



State of New Hampshire
Public Employee Labor Relations Board

New Hampshire Troopers Association

v.

New Hampshire Department of Safety, Division of State Police

Case G-0097-24
Decision No. 2021-039

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 May 29, 2020 the New Hampshire Troopers Association (NHTA) filed an unfair labor practice complaint with the Public Employee Labor Relations Board (board) against the New Hampshire Department of Safety, Division of State Police (Division). The NHTA claims the Division breached Article 16.5 of the June 6, 2018 to June 30, 2019 Collective Bargaining Agreement (CBA)¹ when the Division refused to provide documents or any other information about Division requests to extend internal investigation deadlines. The NHTA argues that it is entitled to the extension requests to ensure they are supported by "just cause" as specified in Article 16.5. The NHTA relies primarily on the text of Article 16.5, which it contends is clear and unambiguous. However, it has also cited extrinsic evidence, like the prior version of Article

¹ The filing of an unfair labor practice complaint is the last step of the CBA grievance procedure.

16.5 and the statements of two NHTA negotiators involved in bargaining the current version of Article 16.5, as further support for its claim in the event the board finds there are ambiguities which warrant the consideration of such evidence.

The NHTA requests that the board find that the Division has violated 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). As relief, the NHTA requests that the board order the Division to: 1) cease and desist from any further violations of CBA Article 16.5; 2) provide the NHTA with all Article 16.5 requests to extend the duration of an internal investigation; 3) provide the NHTA with an explanation of its "just cause" for all such extension requests; and 4) provide the NHTA with the Commissioner of the Department of Safety's response to all such extension requests; and 5) grant such other and further relief as the board may deem necessary.

The Division denies the charges. The Division maintains that it followed Article 16.5 internal investigation procedures and that it is not obligated to provide the reasons an investigator requires more time to finish an investigation to the NHTA or to the employee under investigation. The Division states that the current version of Article 16.5 establishes a 90 day deadline for internal investigations where previously there was no limitation on the duration of such investigations, emphasizes that the Division is required to submit all extension requests to a third party (Commissioner of the Department of Safety) for approval, and that the "recourse for the [NHTA] with regards to any decision of the Commissioner, is to address it with the Commissioner himself." The Division also argues that its management rights include the right to conduct internal investigations of employee conduct that may result in discipline, that under the

Personnel Rules², documents obtained or generated during an investigation are confidential and are only included in a personnel file in the event of disciplinary action, and that providing the requested information could compromise or lead to interference in a pending investigation. Finally, the Division argues that the NHTA is seeking notification rights that it did not obtain through bargaining, in contrast to, for example, those included in the State Employees Association of NH, SEIU Local 1984 (SEA) contract with various state departments, beginning with the SEA's 2011-2013 CBA. The Division requests that the board dismiss the charge or find that the Division did not commit an unfair labor practice and order such other and further relief as the board deems necessary.

This case was submitted for decision on stipulations and briefs.³ Both parties cite and discuss prior CBAs in their briefs. Although these CBAs were not included in the parties' stipulations, they are published⁴ state records available on the State Division of Personnel website and, in the circumstances, we will take official notice of the earlier NHTA and SEA collective bargaining agreements pursuant to *N.H. Admin. Rules*, Pub 203.03 (d). Additionally, the Division filed a motion to strike paragraphs 23-25 in the NHTA's brief because these three paragraphs incorporate unsworn statements attributed to two NHTA bargaining team members which were not included in the stipulated facts. The Division states that the inclusion of these statements in the NHTA brief is contrary to the parties' agreement to submit the case for decision

² *N.H. Admin. Rules*, Per 1501.04, provides:

Documents Obtained or Generated During the Course of an Investigation. Documents obtained or generated during the course of an investigation involving an employee shall:

- (a) Be confidential;
- (b) Be maintained separately from the employee's agency or division personnel files; and
- (c) Not be placed in the employee's agency or division personnel file unless included as part of a disciplinary action.

³ See PELRB Decision No. 2020-144 (July 10, 2020)(pre-hearing order); Decision No. 2020-153 (July 17, 2020)(parties have agreed to limit case to interpretation of Article 16.5 and are working to finalize agreement to submit case on stipulations and briefs); Decision 2020-200 (September 2, 2020)(approving brief schedule) and Status Reports filed August 21 and September 1, 2020.

⁴ See State Division of Personnel website at http://apps.das.nh.gov/laborrelations/cba_nhta_past.aspx (prior NHTA agreements) and http://apps.das.nh.gov/laborrelations/cba_sea_past.aspx (prior SEA agreements).

on stipulations and briefs and is unfairly prejudicial to the Division because the Division cannot conduct cross-examination or present rebuttal testimony. The Division requests that the board grant the motion to strike or, alternatively, schedule a hearing to receive testimonial evidence.

The NHTA requests that the board deny the motion to strike as irrelevant because the disputed statements are unnecessary since the case can be decided on the clear and unambiguous language in the CBA. Alternatively, to the extent the board determines that extrinsic evidence is needed to address any ambiguity in Article 16.5, the NHTA states that the disputed statements⁵ can be submitted by affidavit or at an evidentiary hearing.

Our order on the pending motion to strike as well as our decision in this case is as follows.

Findings of Fact

1. The Division is a public employer within the meaning of RSA 273-A.
2. The NHTA is the exclusive representative of a Division of State Police bargaining unit comprised of all sworn personnel up to and including the rank of Sergeant pursuant to an October 18, 1990 BOARD 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.*

⁵ The NHTA says the statements were meant as an offer of proof. The parties should note that the board only accepts offers of proof when the witness whose testimony is summarized in the offer is available for cross-examination.

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. Article 16.5 in the NHTA 2007-09 CBA provides:

An employee who is the subject of a disciplinary investigation shall be informed when the disciplinary investigation is complete and of the determination of the investigation.

5. Beginning with the NHTA 2010-2011 CBA, Article 16.5 was changed to provide:

An employee who is the subject of an internal investigation, pursuant to division policy, shall be informed in writing when the investigation is complete and of the determination of the investigation. Internal investigations must be complete within ninety (90) days from the date the internal investigation began. The employer may request extensions every thirty (30) days from the Commissioner based on a showing of just cause as to why the investigation has not been completed. The Commissioner may grant or deny such extensions.

Article 16.5 in the NHTA 2018-19 CBA uses the same language.

6. Article 16.5 in the SEA 2007-2009 CBA provides:

***Disciplinary Investigations:** A unit employee who is the subject of a disciplinary investigation shall be informed in writing when the investigation is complete and of the determination of the investigation.*

7. Article 16.5 in the SEA 2011-2013 CBA provides:

***Investigation of Employees:** Any unit employee who becomes the subject of an administrative investigation conducted by his/her agency shall be afforded, as a minimum, the following rights:*

- a. The agency head or designee shall inform the subject employee in writing within ten (10) calendar days of the date the investigation commences that an investigation of that employee has commenced and the reason(s) for the investigation.*

b. The agency head or designee shall inform the subject employee bi-weekly or more often in writing or by email as to the status of the investigation and the probable date of completion.

....

d. If the investigation results in an exoneration of the subject employee, that employee shall be informed of that result in writing and all reports and documents pertaining to the investigation shall be sealed and stored separately from the employee's personnel records and files.

....

f. For the purposes of this provision, an investigation is defined as an inquiry into an allegation or allegations against a unit employee which, if founded, could possibly result in serious discipline including suspension without pay and dismissal.

....

8. On or about October 23, 2018, the Division opened an internal investigation into the alleged actions of a State Trooper. The investigation was completed in 74 days.

9. On or about December 11, 2019 the Division opened a second internal investigation into allegations of sexual misconduct by the same State Trooper. On or about June 30, 2020 the Division notified the involved Trooper that the investigation had concluded.

10. The Division did not notify the Trooper or the NHTA of any Article 16.5 requests to extend the internal investigation by 30 days.

11. The Division did not notify the Trooper or the NHTA of the just cause for any 30 day extension requests.

12. The Division did not notify the Trooper or the NHTA about the Commissioner's actions on any 30 day extension requests.

13. This case is the first time the NHTA filed a grievance over the Division's failure to provide notices of the kind referenced in Findings of Fact 10-12.

14. The last step of the CBA grievance procedure 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.

Decision and Order

Decision Summary:

The Division did not breach CBA Article 16.5 when it failed to provide any notice or information to the NHTA about any requests to extend the duration of the internal investigation. The NHTA complaint charging that the Division violated RSA 273-A:5, I(a) or (h) is dismissed.

Jurisdiction:

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

Discussion:

Our understanding of Article 16.5 is guided by the following rules of contract interpretation:

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). As reflected in the findings of fact, past bargaining resulted in Article 16.5 "process" language relating to employee investigations which dates to the NHTA 2007-09 CBA, and perhaps earlier. Article 16.5 was updated to its current form beginning with the NHTA 2010-11 CBA. Among other things, the 90 day deadline to complete investigations was added, as was the right of the Division to seek 30 day extensions from the Commissioner for just cause. The first sentence of Article 16.5 provides that "[a]n employee who is the subject of an internal

investigation, pursuant to division policy, shall be informed in writing when the investigation is complete and of the determination of the investigation.” This is the only portion of Article 16.5 which imposes upon the Division an obligation to give notice of anything, and it is limited to the provision of a notice to the employee advising that the investigation is complete and the result. The remaining sentences are new. The second sentence states the internal investigation shall be completed within 90 days, the third sentence provides that the Division may request 30 day extensions of this 90 deadline from the Commissioner of the Department of Safety for just cause, and the last sentence states the Commissioner may grant or deny such extensions.

We find that Article 16.5 is unambiguous and does not require the Division to provide the information demanded by the NHTA. Although Article 16.5 imposes a 90 day period in which internal investigations must be completed, it also permits the Division to extend an investigation beyond 90 days, in 30 day increments. Moreover, a 30 day extension is a matter between the Division and the Commissioner, not between the NHTA, the Division, and the Commissioner. There are no terms which give the NHTA the right to receive and challenge internal investigation extension requests, either at the time they are made or later. This exclusion of the NHTA from the process under which internal investigations may be extended is consistent with the Division’s managerial prerogative, which includes the right to discipline employees and investigate possible employee misconduct. See CBA Article 2, Management Prerogatives (Division’s rights include...[d]irecting and supervising employees...[a]ppointing, promoting, transferring, assigning, demoting, suspending, and discharging employees); RSA 273-A:1, XI (defining “managerial policy within the exclusive prerogative of the public employer”); *Appeal of State*, 138 N.H. 716, 723-24 (1994)(State had no obligation to bargain just cause disciplinary proposal because it primarily affects matters of broad managerial policy).

The NHTA argues that the Division is nevertheless obligated to provide it with all extension requests, as well as Commissioner action on such requests, so the NHTA can “determine if [the extension request] is supported by the ‘just cause’ standard to enforce the integrity of the contract.” The NHTA argues that the authority given to the Commissioner in Article 16.5 may not be exercised in an arbitrary and capricious manner and that “there is not a complete deference to the Commissioner in this regard.” We believe the proper forum for these arguments is the bargaining table. Such oversight was not included within the express terms of the CBA, and we are not persuaded that it should be implied for the reasons urged by the NHTA, particularly given the requirements of *N.H. Admin. Rules, Per 1501.04* pertaining to the confidentiality of documents generated during the course of an employee investigation. This rule applies here, as there are no terms to the contrary in the CBA. See *N.H. Admin. Rules, Per 101.02, Scope*, which provides:

- (a) Unless otherwise specified, these rules shall apply to full time classified state employees.
- (b) In the case of terms and conditions of employment which are negotiated, the provisions of the collective bargaining agreements shall control.

....

As to the pending motion to strike, there is no ambiguity which requires that we consider extrinsic evidence like the statements of the two NHTA bargaining team members at issue, and the motion is therefore moot. Additionally, while we have taken official notice of the prior CBAs discussed in the parties’ briefs, how Article 16.5 is structured in the SEA CBA is not a factor in our decision.

In conclusion, the Division did not violate 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) or

I(h)(to breach a collective bargaining agreement) as charged. The NHTA's complaint is dismissed.

So ordered.

March 22, 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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