into that would meet your medical needs. I have, however, enclosed a copy of the current vacancies in state government to which you can apply should you wish to pursue alternative employment with a different state agency.

See Union Exhibit 15.

110. According to Mr. Gerish, non-disciplinary dismissal is issued if an employee is under a doctor's care and the State has notice from the doctor that the employee cannot perform job functions.

111. On October 29, 2012 Mr. Gulla's physician issued the following letter regarding his condition:

Mr. Gulla was seen on Tuesday October 23rd ... Patient should remain out of work until area is completely healed.

It was accompanied with a wound healing trajectory graph showing that the healing steadily progressed and indicating a follow up in two weeks. See State Exhibit GG.

112. On October 30, 2012 Mr. Gulla sent a letter to Ms. Mathews requesting reasonable accommodations while his "toe continue[d] to heal," which stated in part:

While I need to be off my foot for extended periods of time I know in the past the Commission has made accommodations in the office for store level personnel to return to work... Work in the mail department opening/stuffing mail, front desk receptionist, Training [sic] I have excellent spirit and wine knowledge. I also understand we have

many new managers who are new to the commission [sic] I have over 14 years experience I can share with them.

In addition if that can't be met authorize a reasonable amount of leave time for my wound to heal...

See State Exhibit FF.

113. After Mr. Gulla received a letter of intent to initiate a non-disciplinary dismissal, he met with Ms. Mathews and Mr. DeLuca to discuss the situation. The meeting took place on November 8 or 9, 2012. Association Representative McMann attended this meeting. A day before the meeting Mr. Gulla's ulcer closed up. At the meeting, he produced the physician's note releasing him to return to work on that date. Management informed him that the note was insufficient and that his physician had to complete a Medical Release to Return to Work form.

114. On November 8, 2012 Mr. Gulla's physician released him to work full duty with no restrictions authorizing him to lift/carry up to a maximum of 60 lbs effective November 12, 2012. See Union Exhibit 16 & State Exhibits HH & II. Mr. Gulla returned to work on November 13, 2012 as November 12 was a holiday.

115. When employees reapply for supplemental leave after being denied, the LMC holds a meeting.

116. Association President Lacey called Mr. Newland to talk about Mr. Gulla's situation. According to Ms. Lacey, there was a delay in processing of his supplemental sick leave request and he did not have money for food and gas. Ms. Lacey informed Mr. Newland that there were incidents in the past of processing such requests quicker.

117. Mr. Newland did not want "to create a precedent" for by scheduling a non-regularly scheduled meeting to review Mr. Gulla's request but because there have been exceptions to the regular meeting schedule in the past, Mr. Newland agreed to a non-regularly scheduled meeting and the parties had a teleconference to discuss Mr. Gulla's case.

118. At the beginning of November, 2012 the LMC approved Mr. Gulla's request for supplemental sick leave. On November 13, 2012 Mr. Newland sent the following letter to Ms. Mathews:

Richard Gulla of your agency has applied to the Labor Management Committee for supplemental sick leave due to a serious medical condition.

The Labor Management Committee has decided to approve the request in the amount of 39 days, effective upon exhaustion of all available leave. This approval will allow your agency to begin solicitations of donations of sick leave from fellow state employees in the amount indicated above. Mr. Gulla will receive payment only for the amount of sick leave that co-workers agree to donate and only after the donation process is completed.

See Union Exhibit 17.

119. Mr. Gulla's request was one of two requests for supplemental leave that were submitted at the same time. Mr. Newland was not aware that the Liquor Commission had a supplemental leave request from another employee.

120. Ms. Mathews did not ask for leave donations until she had heard the LMC decision regarding other employee's request. That request was approved in approximately 5 days at a regularly scheduled meeting. After she was informed about the approval of the other employee's request, she started soliciting donations.

121. Association President Lacey called Mr. Newland again after the LMC approved Mr. Gulla's request because there was a delay in solicitations for sick leave donations. It was the second delay and, in Ms. Lacey's opinion, it was not coincidental. Ms. Lacey testified that she has never seen the delay to happen to the same person multiple times.

122. Mr. Gulla was without paycheck for 2-4 weeks before he received supplemental sick leave pay.

Decision and Order

Decision Summary

The State's motion to dismiss on the ground of mootness is denied. The Association's

breach of contract claim is dismissed because the parties' CBA provides for final and binding arbitration. The State committed an unfair labor practice in violation of RSA 273-A:5, I (a) and (b) with respect to Cynthia Sanborn-Dubey and in violation of RSA 273-A:5, I (g) and (i). The evidence is insufficient to prove that the violations of subsections (a) and (b) with respect to Anthony Perras and Richard Gulla and these claims are, therefore, denied.

Jurisdiction

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

Discussion

I. Motion to Dismiss

The State argues that the matter is moot because "the issues between the employees and the State have been resolved; there is no live case in controversy"; and "there was no harm or detriment to the stewards." The State further argues that "the matter is not likely to arise in the future, and there is no 'pressing public interest' in the outcome of this controversy"; and that the "instant matter does not present a matter with broad-based implications of a nature that might warrant an exception to the mootness doctrine for the public interest." The Association counters that the case is not moot because:

[R]emedy sought in this case ... is not to compensate, or otherwise make whole the individuals subjected to the specific facts as alleged in the unfair labor practices. Rather the relief sought is that the State did in fact violate RSA 273-A:5, I (a), (d) and (g) and that it cease and desist from retaliating against the named individuals for their union activities henceforth. In other words, even if the situations have been corrected as the State posits, these individuals should never have been subjected to this treatment in the first place because of their roles as union stewards.

See Association's Objection to Motion to Dismiss. The Association also argues that "even if the Board were to agree with the State that this case has become academic the facts of this case fit into an exception to the mootness doctrine; specifically, that of a 'pressing public interest.'" The Association contends that the public interest to be vindicated here is "whether individuals should

be free to engage in union activities without fear of retaliation or reprisal for said activities” and that “the same basic facts could arise again as these individuals could be subject to adverse employment actions due to union activities in the future.”

I find the Association’s arguments persuasive. Under the Act, public employees have a right to organize and to be represented by employee organization in negotiation and a settlement of grievances. See RSA 273-A. “The legislative purpose behind RSA chapter 273-A is to foster harmonious and cooperative relations between public employers and their employees ...” *Appeal of the City of Manchester*, 153 N.H. 289, 295-96 (2006). Under RSA 273-A:5, the violations themselves constitute harm because they undermine the purpose behind the Act. Further, one of the statutory reliefs that the PELRB is authorized to grant upon finding that a party violated RSA 273-A:5 is “a cease and desist order.” Such orders commonly issued to stop offending conduct irrespective of the showing of damages. See RSA 273-A:6, VI (a). This indicates that commission of an unfair labor practice constitutes harm in itself and unfair labor practice claims do not require the showing of material/physical harm or damages.

Furthermore, the United States Supreme Court has recently stated that “[t]he voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.” *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2287 (2012). “A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party... [A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Id.* (citations and quotation marks omitted.)

In this case the Association complains, among other things, that the State discriminated against Association Stewards in retaliation for their union activity. If proven, this action itself constitutes harm. The State appears to argue in its motion that the enforcement of RSA 273-A, including the prohibition on anti-union animus, and therefore of its purpose of maintaining a

“harmonious relations”, does not constitute a matter of a “pressing public interest.” I find the State’s arguments unpersuasive and contrary to the legislative intent.

Accordingly, the State’s motion to dismiss is denied.

II. Unfair Labor Practice Claims.

The Association claims that the State violated RSA 273-A:5, I (a), (b), (d), (g), (h), and (i) when, among other things, it took certain actions, including the following, against the Association and its three stewards, Cynthia Sanborn-Dubey, Anthony Perras, and Richard Gulla: (1) in retaliation for Ms. Sanborn-Dubey’s union activity, the State, without contractually required notice, permanently transferred Ms. Sanborn-Dubey to the store located approximately 50 miles away from her previous employment location and, at first, refused and, later delayed the reimbursement of her traveling-to-new-location expenses; (2) management representatives searched the store computer for union communications and opened the email labeled “Union Business” sent by Ms. Sanborn-Dubey to other Association Stewards; (3) in retaliation for Mr. Perras’ union activity, the State prohibited him from returning to work after a short sick leave absence despite the doctor’s note releasing him to return to full duty and required him to submit Medical Release to Return to Work form thereby causing him to utilize additional sick leave days; (4) in retaliation for his union activity, the State rejected Mr. Gulla’s request for supplemental sick leave and informed him that he cannot reapply, sent him a letter of non-disciplinary termination, and failed to promptly solicit sick leave donations after Mr. Gulla’s request for supplemental leave was finally approved. The Association also claims that the State’s policies requiring employees who were on sick leave to submit Return to Work forms invalidate the terms set forth in the parties’ CBA and that, in its actions, the State failed to comply with the RSA 273-A.

RSA 273-A:5, I provides in relevant part:

I. It shall be a prohibited practice for any public employer:

(a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;

(b) To dominate or to interfere in the formation or administration of any employee organization;...

(d) To discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under this chapter;...

(g) To fail to comply with this chapter or any rule adopted under this chapter;

(h) To breach a collective bargaining agreement;

(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.

A. Breach of Contract Claim

The Association claims that the State breached Article 11.4 of the CBA when it required Steward Anthony Perras to utilize additional sick leave while he was required to obtain a doctor's certification of his ability to return to work.

"A CBA is a contract between a public employer and a union over the terms and conditions of employment. When parties enter into a CBA, they are obligated to adhere to its terms, which are the product of their collective bargaining." *Appeal of the City of Manchester*, 153 N.H. 289, 293, 893 A.2d 695 (2006) (citations omitted). A determination of whether a CBA has been breached by definition involves interpretation of that CBA. "While the PELRB has primary jurisdiction of all ULP claims alleging violations of RSA 273-A:5, see RSA 273-A:6, I, it does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration. Absent specific language to the contrary in the CBA, however, the PELRB is empowered to determine as a threshold matter whether a specific dispute falls within the scope of the CBA." *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006) (citations omitted). Furthermore, "[a] presumption of arbitrability exists if the CBA contains an arbitration clause,

but the court may conclude that the arbitration clause does not include a particular grievance if it determines with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute.” *Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998).

In this case, the parties’ CBA provides for final and binding arbitration, unless arbitrator’s decision is contrary to existing law or regulation or requires an appropriation of additional funds, in either of which case it will be advisory. See Joint Exhibit 1, Article 14.5.2. The CBA also contains specific language granting the arbitrator authority to determine arbitrability of a given dispute. *Id.* (“The Parties further agree that questions of arbitrability are proper issues for the arbitrator to decide.”) In this case, there is no evidence that the arbitrator’s decision would require an appropriation of additional funds or be contrary to the existing law. Moreover, regardless of whether the arbitration is advisory or final and binding, the parties must first exhaust grievance procedure. See *Professional Fire Fighters of Goffstown, IAFF Local 3420 v. Town of Goffstown*, PELRB Decision No. 2012-128. Here, the evidence is insufficient to prove that the Association exhausted a grievance procedure and/or demanded arbitration and that the State refused to participate in grievance and/or arbitration of the dispute in this case. Furthermore, under the parties’ CBA, the question of whether this case falls within the scope of the CBA must be determined by the arbitrator. “The primary purpose of the arbitration process is expeditious and economical dispute resolution.” *Appeal of the City of Manchester*, 153 N.H. 289, 295 (2006) (citation omitted). Allowing the Association to contravene the underlying purpose of arbitration, by raising a substantive issue before the PELRB after agreeing to submit it to final and binding arbitration under the CBA, would not be in accord with the legislative purpose of RSA chapter 273-A. See *id.* at 296. For the foregoing reasons, the PELRB lacks jurisdiction over the Association’s breach of contract claim; and this claim is dismissed. Accordingly, the Association’s request that the PELRB order Mr. Perras to be made full for his use of additional sick leave not required by the CBA is denied.

B. Claims of Violation of RSA 273-A:5, I (a), (b), and (d).

Under RSA 273-A:5, I (a),⁴ (b) and (d), it is a prohibited practice for any public employer to restrain, coerce, or otherwise interfere with its employees in the exercise of the rights conferred by this chapter, to interfere in the administration of any employee organization, and/or to discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under this chapter, respectively. RSA 273-A:11 requires public employers to extend to the exclusive representative the right to represent employees in collective bargaining negotiations and in settlement of grievances and mandates that a "reasonable number of employees who act as representatives of the bargaining unit ... be given a reasonable opportunity to meet with the employer or his representatives during working hours without loss of compensation or benefits."

The Association's and bargaining unit employees' self-determination rights protected under the statute and at issue in this case are

an integral part of the right of public employees to organize and act collectively ... They include the right of the Union and bargaining unit employees to conduct their internal affairs and administer and conduct Union business and operations without unsolicited advice, instruction, criticism or other intrusions by the [employer] designed to influence and change how such affairs are conducted... They include the right of bargaining unit employees to decide the nature and extent of their involvement in Union business and activity ... These are all the prerogatives of the Union and bargaining unit employees.

AFSCME, Council 93, Local 3657/Milford Police Employees v. Town of Milford, Decision No. 2011-084.

In this case, the evidence shows the State interfered with the exercise of Ms. Sanborn-Dubey's and the Association's rights under RSA 273-A. Despite the CBA language authorizing

⁴ The broad RSA 273-A:5, I (a) prohibition on restrain, coercion, and interference with employees' rights includes the prohibition on retaliatory discharge, which can also be asserted under RSA 273-A:5, I (d). In cases involving alleged retaliatory discharge, the Supreme Court has "recognized that a complainant under RSA 273-A:5, I (a) and (d) must prove illegal motivation at least to some degree." *Appeal of Sullivan County*, 141 N.H. 82, 84 (1996). In this case, the allegations of threat of retaliatory discharge are asserted only with respect to Mr. Gulla. There are no allegations of retaliatory discharge with respect to either Ms. Sanborn-Dubey or Mr. Perras.

Stewards to carry out their responsibilities during working hours and authorizing the Association to use the Commission's electronic mail system for internal Association business, provided that emails are clearly identified as the property of the Association, Commission Retail Area Manager Burns opened, read, and forwarded to the management, an email clearly titled "Union Business" that was prepared and sent to Association Stewards by Ms. Sanborn-Dubey. Mr. Burns searched for other union business emails. Ms. Sanborn-Dubey was processing grievances in Concord in her capacity as a Steward when these events occurred. Mr. Burns also encouraged Ms. Sanborn-Dubey's immediate supervisor to be more firm when dealing with her. A month after these events, Ms. Sanborn-Dubey, after 48-hour notice, was transferred to a store at a distant location. Assistant Director of Marketing DeLuca informed her that the transfer was permanent and that she would not receive any mileage reimbursement. When Ms. Sanborn-Dubey attempted to grieve her transfer, Assistant Director of Marketing DeLuca tried to discourage her from exercising her right to file a grievance by stating in his email: "I need for you to perform your store duties as a Retail clerk 2 at the Lincoln operations. Let the UNION handle the grievance if one exists."

Mr. DeLuca' and Mr. Burns' statements and the temporal proximity of the transfer to grievances processed by Ms. Sanborn-Dubey and to her attempt to organize a Stewards Day demonstrate that the transfer was made in retaliation for Ms. Sanborn-Dubey's union activity. See *State Employees' Association of NH, SEIU Local 1984 v. Town of Salem et al.*, PELRB Decision No. 2011-140. The retaliatory motivation can be reasonably inferred from a history of interactions between employer and the employee as well as from the temporal proximity between the grievances filed and the acts of retaliation. See *id.* I find that in this case, the State interfered with Ms. Sanborn-Dubey's right under RSA 273-A to file grievances, to serve as a union steward, and to participate in concerted union activity, with the Association's RSA 273-A:11 right to represent bargaining unit employees, and with the right of the Association and

bargaining unit employees to conduct their internal affairs and administer and conduct Association business and operations without unsolicited intrusions by the employer.

Base on the foregoing, the State committed an unfair labor practice in violation of RSA 273-A:5, I (a) and (b).

The Association also claims that the State violated RSA 273-A:5, I (a) and (d) when it prohibited Steward Anthony Perras from returning to work after a sick leave absence despite the physician's note releasing him to return to full duty and required him to submit Medical Release form thereby causing him to utilize several sick leave days; and when the State rejected Steward Richard Gulla's request for supplemental sick leave, sent him a letter of non-disciplinary termination, and failed to promptly solicit sick leave donations after Mr. Gulla's request for supplemental leave was finally approved. Although the State's interactions with Mr. Perras and Mr. Gulla leave a lot to be desired, I find that the evidence in this case is insufficient to show, by a preponderance of the evidence,⁵ the causal link between the State's actions and Mr. Perras' and Mr. Gulla's union activity. Accordingly, the Association's RSA 273-A:5, I (a) and (d) claims concerning Anthony Perras and Richard Gulla are dismissed.

C. Claims of Violation of RSA 273-A:5, I (g) and (i).

Under RSA 273-A:5, I (g) and (i) it is a prohibited practice for any public employer to fail to comply with this chapter or any rule adopted thereunder and 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, respectively. Further, RSA 273-A:11 provides in relevant part:

I. Public employers shall extend the following rights to the exclusive representative of a bargaining unit certified under RSA 273-A:8:

(a) The right to represent employees in collective bargaining negotiations

⁵ See Pub 201.06 (c).

and in the settlement of grievances...

II. A reasonable number of employees who act as representatives of the bargaining unit shall be given a reasonable opportunity to meet with the employer or his representatives during working hours without loss of compensation or benefits.

In this case, the State failed to comply with the requirement of RSA 273-A:11, thereby violating RSA 273-A:5, I (g), when its representative opened, read, and forwarded Steward Sanborn-Dubey's email communication titled "Union Business" to the administration; when same representative, while admitting that Ms. Sanborn-Dubey is a good employee, encouraged her immediate supervisor to show firmness when dealing with her; and when the State transferred her to a distant location in retaliation for her union activity, causing her significant hardship. See section II, B above.

Further, the policy requiring employees to submit Medical Release to Return to Work form, as applied by the State, see Findings of Fact at 16, invalidates Article 11.4 of the parties' CBA. Under Article 11.4, an employee can be required to submit a doctor's certification only if the Employer believes that the employee's use of sick leave does not conform to the reasons and requirements for sick leave use set forth in the CBA. See Finding of Fact at 15. HR Administrator Mathews acknowledges that employees are not required to provide reasons or doctor's notes for sick leave. See Findings of Fact at 85. The Liquor Commission's Policy number P-106, titled Reporting Work Injuries, appears to apply to "work-related accidents and injuries" contemplated under Worker's Compensation law. See Findings of Fact at 17. It defines "work-related injury" as "[a]ny trauma, illness, or exposure to disease that is sustained by an employee in the course of performing their work duties." This definition, although broad, does not appear to apply to any conditions that are not sustained in the course of performing work duties. Neither diabetic ulcer nor chest pains would appear to fall under this definition as, at least on the facts of this case, they do not appear to be worker's compensation type conditions

incurred in the course of performing work duties. Nevertheless, the Commission Administration seems to interpret this definition much more expansively. In her email communication to all store and supervisors, HR Administrator Mathews stated:

Please note: Whether an employee is part time or full time and the employee obtains an injury *in or out of the workplace* which can be defined as the following:

*Serious Medical Conditions: Any medical condition that prevents employees from performing one or more of their essential job functions.

The employee must have his/her medical provider complete a NH Liquor Commission Medical Release to Return to Work form which must be completed and submitted to Human Resources prior to the employee returning to the workplace...

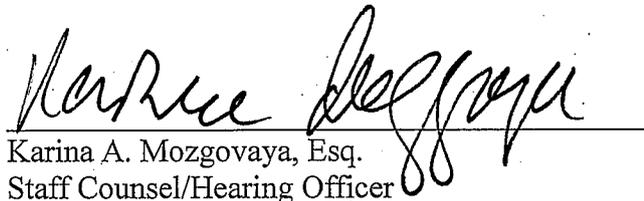
See Findings of Fact at 16 (emphasis added). This policy expands the definition of relevant condition to any condition that prevents employees from performing one or more essential job functions. This policy definition can be easily applied to any and all conditions, such as upset stomach, cold or flu, requiring an employee to utilize sick leave because if an employee does utilize "sick" leave, he or she is, likely "sick" and cannot perform one or more essential job functions due to his/her condition. The Commission's policy as applied would require employees to see a doctor and submit Medical Release to Return to Work every time they have an upset stomach or cold. This policy and its application invalidate Article 11.4 of the parties' CBA and, therefore, violate RSA 273-A:5, I (i).

For the foregoing reasons, the State violated RSA 273-A:5, I (g) and (i).

Accordingly, the State committed an unfair labor practice in violation RSA 273-A:5, I (a), (b), (g), and (i). The State shall cease and desist from violating RSA 273-A, I.

So ordered.

April 8, 2014


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