State of New Hampshire

Public Employee Labor Relations Board

State Employees' Association of NH, SEIU Local 1984

v.

Coos County Board of Commissioners (Department of Corrections)

Case No. G-0282-2
Decision No. 2021-034

Appearances:

Neil Smith, Field Representative II,
State Employees' Association of NH, SEIU Local 1984
Concord, New Hampshire for the Complainant

Mark T. Broth, Esq.
Drummond Woodsum & MacMahon, P.A.
Manchester, New Hampshire for the Respondent

Background:

On September 24, 2020, the State Employees' Association of NH, SEIU Local 1984 (SEA) filed an unfair labor practice complaint with the Public Employee Labor Relations Board (PELRB) against the Coos County Board of Commissioners (County). The SEA claims the County violated its duty to bargain and breached the January 1, 2019 to December 31, 2021 collective bargaining agreement (CBA) between the County and the Department of Corrections bargaining unit represented by the SEA when the County imposed a "Temporary Travel and Use of Leave Policy" effective March 18, 2020 "until further notice." The policy established a 14 day quarantine requirement on County employees following certain out of state travel. It also mandated that employees subject to the quarantine requirement must first exhaust accrued personal and sick time before taking unpaid leave. The County applied the quarantine policy to a

Department of Corrections Corporal Rick Dube who travelled to Rhode Island at the end of May, 2020.

The SEA claims the quarantine policy changes provisions in the CBA addressing paid time off and involves terms and conditions of employment which are subject to mandatory bargaining requirements. The SEA alleges that the County's unilateral actions constitute an unfair labor practice under RSA 273-A:5, I (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the right conferred by this chapter), (e)(to refuse to negotiate in good faith...), (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...). The SEA requests that the PELRB order the County to negotiate in good faith with the SEA, make the SEA and affected employees whole, and grant such other relief as may be just and proper.

The County denies the charges. According to the County, the quarantine policy is not a mandatory subject of bargaining. The County also states that: 1) Dube was informed about the quarantine policy before he travelled out of state; 2) the CBA does not require the County to provide additional paid leave to employees like Dube who are subject to the quarantine requirement; 3) the mandatory use of paid leave has been eliminated from the policy; and 4) Dube can "buy back" the paid leave used.

This case was submitted for decision on stipulations, exhibits, and briefs. See PELRB Decision No. 2020-243 (October 28, 2020) and Decision 2020-246 (November 3, 2020). Our decision is as follows.

Findings of Fact

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

2. The SEA is the exclusive representative of certain employees of the County Department of Corrections, including Corrections Corporal Rick Dube.

3. The County issued a Temporary Travel and Use of Leave Policy on March 18, 2020 effective "until further notice" and which provides:

> Coos County is requiring all employees that travel to contact HR ***prior to*** and ***upon returning from travel, before reporting*** to work.
>
> Due to Coos County's commitment to employee health and safety and to protect the residents that we serve, effective March 18, 2020, and until further notice, employees electing to travel internationally or to any US states (other than bordering areas of VT or ME), may not be allowed to report to work for 14 days after they return and must use accrued personal and sick time if available or, if employee has no accrued time, be without pay. All employees shall be screened before returning to work from any travel.
>
> If employee indicates he or she is symptomatic, leave accruals will be utilized. If no accrued time is available, they will be allowed to go into a negative balance with no discipline.
>
> Employees who answer in the positive to any of the health screen questions will use leave accruals (sick and personal time) until able to return. Employees may not return to work until symptom free per CDC guidelines.
>
> No absences related to current pandemic will be treated as call outs.
>
> Department heads are asked to be flexible with scheduling for child care issues. Employees who need to be out due to unavailability of childcare may use accrued time.
>
> HR will review all other employee situations on a case by case basis.

See Joint Exhibit 3 (emphasis in original).

4. The County did not bargain any portion of the Temporary Travel and Use of Leave Policy with the SEA. The SEA has never requested impact bargaining over the effects of the policy on the terms and conditions of employment.

5. On May 20, 2020, Dube notified County Department of Corrections Superintendent Ben Champagne of his need to travel out of state for a family matter. Superintendent Champagne advised him that a 14 day quarantine would be required on his return, and when Dube disagreed,

the Superintendent ordered him to remain home on sick leave after his return. See Union Exhibit 1.

6. Dube complied with the self-quarantine requirement and used paid sick leave. On May 27, 2020 the SEA filed a Step 1 Grievance with Superintendent Champagne challenging the Dube self-quarantine requirement. See Union Exhibit 1. The grievance provided as follows:

> ....
>
> The Union asserts that there is no language in the Collective Bargaining Agreement that requires that an employee that travels out of state must self-quarantine before returning to work.
>
> Neither the Coos County nor you can make a unilateral change to the use of sick leave without violating the parties' CBA, and the Public Employee Labor Relations Act. Your decision to require the mandatory use of sick leave by employees effectively violates the CBA between the parties and harms the bargaining unit members by reducing employee accrued sick leave which ultimately has a cash value under certain circumstances. Coos County is obligated to negotiate with the Union over mandatory subjects of bargaining, such as sick leave.
>
> ....

7. After the grievance was denied at Step I, the SEA advanced the grievance to Step II for review by County Administrator Jennifer Fish. On June 18, 2020 County Administrator Fish held a grievance hearing, and thereafter issued a written decision dated June 19, 2020, which included the following:

> ....
>
> On January 31, 2020, the US Department of Health and Human Services declared a public health emergency related to the COVID-19 outbreak. On March 13, 2020 Governor Sununu issued the first of a series of Executive Orders (2020-04) declaring a state of emergency due to COVID-19. That initial order highlighted the risk of facility based transmission of COVID-19 to residents of long term care facilities and directed those facilities to take measures to protect those who live and work in those facilities. The same Order suspended all out of State business travel for State and municipal employees. Despite the measures described in Order 2020-004 and subsequent Orders, the COVID-19 virus has continued to spread and is present in every New Hampshire County. Data available from the NH Division of Public Health makes clear that residential facilities have been disproportionately affected by the virus.

The NH Division of Public Health Services issued guidance to employers…recommending that employers not permit any out of state domestic business travel and personal international travel. The guidance recommended that employers "[d]iscourage personal domestic travel outside of NH, ME and VT", as well as all travel by public conveyances. The guidance recommended that persons who travel internationally, on public conveyances outside of NH, VT or ME, or on a cruise ship, should quarantine for 14 days after return.

The County Commissioners have a legal, ethical and moral obligation to protect the health and safety of County employees and the persons who reside in County facilities, including the correctional facility and nursing homes. Consistent with those obligations and the guidance issued by federal and state health authorities, the Commissioners adopted and disseminated to all County employees, including CO Dube, a "Temporary Travel and Use of Leave Policy"…

….

On May 21, 2020 CO Dube traveled to Rhode Island on a personal matter. Per the Policy, he was instructed that he was not to report to work for 14 days. His personal leave was debited for the scheduled work days during this period, so that he was paid for those missed work days.

….

In this instance, CO Dube could have avoided the mandatory absence by restricting his out of state travel…the Union's suggestion that CO Dube be placed on paid administrative leave is rejected.

The County agrees that nothing in Articles 8.1 or 8.2 of the CBA identifies circumstances where an employee is required to use personal or sick leave. Accordingly, the County will modify the Policy so as to eliminate the requirement that employees must use accrued leave during the 14 day mandatory absence from work. Instead, employees who are unable to work because they chose to travel will not be scheduled to work and therefore be in a "no pay" status for the 14 days following their return from travel. The Policy will further provide that employees will have the option of using their personal and sick leave for their scheduled work days during the 14 day period.

As a resolution of the grievance, the Union has asked that CO Dube be restored the accrued time that he was required to use during the 14 day period following his return from out of state travel. The County is agreeable to restoring those days. However, as CO Dube has already used those days and been paid for the time away from work during the 14 day period, restoring his earned days would result in a windfall, in that he would both have been paid and not have utilized earned time days. In order to allow CO Dube to restore the utilized earned days, the County will allow him to buy them back by repaying the County for the days that he was paid during the period he was required to be absent from work…

8. Under the CBA, the County Administrator's Step II grievance decision was the last step in the grievance procedure for the Dube grievance. The grievance procedure does not provide that Step II County Administrator's decisions are "final and binding."

9. CBA Article IV, Management Rights, provides:

> Except as specifically limited or abridged by the terms of this agreement, the management of Coos County Corrections and Coos County Recycling Center in all its phases and details shall remain vested exclusively in the County and its designated agents. The County and its agents shall have jurisdiction over managerial policy within the exclusive prerogative of the public employer construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions. It is further specifically agreed that this Article and the exercise of any management rights shall not be subject to the Grievance Procedure, Article XIII as hereinafter set forth.

See Joint Exhibit 2.

Decision and Order

Decision Summary:

The County did not breach the CBA or violate RSA 273-A:5, I(a), (e), (h) or (i) as charged. The complaint is dismissed.

Jurisdiction:

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

Discussion:

There are two aspects of the Temporary Travel and Use of Leave Policy under review in this case. The first is the 14 day quarantine requirement, and the second is the requirement that employees like Dube exhaust accrued personal and sick leave following which they will be in a leave without pay status. The SEA argues that the County's establishment of both of these violated the County's mandatory bargaining obligations and the CBA.

As to the bargaining claim, it is well established that the County is obligated to negotiate in good faith over the 'terms and conditions of employment" with the Union. See RSA 273-A:3, I. The "terms and conditions of employment" are:

> [W]ages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

See RSA 273-A:1, XI and 273-A:3, I. The court has adopted a three part test to define a union and public employer's respective bargaining rights and obligations as to various subjects:

> First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation.... Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy....Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI. A proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.

Appeal of State, 138 N.H. 716, 724 (1994). As to whether a public employer's actions, like those at issue in this case, primarily affect "the terms and conditions of employment, rather than matters of broad managerial policy," there are situations where such action:

> [W]ill touch on significant interests of both the public employer and the employees. In such instances, the second part of the inquiry cannot be resolved through simple labels offered by management, such as "restructuring" or "personnel reorganization," or through conclusory descriptions urged by employees, such as "inherently destructive" conduct. Rather, [d]etermining the primary effect of the proposal requires an evaluation of the strength and focus of the competing interests...a public employer's "greater" power to create or eliminate a position or program does not necessarily include the "lesser" power to unilaterally determine wages and hours for the position or program.

Appeal of Nashua Board of Education, 141 N.H. 768, 774-776 (1997)(quotations and citations omitted).

We conclude that the County's decision to impose the 14 day self-quarantine policy falls squarely within its managerial prerogative and is not a mandatory subject of bargaining. While both employer and employee interests are affected by the policy, when we weigh the strength and focus of these competing interests, the scales tip in favor of the employer's interest in maintaining a safe and healthy workplace for the benefit of employees and residents in facilities operated by the County. The County's obligation to operate its facilities in a manner that maintains and promotes the health and safety of all employees and residents during the COVID-19 pandemic, which was well underway by March 18, 2020, outweighs any individual employee's interest in maintaining his normal work schedule, notwithstanding the risk of COVID-19 transmission that employee may represent following certain out of state travel. There is ample evidence in the record which demonstrates the policy is consistent with state and federal recommendations and was intended to reduce the risk of facility based transmission of COVID-19, all as discussed in the County Administrator's Step II grievance decision.

We recognize that there are other elements of the March 18, 2020 policy which impinge upon the terms and conditions of employment, and specifically that the policy necessarily results in mandatory absences from work. However, having determined that the quarantine requirement was a proper exercise of the County's managerial prerogative, we cannot simultaneously invalidate it because of the policy's effect in this case, e.g. mandatory absences from work. This does not mean that the SEA had, or has, no recourse. There was a two month period prior to the Dube out of state travel when the SEA could have demanded impact bargaining on the effect of the quarantine requirement on the terms and conditions of employment. See, e.g., *Concord Fire*

Fighters Association, IAFF Local 1045 v. City of Concord, PELRB Decision No. 2012-252 (November 13, 2012)(impact bargaining required as to new Rapid Sequence Intubation certification requirement for firefighter paramedics); *Derry Police Patrolmen's Association, NEPBA Local 38 v. Town of Derry*, PELRB Decision No. 2011-278 (November 8, 2011)(impact bargaining effect of installation of GPS devices in police cruisers); *Laconia Education Association/NEA-NH v. Laconia School District*, PELRB Decision No. 2008-204 (October 10, 2008)(impact bargaining effect of schedule change); *Conway Administrator's Assoc/Teamsters Local 633 of NH v Conway School District*, PELRB Decision No. 93-33(March 19, 1993)(impact bargaining effect of changes to administrative evaluations). It did not do so, and still has not done so.[1] We recognize that there are references to mandatory bargaining obligations in the grievance paperwork which did not result in bargaining of any type. Presumably this is because of how the SEA has characterized the County's bargaining obligations to date. As already discussed, we understand the SEA has been seeking to compel bargaining on the County's decision to adopt the March 18 policy, and not just the effects of the policy. However, the County has no obligation to bargain the quarantine requirements based on certain out of state travel, as discussed, and this is now settled. Having determined that it was the SEA's obligation to request impact bargaining as to the effect of the two week quarantine requirement on the terms and conditions of employment, and that the SEA has not yet demanded such impact bargaining, we find the evidence is insufficient to prove that the County violated its bargaining obligations as charged.

The remaining issue is whether the mandatory use of accrued personal or sick leave required by the March 18 policy violated the CBA. This issue was grieved, and, in our judgment, was resolved by the County Administrator's grievance decision, which provides:

[1] The County states in its brief that impact bargaining is still an option.

> The County agrees that nothing in Articles 8.1 or 8.2 of the CBA identifies circumstances where an employee is required to use personal or sick leave. Accordingly, the County will modify the Policy so as to eliminate the requirement that employees must use accrued leave during the 14 day mandatory absence from work. Instead, employees who are unable to work because they chose to travel will not be scheduled to work and therefore be in a "no pay" status for the 14 days following their return from travel. The Policy will further provide that employees will have the option of using their personal and sick leave for their scheduled work days during the 14 day period.

See Finding of Fact 7. The March 18 policy, as amended by the County Administrator's decision, eliminated the mandatory paid leave requirement. It provides for "no pay" as the default status for employees like Dube, and it also provides a method by which Dube could convert his quarantine leave to "no pay" leave. The SEA's argument that quarantine leave should be treated as additional paid leave[2] which should be restored to Dube's accrued leave account is not supported by the CBA and is not persuasive. The CBA is silent on how mandatory leave instituted in response to pandemic driven conditions should be treated. Nevertheless, some interim arrangement that does not conflict with express provisions of the CBA is necessary, and we find that the County has established an acceptable approach. After that, as already discussed, we believe this subject matter is appropriate for, and falls within the scope of, impact bargaining.

Accordingly, we find that the County did not breach the CBA or violate RSA 273-A:5, I(a), (e), (h) or (i) as charged. The complaint is dismissed.

So ordered.

March 9, 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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[2] Like, for example, administrative paid leave.