STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

State Employees' Association of NH, Inc., SEIU Local 1984

v.

State of New Hampshire, Department of Health & Human Services

Case No. G-0148-2
Decision No. 2014-184

Appearances:

For the Complainant:

Glenn R. Milner, Esq.
Molan, Milner & Krupski, PLLC
Concord, New Hampshire

Lauren S. Chadwick, Esq.,
SEA, SEIU Local 1984
Concord, New Hampshire

For the Respondent:

Michael K. Brown, Esq., Senior Assistant Attorney General
Rosemary Wiant, Esq., Assistant Attorney General
Concord, New Hampshire

Background:

On April 4, 2014 the State Employees' Association of New Hampshire, Inc., SEIU Local 1984 (SEA) filed an unfair labor practice complaint under the Public Employee Labor Relations Act against the State of New Hampshire Department of Health and Human Services (State). The SEA represents certain State bargaining unit employees, including 9 month and 12 month academic employees (such as teachers and special education coordinators) working at the Sununu Youth Services Center (SYSC). According to the SEA, the salary enhancement portion of the SYSC pay plan for these employees originated from the "James O" 1991 federal court

consent decree which addressed, among other things, the delivery of a free public education to youth now being served by the SYSC and the need to attract and retain educational personnel to provide this education. The SEA maintains that the provision of salary enhancements to the SYSC employees has become a binding past practice established over approximately 21 years and any changes to this wage arrangement is subject to mandatory negotiations. The SEA charges that the State's scheduled implementation of a salary reduction effective on July 1, 2014 via the elimination of the salary enhancements which will reduce the wages of affected employees by as much as 25% is an unlawful unilateral change to the wage plan of the SYSC employees and a violation of the State's mandatory bargaining obligations.

On May 9, 2014 the SEA filed a Motion for Interim relief under RSA 273-A:6, III and N.H. Admin. Rule, Pub 203.04, requesting that the PELRB order the State to maintain the status quo pending a hearing and decision. In support of this motion the SEA maintains that given the State's intention to implement the salary reductions effective July 1, 2014 some of the SYSC employees will be forced to prematurely retire in order to avoid a loss in their retirement benefit and it is unlikely that these employees could subsequently return to their positions and reverse their retirement decision. The SEA also claims other SYSC employees will be adversely and unfairly affected by the scheduled pay reduction to the extent that they are proceeding with plans to sell their homes. The SEA further argues it has a strong case on the merits and given the circumstances the PELRB should issue a cease and desist in order to prevent the implementation of the salary cuts pending the outcome of these proceedings.

Based upon the foregoing, the SEA claims that the State has violated RSA 273-A:5, I (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations),

(h)(to breach a collective bargaining agreement), and (i)(to make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule). The SEA requests that the PELRB: 1) find that the State has committed an unfair labor practice; 2) order the State to maintain the status quo; and 3) order the State to negotiate any changes to the existing SYSC pay plan.

The State denies the charges, has objected to the SEA motion for interim relief, and on May 15, 2014 filed a motion to dismiss. The State says that the additional pay given to the SYSC employees beginning in 1993 was a "temporary" salary enhancement pursuant to RSA 99:8 and N.H. Admin. Rule Per 904.01:

> RSA 99:8 Increases for Recruitment Purposes. – Upon request of the appointing authority, the governor and council are hereby authorized and empowered, notwithstanding any other provisions of the law to the contrary, upon a finding by them and a recommendation from the director of personnel that a substantial number of vacancies exist in any class of authorized positions which vacancies require an increase in salaries for recruitment of qualified personnel therefor, to increase salaries of such classified positions, any such increases to be a charge against the salary adjustment fund.

Per 904.01 Request for Temporary Increase.

(a) An appointing authority may request an increase in the compensation of a class for recruitment purposes under RSA 99:8 by submitting a request to the director containing the following information:

> (1) A comparison of salaries in the appropriate industry and geographic location, including:
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> a. Occupations which are comparable to the state classification for which the increase is sought; and
>
> b. A comparison of benefits as a percentage of salary;
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> (2) A recommended percentage increase over the current salary grade assignment of the class title, based on the data compiled by the appointing authority under (1);

(3) A detailed plan explaining how the appointing authority intends to adjust the salaries of all class members; and

(4) The number of positions affected by an increase for recruitment purposes and the overall cost of the proposed increase.

(b) If the director concurs with an increase in compensation for recruitment purposes based upon the information provided in (a) or the director's own market studies conducted under RSA 21-I: 42, VI, the appointing authority's recommendation to governor and council shall be in the form of a suggested percentage increase in the hourly wage of the class, for a period not to exceed 24 months.

(c) If the director or the appointing authority determines the need for the temporary increase no longer exists, either based on information from the appointing authority or on the director's own market studies conducted under RSA 21-I:42, VI, the director shall recommend to governor and council that any increase originally recommended under paragraph (b) be withdrawn.

The State also argues that the decision to give salary enhancements falls within the State's exclusive managerial prerogative, and that the SEA cannot prove a past practice since the salary enhancements are statutory. The State also says that the "James O" federal court case was closed over ten years ago based upon a finding that the State had substantially complied with the decree, that the salary enhancements are not expressly included in the collective bargaining agreement, that the elimination of the salary enhancements is required to meet a $1.2 million SYSC budget reduction obligation and avoid employee layoffs, that the use of salary enhancements is no longer necessary to attract and retain SYSC education personnel, that any retirement decisions can be reversed if necessary, and that the complaint is barred by the RSA 273-A:6, VII six month limitation period. For these reasons the State argues that the SEA motion for interim relief should be denied, that the PELRB lacks jurisdiction, and the complaint should be dismissed.

The SEA has objected to the State's motion to dismiss, contending the complaint was filed within 6 months of the SYSC Director's February 21, 2014 letter stating that the disputed

wage reduction will be implemented effective July 1, 2014. The SEA also argues it has stated a valid past practice claim which requires an evidentiary hearing, that the parties have developed and utilized a separate salary scale for the SYSC employees, and that the SYSC employee wage scale is the product of the federal court case and is not an RSA 99:8 salary enhancement as the State claims.

The undersigned board held a hearing in this case on May 22, 2014 at the offices of the PELRB in Concord. Both parties submitted post-hearing briefs by the June 4, 2014 deadline, and the board's decision in this case is as follows.

Findings of Fact

1. The State of New Hampshire Department of Health and Human Services (State) is a public employer within the meaning of RSA 273-A. The State Employees' Association of New Hampshire, Inc., SEIU Local 1984 (SEA) is the certified exclusive representative of certain employees who work at the Sununu Youth Services Center (SYSC), including employees in the positions of Teacher I, Teacher II, Teacher III, and Principal (the SYSC employees).

2. A portion of the parties' 2013 to 2015 collective bargaining agreement (2013-15 CBA) is set forth in Joint Exhibit 1, and the full 2013-15 CBA, signed November 21, 2013 and with effective dates of November 21, 2013 to June 30, 2015, is on file with the PELRB.

3. A lawsuit was filed in the late 1980's in the United States District Court for the District of New Hampshire claiming that the named State Defendants "have failed to take adequate steps to ensure that students who are or may be educationally disabled and who are placed pursuant to New Hampshire RSA 169-B (Juvenile Delinquency), 169-C (Neglect and Abuse), or 169-D (Children in Need of Services) receive a free appropriate public education and

the procedural protections provided by Federal and State law." Joint Exhibit 2 (August 21, 1991 "James O" Consent Decree).

4. Under the "James O" Consent Decree (consent decree), the State was legally bound to establish a written plan which, among other things:

> Attracts and retains by December 31, 1992 sufficient numbers of appropriately certified personnel under the State Standards and State law required to implement IEPs of the residents of each facility. This part of the plan shall include a schedule of salary enhancements and comparative salary data for public systems in the geographic area of each of the facilities.

5. At the time the consent decree issued the SYSC employees were paid according to the collective bargaining agreement (CBA) salary scale 180 or 234, depending on whether they worked 180 days per year or year round. Under and pursuant to the consent decree the State put salary enhancements in place for the SYSC employees in 1993 and since that time has always paid the SYSC employees wages that are 15%, 20%, or 25% above the CBA 180 and 234 scales. The salary enhancements were not the result of an independent RSA 99:8 proceeding, but were the result of and evolved from the federal court consent decree.

6. The federal court retained jurisdiction and enforcement power over the consent decree through July 1, 2002. The State had reached full compliance as of that date.

7. The State told SYSC employees in 1993 that the salary enhancement was a permanent pay increase. SYSC employees were not told that the salary enhancement was subject to reduction or could be discontinued for budgetary or other reasons. New SYSC employee hires were simply provided with gross salary information which reflected and incorporated the salary enhancements. The State did not advise new hires that a portion of their pay was a salary enhancement or that a portion of their pay was temporary and subject to elimination and or renewal. The State also did not inform new hires that any portion of their pay required Governor

and Council (G&C) approval every two years for its continuation. The same is true with respect to any notices advertising the SYSC positions and paperwork verifying wage information for third parties. See Union Exhibits 7-12.

8. Although the consent decree does not condition the implementation of any salary enhancements upon the approval of G&C, the State submitted requests to G&C in 1993, 1999, and 2001. Hearing Exhibits reflect that it was obtained in 1999, and we presume approval was also provided in 1993 and 2001, although the record is not clear on this point. See State Exhibits F, G, I and J. The record does not reflect any G&C activity in 1994-1998 and 2002 through 2012.

9. The parties never inserted the salary enhancement schedule in their collective bargaining agreement, although the State did maintain records documenting the salary scale for the SYSC employees inclusive of the salary enhancement. These records also reflect that SEA dues (full dues and agency fee dues) are computed based on the enhanced wages shown on these salary charts. See Union Exhibit 13.

10. The gross wages paid to the SYSC employees inclusive of the salary enhancement has been known to and accepted by both the State and the SEA as the actual wages of the SYSC employees since 1993. The enhancements were initially instituted in order to satisfy the State's legal obligations as recounted in the consent decree. From 1993 through 2012 both parties negotiated the underlying grade and step wage plan (examples of which are provided at pages 15-39 of Union Exhibit 13) with the knowledge and understanding that the percentage salary enhancements would be added to these "base wages" to arrive at the true wage for the SYSC employees.

11. The State presented some evidence that salary enhancements are no longer necessary to attract and retain people to fill the SYSC positions at issue in these proceedings. This evidence included testimony about the current and relative stability of the SYSC employee workforce compared with the situation in the past. However, there is no evidence that the SEA has expressly, or by its conduct over the last twenty years, agreed that the State may unilaterally discontinue the enhanced salary wage schedule in the event of improved stability in the SYSC employee workforce.

12. As a result of the State 2014-2015 budget law, the State DHHS is required to make a $1.2 million cost reduction at the SYSC. On August 26, 2013 Maggie Bishop, Director of the Division for Juvenile Justice Services of the New Hampshire DHHS met with the SEA President Diana Lacey to present the State's plan to meet the required budget reduction by cutting the SYCS employees' salaries. By letter dated September 12, 2013 the SEA President notified Director Bishop the SEA would be legally challenging the plan to cut salaries. See State Exhibit W.

13. By late September, the State hesitated and decided to hold off on any plan to cut the salaries of the SYSC employees. Employees were so notified via a September 27, 2013 email (State Exhibit P) from the SYSC Director, who stated that:

enhancements are still on the table...[i]f and when anything is to be instituted, I will notify you as soon as possible. Currently we are still looking at savings in all departments and working diligently to meet the reduction without affecting positions at the facility...I will relay information to you as soon as it is made available to me."

14. In his October 16, 2013 letter to the Director of Personnel, the DHHS Commissioner acknowledged that:

> "[t]he current status of the salary enhancements, however, is not entirely clear....The personnel rule limits the duration of salary enhancements for a period of time not to exceed 24 months...The Department has not requested that these salary enhancements be

continued since 2001...The Department has not affirmatively requested the withdrawal of the enhancements under this section and the enhancements have consequently remained in place." State Exhibit M.

15. In November of 2013, after the SEA had provided notice that it would challenge any reduction of the SYSC employees' salary, the State DHHS Commissioner submitted a letter to the G&C (State Exhibit M) requesting the continuation of the salary enhancements. This was the first such request to the G&C since 2001, and it appears to have been prompted by the brewing controversy over the State's developing plan to cut SYSC employees' salaries.

16. During negotiations on the 2013-15 collective bargaining agreement, the SEA submitted a proposal seeking to expressly incorporate the salary enhancements into the contract. (State Exhibit X). The State did not agree to this proposal.

17. By letter dated February 21, 2014 (Union Exhibit 16) the SYSC Director told the SYSC employees that the previously discussed wage reduction would in fact happen effective July 1, 2014.

18. By letter dated April 1, 2014, the State DHHS Commissioner wrote to the SEA President requesting a consultation "to discuss the withdrawal of the temporary salary enhancements currently in place for teachers at the Sununu Youth Services Center." Notwithstanding this request to consult with the SEA, it is the State's position that it has the authority to unilaterally discontinue what it calls "temporary" salary enhancements and the State has taken steps to make the resulting wage reduction for the SYSC employees effective as of July 1, 2014.

Decision Summary

The inclusion of a 15% to 25% salary enhancement of the CBA 180 and 234 wage scales for the SYSC employees is a binding past practice and is subject to mandatory negotiation and

the State's unilateral discontinuation of the 15% to 25% salary enhancement effective July 1, 2014 is an unfair labor practice. The State is ordered to restore the salary enhancements, make affected employees whole, allow any SYSC employee who retired on account of the July 1, 2014 wage change to return to State service, and to negotiate any changes to the existing salary enhanced wages for the SYSC employees.

Jurisdiction and Pending Motions:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6. We find that the SEA's complaint alleges facts and violations of RSA 273-A:5 which are within the PELRB's jurisdiction. The State's arguments based upon RSA 99:8 and N.H. Admin. Rule Per 904.01 do not mean that we lose our jurisdiction to decide whether the State has in fact violated the provisions of RSA 273-A:5 as charged by the SEA. The State's motion to dismiss based upon the six month limitation period set forth in RSA 273-A:6, VII is denied. The SEA complaint was filed within six months of the triggering event, which we find to be the SYSC Director's February 21, 2014 letter (Union Exhibit 16). Prior to that date the State did consider implementing the disputed salary reductions, but that plan was suspended as stated in the SYSC Director's September 27, 2013 letter (State Exhibit P) in a way that suggested that the salary reductions might not go forward at all, and any unfair labor practice complaint would have been premature. Finally, given the issuance of this decision, the SEA's motion for interim relief is moot.

Discussion:

We find that the SEA has proven a past practice pursuant to which the RSA 273-A wages of the SYSC employees consists of the CBA salary scale plus the disputed salary enhancement amount.

> "An employer's practices, even if not required by a collective-bargaining agreement, which are regular and long-standing, rather than random or intermittent, become terms and conditions of [union] employees' employment, which cannot be altered without offering their collective-bargaining representative notice and an opportunity to bargain over the proposed change." *Sunoco, Inc.,* 349 N.L.R.B. 240, 244 (2007)..."A practice need not be universal to constitute a term or condition of employment, as long as it is regular and longstanding." *Sunoco, Inc.,* 349 N.L.R.B. at 244.
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> As the party alleging an established past practice, the Union had the burden of proof on this issue. *Eugene Iovine, Inc.,* 353 N.L.R.B. 400, 400 (2008), *petition for enforcement granted by* 371 Fed.Appx. 167 (2d Cir.), *vacated on other grounds by* __ U.S. __, 131 S.Ct. 458, 178 L.Ed.2d 282 (2010). To meet this burden, the Union had to show that the alleged practice "occurred with such regularity and frequency that employees could reasonably expect [it] to continue or reoccur on a regular or consistent basis." *Caterpillar, Inc.,* 355 N.L.R.B. 521, 522 (2010) (quotations omitted). In addition, "[i]t is implicit in establishing a past practice that the party which is being asked to honor it" - here, the DOC - "be aware of its existence." *BASF Wyandotte Corp.,* 278 N.L.R.B. 173, 180 (1986).

Appeal of New Hampshire Department of Corrections, 164 N.H. 307, 309 (2012).

The enhanced salary scale for the SYSC employees has remained in effect for over twenty years. It was established pursuant to and evolved from a federal court consent decree, and not pursuant to some independent and unrelated RSA 99:8 action. It was considered permanent in 1993 by the State and SYSC employees were so informed at that time. During the time period from 1993 to 2012 the State did not take the position or warn, caution, or otherwise inform the SEA, current employees, or new hires that a portion of their wage was a salary enhancement, was temporary, was subject to periodic approval by the G&C, or was subject to reduction in the State's discretion. In fact, for over twenty years the SYSC employee salary scale, inclusive of the percentage enhancements, has been maintained and accepted by both the State and the SEA (and affected employees) as the established and applicable wage scale for the SYSC employees and the basis for the calculation of union dues and agency fee. Consistent with the foregoing, we find that the provision of wages to the SYSC employees, inclusive of the percentage enhancements, is both "regular" and "long standing." We are convinced that affected

SYSC employees reasonably expect the established salary scale to continue unless altered by negotiation. We are satisfied that the SEA has proven the claimed past practice in accordance with the cited authorities.

The State's intermittent and random filings with G&C do not lead to a different conclusion. The initial filing, which was not explained or addressed in any particular detail at hearing, appears to have been a step which the State believed was administratively required at that time. We seriously question any suggestion or argument that the G&C could block the implementation of the consent decree by withholding its approval of the requested wage adjustment. Instead, we view the filings with the G&C and its action thereon as ministerial acts given the circumstances. The irregularity of the subsequent filings is inconsistent with the State's argument that the salary enhancement portion of the SYSC employee wages are temporary and require G&C approval to continue. The lack of consistent G&C filings supports the conclusion that the arrangement is a permanent term and condition of employment for the SYSC employees.

By 2002, the State had reached a milestone, as reflected by its full compliance with the consent decree and the related closing of the federal court case. This is the point at which we would have expected the State to attempt to proceed with the elimination of the enhanced portion of the SYSC employee wages if in fact the State had such a right. However, the State did not take such action in 2002, nor did it take such action in the following ten years. Instead, virtually the exact opposite occurred. The State continued to maintain the SYSC employee wage plan first implemented in 1993 consistently and regularly and without qualification, restriction, condition, or any filings with the G&C through 2012 and into 2013 to the point of the current controversy. Given this history, any doubt about the proper characterization of the SYSC

employee salary enhancements must be resolved in favor of a finding that the enhanced wages had become a permanent term and condition of employment for the SYSC employees.

By 2012, a past practice of providing the SYSC employees with wages inclusive of a salary enhancement was firmly and clearly established. In 2013, in an effort to justify its plan to unilaterally reduce SYSC employee wages, the State developed and argued for the first time that the salary enhanced portion of the SYSC employees' wages had in fact been temporary all along and could be eliminated in the State's discretion and without negotiation under RSA 99:8 and N.H. Admin. Rule Per 904.01. In this context, we view the State's November, 2013 G&C filing as simply a step in furtherance of the State's new position. We find that the State's current reliance on RSA 99:8 and N.H. Admin. Rule Per 904.01 cannot be sustained. It represents a sharp departure from the clear history of how the State has viewed the SYSC employee wage arrangement, particularly since 2002, and is in direct conflict with the established past practice.

The State argues that the SEA's claims should be denied because the State rejected an SEA proposal (State Exhibit X)(Finding of Fact 16) to include language in the parties' 2013-15 CBA recognizing that the SYSC employees' wages include the salary enhancement and because the State effectively cancelled the past practice at the end of the term of the contract which preceded the 2013-15 CBA. We are not persuaded by either of these arguments.

We do not equate the SEA bargaining proposal with an admission that a binding past practice covering the SYSC wages does not exist or is not enforceable. We accept this evidence as nothing more than an attempt by the SEA to have an existing past practice reduced to writing and expressly described in the contract. The State cites a labor arbitration treatise (Elkouri & E. Elkouri, How Arbitration Works (7th Ed. 2012) Ch. 12, pp. 12-15) in support of its argument that it could unilaterally discontinue a past practice covering a mandatory subject of bargaining like

wages at the end of the preceding contract's term. Elkouri states, in substance, that some arbitrators recognize that an employer may end a past practice by giving notice at the end of the contract term that a particular practice will not continue during the next contract. However, we are not convinced that this particular arbitrators' rule applies to this case. First, this is not an arbitration proceeding, but a statutory unfair labor practice case filed under the provisions of RSA 273-A. Second, the rule conflicts with the obligation of public employers under RSA 273-A to negotiate changes in mandatory subjects of bargaining like wages, including during the status quo period preceding the first contract and during the status quo period following the expiration of a contract. *See Appeal of State*, 138 N.H. 716, 722 (1994); *Appeal of Nashua Board of Educ.,* 141 N.H. 768, 772-73 (1997); *Appeal of New Hampshire Department of Corrections,* 164 N.H. 307, 309 (2012)(bargaining required to alter past practice). There is no distinction under the status quo doctrine between terms and conditions of employment like wages which are in place in advance of negotiations on the first contract, those established through collective bargaining, and those established by past practice. Additionally, the facts of this case do not support the application of the arbitrator's rule. The rule contemplates that an employer will give notice to discontinue a past practice at the end of a contract term and in advance of the successor contract, and not during a contract term. In this case, the State announced its plan to terminate salary enhancements in February, 2014, a date that falls within the term of the 2013-15 CBA. Under the State's plan, the past practice would also continue during a portion of the 2013-15 CBA term, another distinction between the facts of this case and the contemplated application of the arbitrator's rule.

In conclusion, we find that the State's unilateral reduction in SYSC employee wages effective July 1, 2014 is a violation of the State's obligation to negotiate wages, a term and

condition of employment that is a mandatory subject of bargaining. Under RSA 273-A:5, I (e), it is an unfair labor practice for a public employer to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, which is what happened in this case when the State unilaterally implemented a wage reduction effective July 1, 2014. The State is ordered to restore the salary enhancements, make affected employees whole, allow any SYSC employee who retired on account of the July 1, 2014 wage change to return to State service, and to negotiate any changes to the existing salary enhanced wages for the SYSC employees. Given our finding of a violation under sub-section (e), which we conclude is the statutory provision applicable to this case, we dismiss the SEA claims under sub-sections (h) and (i).

So Ordered.

Date: July 31, 2014.

Michele E. Kenney

Michele E. Kenney, Esq., Chair

By unanimous vote of Board Members Michele E. Kenney, Esq., Richard J. Laughton, Jr., and James M. O'Mara, Jr.

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