State of New Hampshire

Public Employee Labor Relations Board

New Hampshire Troopers Association

v.

New Hampshire Dept. of Safety, Division of State Police

Case G-0097-28
Decision No. 2021-133

Order

The New Hampshire Troopers Association (NHTA) filed an unfair labor practice complaint against the New Hampshire Department of Safety, Division of State Police (State) after the Commissioner denied State Police Sergeant Russell Holmes' request for the return of annual leave and sick leave. According to the NHTA, the Commissioner's decision violates Article 11.9 of the collective bargaining agreement (CBA) and is an unfair labor practice under RSA 273-A:5, I (h).

The State denies the charges. According to the State, Sergeant Holmes' return request was submitted and processed under RSA 21-I:43-a and RSA 106-B:18. The State contends that pursuant to these statutory provisions, whether a return of leave request is approved is a question reserved exclusively to the Commissioner, and the Commissioner's decision to deny Sergeant Holmes' return request is not subject to review by this board. The State contends that the only bargained for provision in CBA Article 11.9 is the requirement that "[t]he Commissioner shall respond (to the return request) within 60 days," which is not an issue in this case.

Following the pre-hearing conference the board granted the parties' joint motion to bifurcate requesting that the board first determine whether it has authority to review the Commissioner's decision and thereafter hold an evidentiary hearing on the merits of the complaint if necessary. The parties submitted stipulations, exhibits as well as briefs, and our decision is as follows.

Findings of Fact

1. The New Hampshire Department of Safety, Division of State Police, is a public employer within the meaning of RSA 273-A.

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 XI, Sick Leave, provides:

....

11.9. *In accordance with RSA 21-I:43-a employees may submit a letter directly to the Commissioner with a copy to the Director requesting the return of their annual and sick leave back due to a line of duty injury. The Commissioner shall respond within 60 calendar days.*

4. RSA 21-I:43-a, Compensation for State Employees Injured in Line of Duty, provides:

> Any injury received by any state employee who is injured in the line of duty by a hostile act, or by an act caused by another during the performance of duties which are considered dangerous in nature, that requires the employee to be hospitalized or renders the employee temporarily unable to perform the duties of his or her position shall not be charged against annual leave or sick leave for the time lost due to the injury. During such time, the employee shall remain on the active payroll. In this event, no employee shall be terminated from state service until he or she has applied for disability retirement and a final decision on the application is made by the board of trustees of the New Hampshire retirement system and appeals of such decision, if any, are finalized; provided, that the employee shall make such application within 18 months of the injury contemplated by this section. The executive head of the employee's agency shall make the determination as to whether an injury is in the line of duty and due to a hostile or overt act, or an act caused by another during the performance of duties which are considered dangerous in nature, and, after

approval by the governor and council, the determination shall be final. The employee's name and details of the injury shall be exempt from public disclosure pursuant to RSA 91-A:5, IV. During the time in which the injured employee remains on active payroll at full base salary pursuant to this section, his or her state compensation shall not be offset by state workers' compensation payments and he or she shall not receive state workers' compensation payments to supplement his or her full base salary. Nothing in this section shall prohibit medical payments or final settlements.

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

14.1. *The purpose of this Article is to provide a mutually acceptable procedure for adjusting grievances and disputes arising with respect to interpretation or application of any provision of this Agreement.*

.....

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.*

6. On or about June 4, 2020, Sergeant Holmes submitted an inter-department communication to the Commissioner summarizing the events of February 12, 2020, when his cruiser was struck from behind by another vehicle while he was waiting to make a left hand turn on Route 28 in Alton. He was out of work from February 12, 2020 to June 5, 2020, and he used 218.37 hours of sick leave and 59.18 hours of annual leave. In the communication Sergeant Holmes states that "[i]n accordance with RSA 21-I:43-a, I am respectfully requesting the return of sick leave and annual leave I utilized while out of work, due to a line of duty injury." See Stipulated Exhibit 4.

7. By inter-department communication dated September 18, 2020, Sergeant Holmes provided the Commissioner with additional information in support of his return of leave request. See Stipulated Exhibit 5. This communication includes a citation to RSA 106-B:18, Line of Duty Injury, which provides:

> Any injury, which is due to a hostile or overt act or an act caused by another during the performance of duties which are considered dangerous in nature, received by any state police employee while on assignment, patrol, or duty that requires that the employee be hospitalized or to the extent that the employee is unable to perform normal or routine duties shall not be charged against earned sick leave or annual leave, and during such time the employee shall remain on the payroll. The commissioner of safety shall make the final determination as to whether the injury received is in line of duty and due to a hostile or overt act or an act caused by another during the performance of duties which are considered dangerous in nature, and the commissioner's decision is final, subject to approval of governor and council.

8. On November 13, 2020, the State notified Sergeant Holmes that the Commissioner had denied his return of leave request. See Stipulated Exhibit 6.

9. On February 23, 2021, the State denied the NHTA's step 3 grievance over the Commissioner's decision. See Stipulated Exhibit 9. The NHTA filed this unfair labor practice complaint on March 3, 2021.

Decision and Order

Decision Summary:

The parties did not incorporate by reference the text of RSA 21-I:43-a (or RSA 106-B:18) into the CBA. Therefore, the alleged violation of this statute cannot serve as the basis for an RSA 273-A:5, I (h) breach of collective bargaining agreement claim. Since the board does not otherwise have jurisdiction to review the substantive decisions the Commissioner makes under RSA 21-I:43-a (or RSA 106-B:18), 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:

We interpret the 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).

According to the NHTA, RSA 21-I:43-a has been incorporated into the parties' contractual agreement because the statute is clearly referenced in CBA Article 11.9, and cites *Penta Corp. v. Town of Newport,* No. 212-2015-CV-00011 (Merrimack County Superior Court)(April 23, 2018) as authority for this proposition.

Penta involved upgrades to Newport's wastewater treatment facility and was decided, in relevant part, under Article 2 of the Uniform Commercial Code, adopted and enacted in New Hampshire as RSA 382-A. *Penta,* in turn, cites *Std. Bent Glass Corp. v. Glass Robots Oy,* 333 F.3d 440, 447 (3rd Cir. 2003). Standard Bent Glass, a Pennsylvania company, paid the full purchase price for a glass fabricating system sold by Glassrobots, a Finnish corporation. When Standard Bent Glass later discovered some equipment defects, it filed suit in state court. Glassrobots moved to dismiss, claiming the parties' contract included an arbitration provision which covered the claims in the lawsuit. The issue was whether an arbitration clause had in fact been incorporated in the contract. The court applied UCC §2-207 to "ascertain the terms of the agreement," and described the requirements for incorporation by reference as follows:

> The seller's terms may include documents or provisions incorporated by reference into the main agreement. Traditional documents incorporated by reference into contracts include accepted industry guidelines or parallel agreements between the parties. Incorporation by reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and the incorporation of the document will not result in surprise or hardship.

The court concluded that the arbitration clause was incorporated by reference into the parties' agreement, and explained that:

> Here, on February 2, Glassrobots sent its standard sales agreement to Standard Bent Glass. That agreement contained references to Orgalime S92, which included the arbitration clause, as well as an explicit reference to arbitration as the method of dispute resolution. First, the cover letter to the agreement referred to the enclosure of certain appendices, including Orgalime S92. Second, section 6.2 provided that, if the parties could not agree to a completion date, "the matter shall be submitted to arbitration as set out later in this Agreement." Third, section 11.1 expressed that "[a]s to the other conditions shall apply Orgalime S92 General Conditions for the Supply of Mechanical, Electrical and Associated Electronic Products." Finally, section 13 listed Orgalime S92 as one of the appendices to the agreement.
>
> Although proposing five changes to the standard sales agreement, Standard Bent Glass did not alter or respond to any of the references to the Orgalime S92 arbitration clause. On February 5, Glassrobots provided Standard Bent Glass with a revised sales agreement that included the same four references. Standard Bent Glass should have advised Glassrobots it had not received Orgalime S92, if that were the case. Its failure to object to the arbitration terms of Orgalime S92, absent surprise or hardship, makes those terms part of the contractual agreement.
>
> Even in a commercial transaction, a provision will not be incorporated by reference if it would result in surprise or hardship to the party against whom enforcement is sought. Standard Bent Glass has not demonstrated surprise nor hardship. According to the Karisola affidavit, unrefuted by Standard Bent Glass, the Orgalime S92 arbitration provision accords with industry norms. The Orgalime S92 general conditions are frequently used in international trade and the submission of disputes to arbitration is common industry practice.

Std. Bent Glass Corp. at 447-48.

We are not convinced that the law of the UCC, as explained in *Standard Bent Glass*, applies to the current case. Moreover, even if it did, the reasoning in *Standard Bent Glass* does not lead to the conclusion that a reference to a statute like RSA 21-I:43-a in the parties' collective bargaining agreement is sufficient, by itself, to fully incorporate the statute into the contract.

While neither party cited any New Hampshire Supreme Court cases addressing the question, there is authority from other jurisdictions recognizing the very reasonable requirement that the incorporating contract (the CBA) must include clear language establishing that the purpose of a reference to extrinsic material (RSA 21-I:43-a) is to incorporate the referenced material into the collective bargaining agreement. See *Northrup Grumman Info. Tech., Inc. v.*

United States, 535 F.3d 1339 (Fed. Cir. 2008). *Northrup* is a government contract case involving Northrup's lease of software to the United States Army. In deciding that a "Letter of Essential Need" was not part of the contract as claimed by Northrup, the court stated that the "incorporating contract must use language that is express and clear, so as to leave no ambiguity about the identity of the document being referenced, *nor any reasonable doubt about the fact that the referenced document is being incorporated in the contract.*" *Id.* at 1343-45 (emphasis added). This approach to questions of incorporation by reference is both logical and reasonable, and has been followed in several subsequent decisions applying Massachusetts contract law, *NSTAR Elec. Co. v. Dep't of Pub. Utils.*, 968 N.E.2d 895 (Mass. 2012) and *Awuah v. Coverall N. Am., Inc.,* 703 F.3d 36 (1st Cir. 2012)(applying Massachusetts law).

In *NSTAR*, the incorporation by reference dispute involved whether a settlement agreement between NSTAR Electric Company and the Department of Public Utilities included any of its exhibits. The court cited *Northrup* with approval, stating the "'language used...must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g. as background law or negotiating history).'" *NSTAR Elec. Co. v. Dep't of Pub. Utils.*, 968 N.E.2d at 905 (citations omitted; parenthetical in original).

Awuah involved a dispute over whether arbitration clauses contained in franchise agreements had been incorporated by reference in related "Consent to Transfer Agreements" or "Guaranties to Coverall Janitorial Franchise Agreements." While these agreements did not themselves contain arbitration clauses, they incorporated by reference obligations under Franchise Agreements that did contain such clauses. See *Awuah v. Coverall N. Am., Inc.,* 703 F.3d at 38.

Based upon the principles governing incorporation by reference reviewed in *Northrup, NSTAR, and Awuah,* we do not agree with the NHTA's assertion that the reference to the statute in CBA Article 11.9 is enough to incorporate and establish the text of the statute as part of the CBA. CBA Article 11.9 mentions RSA 21-I:43-a because Article 11.9 establishes how bargaining unit employees should make a return of leave request (*"a letter directly to the Commissioner with a copy to the Director requesting the return of their annual and sick leave back due to a line of duty injury")* and also sets a deadline for the Commissioner's decision (60 days). While no "magic terms" like the "traditional language of 'incorporating by reference'" are required[1], here there is no language which clearly communicates that the purpose of the reference to RSA 21-I:43-a is the incorporation of this statutory provision into the CBA, and not just the provision of background or context. Therefore, since the complaint in this case alleges a violation of RSA 21-I:43-a, but not a violation of the CBA, the NHTA cannot prevail on its claim that the State committed an unfair labor practice under RSA 273-A:5, I (h)(to breach a collective bargaining agreement) when Sergeant Holmes' return of leave request was denied. The complaint is dismissed.

So ordered.

July 29, 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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[1] *Awuah v. Coverall N. Am., Inc.*, 703 F.3d at 43.