



**State of New Hampshire**  
Public Employee Labor Relations Board

**New Hampshire Troopers Association**

v.

**New Hampshire Department of Safety**

**Consolidated Cases G-0097-26 & G-0097-27**  
**Decision No. 2021-033**

**Appearances:** Marc G. Beaudoin, Esq.,  
Milner & Krupski, PLLC  
Concord, New Hampshire for the Complainant

Marta A. Modigliani, Esq., NH Dept. of Safety, Div. of State Police and  
Jessica A. King, Esq., Office of the Attorney General  
Concord, New Hampshire for the Respondent

**Background:**

On August 12, 2020<sup>1</sup> and on September 15, 2020<sup>2</sup> the New Hampshire Troopers Association (NHTA) filed unfair labor practice complaints with the Public Employee Labor Relations Board (PELRB) against the State Department of Safety (State).<sup>3</sup> The NHTA claims the State breached Article XI, Sick Leave, of the June 6, 2018 to June 30, 2019 Collective Bargaining Agreement (CBA) when the State terminated the employment of two State Troopers for “non-disciplinary” reasons. Both Troopers had been on extended sick leave and at the time were receiving paid sick leave benefits pursuant to CBA Article 11.8, which establishes a Sick Leave Bank available to employees who have exhausted their sick leave time and who receive

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<sup>1</sup> Case G-0097-26.

<sup>2</sup> Case G-0097-27.

<sup>3</sup> These cases were consolidated pursuant to PELRB Decision No. 2020-297 (December 22, 2020).

the necessary approvals from the governing board of the Sick Leave Bank (Sick Bank Committee). The NHTA argues that the State made the Sick Leave Bank a “nullity” when it took “unilateral control over the CBA” and ended the employment of the two Troopers to avoid the payment of Article 11.8 sick leave.

The NHTA requests that the PELRB: 1) find that the State has committed unfair labor practices in violation of RSA 273-A:5, I(a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter) and I(h)(to breach a collective bargaining agreement); and 2) order the State to cease and desist from any further violations of CBA Article 11.8, reinstate the two employees, and reimburse them for lost pay, leave, and benefits.

The State denies the charges. The State maintains that its decision to discharge the two Troopers is authorized by CBA Article II, Management Prerogatives, which includes the right to discharge employees, and by *N.H. Admin. Rules*, Per 1003, Removal for Non-Disciplinary Reasons. The State also contends the NHTA has not stated a claim under RSA 273-A:5, I(a). The State requests that the PELRB dismiss the complaints.

We previously determined that these consolidated cases could be decided on stipulations, exhibits, and briefs.<sup>4</sup> The filing schedule provided for stipulations and exhibits by January 20, 2021 and briefs by February 3, 2021, and both parties made submissions as per this schedule. On February 17, 2021 the State filed an assented to motion to file reply briefs by February 19, 2021. We denied this motion.<sup>5</sup> Our decision is as follows.

### **Findings of Fact**

1. The State is a public employer within the meaning of RSA 273-A.

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<sup>4</sup> PELRB Decision No. 2021-001 (January 7, 2021).

<sup>5</sup> PELRB Decision No. 2021-025 (February 18, 2021).

2. The NHTA is the exclusive representative of a State Police bargaining unit comprised of all sworn personnel up to and including the rank of Sergeant pursuant to an October 18, 1990 PELRB certification.

3. CBA Article II, Management Prerogatives, provides:

*2.1. The Employer retains all rights to manage, direct and control its operations, subject to the provisions of law, personnel regulations and the provisions of this Agreement, to the extent that they are applicable. These rights shall include but not be limited [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. For purposes of this section "emergency" is defined as any conditions or situation out of the ordinary, which requires immediate action to avoid danger to life, property, or to prevent losses affecting the Employer, the employee or the general public.*

4. CBA Article XI, Sick Leave, provides:

*11.1. Accrual: Full-time employees in the bargaining unit shall accrue sick leave in accordance with the formula given below. The purpose of sick leave is to afford employees protection against lost income for absences due to illness or injury and, in particular long-term disability due to catastrophic illness or injury. Sick leave is not intended to supplement other leave provisions of this Agreement and is intended to be used only for the purpose set forth herein. Sick leave shall be computed at the end of each completed month of service. Sick leave shall be cumulative for not more than the prescribed days and shall not lapse.*

....

*11.8. The Sick Leave Bank provides full pay for a limited time to those employees who have exhausted their sick leave time and are suffering from a disabling injury or illness.*

*A governing board of the Sick Leave Bank will be comprised of the Director and two designees and two designees of the Association. One of the Director's designees shall be below the rank of lieutenant. The Director will cast a vote only in the event of a tie.*

*No employee shall be eligible to receive more than two years of consecutive Sick Leave Bank days. Evidence of disability must be provided by a licensed health care provider. An employee may be required to provide on-going certification of disability every 60 working days.*

*Employees may apply for assistance from the Bank only for their own disabling injury or sickness, including disability due to pregnancy or childbirth (as defined by F.M.L.A. guidelines) or immediately after the adoption of a child when they have fewer than 80 hours sick leave time available if injured or sick in the line of duty or when they have fewer than 80 hours of all leave (including sick leave, vacation, and bonus days) in all other cases.*

*To apply, the employee or his/her designee must submit the request in writing to the Director along with the evidence of disability.*

*The board will meet on an as needed basis within 10 working days of a request, but in no event fewer than twice per year or whenever the number of days in the bank drops below 100. The board may require all vested members to deposit an additional day(s) on an as needed basis, but in any case, no more than 4 days in any 12-month period. It will be left up to the discretion of the board to determine the minimum and maximum number of days per year to be deposited subject to the limits set forth above. New employees shall make their first deposit to the bank on September 1<sup>st</sup> in their second year of employment.*

5. State Division of Personnel rules addressing the non-disciplinary termination of employment are set forth in *N.H. Admin. Rules, Per 1003, Removal for Non-Disciplinary Reasons*, which provides:

*Per 1003.01 Purpose. 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.*

*Per 1003.02 Request for Assessment Information (omitted)*

*Per 1003.03 Removal.*

*(a) An appointing authority shall not remove a full-time employee under the provisions of Per 1003 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.*

*(b) (Omitted)*

*(c) (Omitted)*

*(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.*

*(e) (Omitted)*

*Per 1003.04 Written Notice.*

*(a) The appointing authority shall provide written notice to any employee removed from employment under this part that:*

*(1) The employee's personnel file shall note that the removal was for non-disciplinary reasons; and*

*(2) The employee may request resolution of the dispute pursuant to Per 205.07 (a) or may appeal directly to the board under the provisions of RSA 21-I:58, I.*

*(b) If applicable, the appointing authority or the employee may make application for the employee removed pursuant to this part to receive disability retirement benefits in accordance with state law.*

6. Prior to the filing of the complaints in these cases, the State issued written notices of removal for non-disciplinary reasons to two State Troopers. Both notices state that "you may request resolution of this non-disciplinary termination pursuant to Per 205.07 (a) or you may appeal directly to the Personnel Appeals Board under the provisions of RSA 21-I:58, I." Both Troopers were receiving benefits under the CBA Article 11.8 sick leave bank when they received the removal notices.

7. CBA Article XIV, Grievance Procedure, sets out a four step grievance procedure, and provides:

***14.5 STEP IV – Public Employees Labor Relations Board***

*14.5.1 If subsequent to the Director's decision the Association feels that further review is justified an unfair labor practice complaint may be submitted to the Public Employees Labor Relations Board. A copy of the complaint must be sent to the Employer and the Manager of Employee Relations at the same time. The decision of the Public Employees Labor Relations Board shall be final and binding.*

8. The NHTA asserts, and the State does not dispute, that grievances challenging the termination decisions were filed and advanced through the CBA grievance procedure to the point where the NHTA was entitled to file these unfair labor practice complaints.

**Decision and Order**

**Decision Summary:**

The State did not breach CBA Article 11.8 when it terminated the employment of the two State Troopers for non-disciplinary reasons and did not violate RSA 273-A:5, I(a) or (h) as charged. The complaints in these consolidated cases are dismissed.

**Jurisdiction:**

The PELRB has primary jurisdiction of all RSA 273-A:5 alleged unfair labor practices. See RSA 273-A:6, I.

**Discussion:**

We will interpret the parties' CBA in accordance with the following rules of construction:

We [will] begin by focusing upon the language of the collective bargaining agreement, as it reflects the parties' intent. This intent is determined from the agreement taken as a whole, and by construing its terms according to the common meaning of their words and phrases. The interpretation of a collective bargaining agreement, including whether a provision or clause is ambiguous, is ultimately a question of law for this court to decide.

*Appeal of New Hampshire Division of State Police*, 160 N.H. 588, 591 (2012)(quotations and citations omitted).

CBA Article 11.1 provides that “the purpose of sick leave is to afford employees income protection against lost income for absences due to illness or injury and, in particular[,] long-term disability due to catastrophic illness or injury.” CBA Article 11.8 establishes a Sick Leave Bank, administered by the Sick Bank Committee, and provides that employee eligibility is capped at “two years of consecutive Sick Leave Bank days.” There is no language in CBA Article 11.1, 11.8, or elsewhere in the CBA, expressly limiting the authority of the State to discharge an employee by their removal for non-disciplinary reasons in the event the employee is receiving paid sick leave under CBA Article 11.8. For example, there is no CBA language providing that “employees receiving assistance from the Sick Leave Bank shall not be terminated for non-disciplinary reasons” or other words of similar substance or effect. This is in contrast to the express language used in CBA Article II, Management Prerogatives, which provides that the State:

[R]etains all rights to manage, direct and control its operations, subject to the provisions of law, personnel regulations and the provisions of this Agreement, to the extent that they are applicable. *These rights shall include but not be limited [to:]... 2.1.2. Appointing, promoting, transferring, assigning, demoting, suspending, and discharging employees.*

(Emphasis added). Additionally, the personnel rules expressly provide that the State may terminate employees for non-disciplinary reasons and provides a detailed procedure for doing so. See *N.H. Admin. Rules*, Per 1003.

*Appeal of New Hampshire Division of State Police*, 160 N.H. 588 (2012), also involved a collective bargaining agreement dispute between the same parties, and the issue was whether negative references to sick leave use and call back responses could be included in the annual performance reviews of two State Troopers. A State Troopers’ use of sick leave and obligation to

respond to call backs were addressed in the parties' collective bargaining agreement, cited and relied upon by the NHTA as the basis for the unfair labor practice complaint. The State maintained that the PELRB lacked jurisdiction because annual performance reviews were governed by specific laws and personnel rules, e.g. RSA 21-I:42, XIII<sup>6</sup> and *N.H. Admin. Rules*, Per 801.03(a)(1), 801.04(a)(1), and 801.05(a)(1).<sup>7</sup> The court determined that the issue was not jurisdictional but whether, in finding for the NHTA, the PELRB had correctly interpreted the parties' CBA. *Id.* at 591. The court found that the State did not breach the CBA, stating as follows:

By its plain language, the collective bargaining agreement permits employees to accrue sick leave and utilize it up to the maximum rate allowed. It also provides that troopers who are called back to work are entitled to additional compensation for their time. *Nothing in the express terms of the collective bargaining agreement, however, precludes the Division from commenting on these topics during troopers' performance evaluations.*

Moreover, pursuant to Article II of the collective bargaining agreement, the Division "retains all rights to manage, direct and control its operations," including "[d]irecting and supervising employees"; "[a]ppointing, promoting, transferring, assigning, demoting, suspending, and discharging employees"; and "[m]aintaining the efficiency of governmental operations." These rights are "subject to the provisions of law, personnel regulations and the provisions of this Agreement, to the extent that they are applicable," including RSA 21-I:42, XIII and the rules promulgated by the division of personnel.

.....

Because the Division's comments on the troopers' attendance and dependability are authorized under the plain language of Article II of the collective bargaining agreement, RSA 21-I:42, XIII and by administrative rule, the PELRB erred in construing the collective bargaining agreement as prohibiting the Division's actions. We therefore reverse the PELRB's ruling that the Division breached the collective bargaining agreement.

*Id.* at 593-94 (emphasis added).

We conclude that in order for the NHTA to prevail on its claims in these consolidated cases the express terms of the CBA must preclude the State from exercising its authority to

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<sup>6</sup> Establishes performance evaluation system for classified employees.

<sup>7</sup> Relating to requirement that supervisors indicate in performance evaluations whether an employee meets or falls below attendance expectations.



discharge a Trooper for non-disciplinary reasons when the Trooper is receiving paid sick leave pursuant to CBA Article 11.8. However, the CBA is devoid of such language. Moreover, the NHTA cannot rely on the inclusion of the Sick Bank Leave provision in the CBA to bootstrap such a term into the agreement. CBA Article 11.8 does not, by itself, operate to invalidate or suspend the State's authority to discharge employees that is expressly provided for in CBA Article II and *N.H. Admin. Rules, Per 1003*.

Accordingly, we find that the State's non-disciplinary termination of the two State Troopers is authorized under the plain language of CBA Article II (managerial prerogative) and *N.H. Admin. Rules, Per 1003* (removal for non-disciplinary reasons). The State did not violate RSA 273-A:5, I(a) or (h) as charged and the complaints in these consolidated cases are dismissed.

So ordered.

March 3, 2021

/s/ Peter G. Callaghan  
Peter G. Callaghan, Esq.  
Chair/Presiding Officer

By unanimous vote of Alternate Chair Peter G. Callaghan, Esq., Board Member James M. O'Mara, Jr., and Board Member Richard J. Laughton, Jr.

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