State of New Hampshire

Public Employee Labor Relations Board

New Hampshire Troopers Association

v.

NH Dept. of Safety – Division of State Police

Case G-0097-29
Decision No. 2022-016

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
Jessica A. King, Esq., Office of the Attorney General
Concord, New Hampshire for the Respondent

Background:

On June 14, 2021, the New Hampshire Troopers Association (NHTA) filed an unfair labor practice complaint with the Public Employee Labor Relations Board (PELRB). The NHTA charges that the Department of Safety - Division of State Police (Division) violated an established past practice pursuant to which Trooper First Class Richard Perreault (TFC Perreault) was entitled to receive four hours of overtime pay for attending an off-duty administrative hearing on February 18, 2021. The NHTA claims the Division has violated RSA 273-A:5, I (h)(to breach a collective bargaining agreement) and requests an order: 1) finding that the Division has committed an unfair labor practice; 2) directing the Division to cease and desist from any further violations; and 3) requiring the Division to pay TFC Perreault four hours for his attendance at the February 18, 2021 off-duty administrative hearing.

The Division denies the charges. The Division argues there is not a binding past practice as claimed and TFC Perrault was properly paid two hours of overtime pursuant to CBA Article 7.6. The Division requests that the PELRB deny the NHTA's request for relief and dismiss the complaint on this basis.

The undersigned held a hearing[1] on November 23, 2021 and both parties filed post-hearing briefs by the January 14, 2022 deadline agreed to at the close of evidence.

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 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. The grievance procedure in the parties' 2018-19 collective bargaining agreement (CBA)(Joint Ex. 1) is set forth in Article 14. There are four steps to the grievance procedure, and it includes the following sub-sections:

> **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***
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> **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.*

4. CBA Article VII, Overtime, includes the following sub-sections:

> 7.1. Employees shall be entitled to time and one-half of compensation for each hour of overtime worked.

[1] The July 28, 2021 hearing date was continued on the Division's motion with the NHTA's assent.

7.2. The following provision constitutes the understanding of the parties with respect to defining "time worked" for the purpose of determining the number of hours required for overtime compensation eligibility.

"Time worked" shall include all hours actually worked and all hours on approved leave status including bona fide meal periods, bona fide rest periods and absences due to a compensable worker's compensation injury except unscheduled sick leave that results in the shift being filled at overtime and any time worked for which specific compensation provisions have been established elsewhere in the Agreement.

a) For the purpose of this provision, 'unscheduled sick leave', with the exception of bereavement leave, shall be defined as any sick leave taken with less than three (3) work days' notice.

7.3. Employees called back to work without prior notice on the same day after once leaving work or before the next regular starting time, shall be guaranteed a minimum of not less than four (4) hours compensation.

7.4. Employees called back to work pursuant to 7.3, shall have the hours worked computed from portal-to-portal.

7.5. Standby: Any employee who is required by the Employer to be available for immediate return to duty, under conditions which do not allow the employee reasonable use of the time waiting to be called back to duty for his or her own purposes, shall be deemed to be in standby status. Time in standby status shall be considered time worked for regular compensation and overtime compensation purposes.

7.6. Any employee who is not on duty and is required by the employer to appear in court or at an administrative hearing on behalf of the Employer shall be compensated for all hours worked at time and one half the regular rate and shall be granted a minimum of four (4) hours compensation. The employee shall be paid portal-to-portal. Employees scheduled to appear in a single court but at times separated by at least four (4) hours shall be entitled to the four (4) hour minimum for each scheduled time, provided that the two appearances do not involve the same case. If an employee is late for court and the case has already been disposed of by the time of his or her arrival, no compensation shall be paid. Witness fees paid to employees under these circumstances shall become the property of the Employer. Court/administrative hearings for employees who are not on duty shall be compensated with a four (4) hour minimum when the minimum does not cover duty hours. Employees shall not be entitled to two (2) four (4) hour minimums when two court appearances overlap but shall be entitled for hour for hour compensation over the four (4) hour minimum. (Emphasis added).

5. Slightly different versions of the first and sixth sentences in Article 7.6 of the 2018-19 CBA were included in the 2001-03 CBA. Changes were made in the 2007-09 CBA, and have remained the same since then, as reflected in the table below. See Joint Ex. 13[2]:

CBA Term	First Sentence	Last Sentence
2001-03	Any employee who is not on duty and is required by the Employer to appear in court or at an administrative hearing on behalf of the Employer shall be compensated for all hours worked at time and one-half the regular rate and shall be guaranteed a minimum of 4 hours compensation.	Court/administrative hearings for employees who are not on duty shall only be compensated with a 4 hour minimum when the minimum does not cover on duty hours.
2005-07	No change	No change
2007-09	…shall be ~~guaranteed~~ *granted* a minimum of 4 hours compensation.	Court/administrative hearings for employees who are not on duty shall ~~only~~ be compensated with a 4 hour minimum when the minimum does not cover on duty hours.
2010-11	No change	No change
2011-13	No change	No change
2013-15	No change	No change
2015-17	No change	No change
2018-19	No change	No change

6. During his off-duty time on February 18, 2021, TFC Perreault attended an administrative hearing (telephonic hearing with the Bureau of Hearings at the Department of Safety) from 10:30-11:00. He was off-duty from 11:00-12:30, and he then worked duty hours from 12:30-21:00. See Joint Ex. 2.

7. TFC Perreault entered 4 hours of "Witness Testify OT" on his timecard for his off-duty appearance at the administrative hearing on February 18, 2021. After review, the Division

[2] The parties filed Joint Ex. 13 post-hearing per my request for an exhibit containing the prior versions of CBA Article 7.6.

reduced TFC Perreault's Witness Testify OT entry by two hours because the CBA Article 7.6 four hour minimum covered his duty time by that amount. See Joint Exhibits 2-11.

8. TFC Perreault and the NHTA challenged the Division's actions under the grievance procedure, arguing that TFC Perrault's timecard entry of four hours Witness Testify OT was "backed up by years of past practice and that although this particular situation does not happen often it is the widely accepted interpretation of the contract within the State Police." See Joint Ex. 6.

9. The Division denied the grievance at all steps, and the NHTA subsequently filed this unfair labor practice complaint within the time limits prescribed by RSA 273-A:6, VII.

10. The NHTA submitted three exhibits with the following examples of unit employees receiving the full 4 hour minimum for Witness Testify OT for off-duty testimony in circumstances like TFC Perreault's, even though the 4 hour minimum covered a portion of the employee's duty hours:

Date	Exhibit	Detail
10/22/2018	Union Ex. A	TFC Livingstone: 4 Hours off-duty Witness Testify Overtime: 12:45-13:00. Duty hours: 14:00-22:30. Result: 4 hour minimum covers duty hours by 2.75 hours.
2/22/2019	Union Ex. B	TFC Livingstone: 4 Hours off-duty Witness Testify Overtime: 10:30-12:00. Duty hours: 14:00-22:30. Result: 4 hour minimum covers duty hours by .5 hours.
6/2/2021	Union Ex. C	TFC Chapdelaine: 4 Hours off-duty Witness Testify Overtime: 12:14-13:21. Duty hours: 16:00-00:00. Result: 4 hour minimum covers duty hours by .25 hours.

11. TFC Livingstone (Troop D) has been a Trooper for eleven years and a union representative for the last three years. He "messaged" his fellow Troopers several times seeking to corroborate the past practice claim. He spoke with approximately five Troopers whom he

testified acknowledged the claimed past practice but, to paraphrase, "they did not want their names put forward on anything like this." TFC Livingstone testified that these Troopers did not want to create ripples and did not want to testify. None of these Troopers testified nor were their names submitted into the record. Additionally, there was no testimony or exhibits identifying specific instances in which these other Troopers received four hours of Witness Testify OT according to the claimed past practice.

12. TFC Livingstone also provided some testimony that he always received a four hour minimum payment for canine callouts, even when he returned to off-duty status before his regular duty shift. However, there was no evidence that such payments were issued pursuant to CBA Article 7.6 or the claimed Witness Testify OT past practice in this case.

13. TFC Chapdelaine (Troop F) testified about NHTA Ex. C, and confirmed he had received the June 2, 2021 four hour Witness Testify OT payment. He also testified that he asked TFC Favreau, the court officer for Troop F, about how Witness Testify OT worked, and she confirmed the claimed Witness Testify OT past practice. TFC Favreau did not testify at the hearing, and there was no testimony or exhibit providing any detail about the basis for TFC Favreau's statement to TFC Chapdelaine.

14. Steven Aubertine has worked for the Department of Safety as the payroll supervisor since July, 2021. He oversees three payroll officers, including Samantha Chase, who has been the payroll officer responsible for the State Police payroll since November 22, 2019. Prior to this hearing, Aubertine researched Trooper timecards corresponding to approximately 90 entries on a payroll report listing "Witness Testify OT" time card entries of less than four hours for the period from July, 2017 to July of 2021. A version of this report was submitted at hearing as State Exhibit 1.

15. The probative value of State Exhibit 1 is limited. It does not show the time of the off-duty court/administrative hearing and the employee's duty time. It also does not include a listing of payments for four hours for Witness Testify OT, even though such payments were relatively common.

16. Aubertine noted that on the timecards he reviewed, Witness Testify OT hours claimed were reduced by any portion of the four hour minimum which covered duty time. However, it appears this review did not encompass situations where a Trooper had first returned to off-duty status before the commencement of duty time.

17. There was discussion at the hearing which indicated a report showing payments of four hours for Witness Testify OT could have been generated, but this was apparently not done because it would have been unduly demanding on Division resources.

18. Aubertine also testified that since he was hired in July of 2021, he has rejected approximately six time card entries claiming 4 hours for Witness Testimony OT in circumstances like TFC Perreault's.

Decision and Order

Decision Summary:

There is insufficient evidence to establish the claimed past practice, and accordingly 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. It has jurisdiction over the NHTA's breach of collective bargaining agreement claim since the last step of the grievance procedure is not final and binding. See, e.g., *Appeal of Silverstein,* 163 N.H. 192 (2012). In fact, the CBA grievance procedure specifically recognizes the NHTA's right to file this unfair labor practice complaint.

Discussion:

In this case, the NHTA agrees that the Division's changes to TFC Perreault's February 18, 2021 time card were generally in accord with CBA Article 7.6, and the off-duty four hour Witness Testify OT minimum ordinarily should be reduced to the extent it overlaps with duty time. However, the NHTA maintains a binding past practice has established an exception in cases where a Trooper has returned to off-duty status before the Trooper's duty time begins. In this situation, the NHTA contends past practice mandates that the Trooper receive the full four hours of Witness Testify OT, regardless of whether the four hour minimum overlaps with duty time.

The court addressed a past practice claim in *Appeal of New Hampshire Department of Corrections,* 164 N.H. 307 (2012), and provided the following overview of the relevant law:

> "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 at 309. Board decisions recognize that past practice is not mere prior conduct but is something of sufficient duration that is a "consistent, repeated, mutually understood and accepted practice which is binding upon the parties even though not contained within the parties' written collective bargaining agreement."

Exeter Police Association v Town of Exeter, Case No. P-0753-17, PELRB Decision No. 2009-183. "In general, resort to past practice evidence is appropriate to clarify ambiguity" and to "establish a binding term and condition in situations where the collective bargaining agreement is silent..." *Derry Education Association/NEA-NH v. Derry Cooperative School District #1,* PELRB Decision No. 2009-152 (citation omitted).

In *Appeal of New Hampshire Department of Safety,* 155 N.H. 201 (2007), the court affirmed the PELRB's decision that the NHTA had established a past practice with respect to the calculation of leave use. The court summarized the practice, and the Division's unilateral change, as follows:

> Prior to July 1, 2004, the Division deducted a full day of leave from a trooper's accumulated leave total at a rate of eight hours for each day of annual or sick leave taken, regardless of whether the employee worked a shift of eight, eight and one-half, or nine hours, or longer. Beginning July 1, 2004, however, the Division deducted the actual number of hours in a particular trooper's shift from that trooper's accumulated leave totals for each day of annual or sick leave taken. For example, as of July 1, 2004, if a road trooper worked nine-hour shifts at the time of taking an annual leave day, the Division deducted nine hours of annual leave from the trooper's accumulated annual leave total.

Id. at 205. The court concluded that "the language used by the parties in the CBA with regard to the manner of calculating annual and sick leave is inherently ambiguous..." and "the Board was justified in examining the parties' past practices and other extrinsic evidence to discern the intent of the parties." *Id.* at 208. The court's decision included extensive excerpts from the Board's findings of fact, such as the following:

> [P]rior to July 1, 2004, in order to claim a full day of annual and/or sick leave, a trooper working a shift of more than eight hours completed an annual/sick leave request form and indicated eight hours of leave, completed a weekly duty report and indicated the actual number of hours on annual/sick leave for each day, and the Department of Safety, Division of Administration (Administration Division) deducted only eight hours of annual/sick leave from the trooper's earned leave time. The Board found that this was common practice "[f]rom at least 1997 and, more probably than not since 1986." The Board heard testimony that all levels of authority, including management and supervisory employees, administrative staff, and troopers were aware of the above methods of recording and calculating and that, in some instances, supervisors directly instructed new troopers as to how to reconcile the leave request forms with the weekly duty reports.

Appeal of New Hampshire Department of Safety, 155 N.H. at 209. In affirming the Board's decision, the court stated:

> Even if we were to hold that the language of the CBA is unambiguous (as was true in Port Huron), we believe that Port Huron would cut against the Division. The Board found that both parties had knowledge that the pre-July 1, 2004 practice for leave utilization existed and that they had demonstrated an acceptance of that practice by their respective actions over a protracted period of time. As already noted, our review of the record supports these findings. We believe that this widely acknowledged and mutually accepted past practice would serve to amend any perceived unambiguous language of the CBA.

Id. at 211 (parenthetical in original)(citing *Port Huron Education Ass'n v. Port Huron Area School District*, 452 Mich. 309, 550 N.W.2d 228 (1996)).

The factual basis for the Board's decision in *Appeal of New Hampshire Department of Safety* provides a guide to the level of evidence required to prove a claimed past practice. I find that under *Appeal of New Hampshire Department of Safety,* and the other authorities discussed, the evidence in this case is insufficient to prove the claimed past practice. The relevant off-duty four hour minimum language in CBA Article 7.6 has remained unchanged in any legally significant way with respect to the issue in this case for nearly twenty years. However, the NHTA's claimed past practice was only supported by two documented prior examples dating to 2018 and 2019, both for the same Trooper, and one subsequent documented example dating to June of 2021. See Union Exhibits A, B and C. The NHTA also alluded to other incidents of the claimed Witness Testify OT past practices at hearing. However, the involved Troopers did not testify, were not identified (with the exception of TFC Favreau), and the evidence about these other examples was not sufficiently developed.

The fact that no evidence of the past practice covering the years from 2001 to 2017 was submitted is not, by itself, fatal to the NHTA's claim, since a past practice could conceivably have developed over the last three and one-half years. However, the absence of any examples during this prior 16 year period is a weakness in the NHTA's claim. There is also a significant

and clear contrast between the evidence offered in support of the claimed past practice in this case and the record developed in support of the claimed past practice in *Appeal of New Hampshire Department of Safety,* 155 N.H. 201 (2007). This is true even when the differences between the two cases are taken into account, e.g., the fact that Troopers returning to off-duty status before commencement of their regular duty time may be a relatively infrequent occurrence when compared to the use of leave time at issue in *Appeal of New Hampshire Department of Safety*.

In conclusion, the evidence adduced by the NHTA does not satisfy the "regularity and frequency requirement" cited in *Appeal of New Hampshire Department of Corrections,* 164 N.H. at 309. The NHTA has not proven that payment of the full four hour minimum for off-duty Witness Testify OT, without reduction for any portion of the four hour minimum that covers duty time, is a regular and long-standing practice in any situation. There was scant evidence that the Division conducted itself in a manner that evidenced an acceptance of the claimed practice over a protracted period of time. Accordingly, based on the record for decision developed in this case and the legal requirements of a binding past practice as per the cited authorities, the NHTA's requests for relief are denied, and the complaint is dismissed.

So ordered.

Date: 1/28/2022

Douglas L. Ingersoll, Esq.
Executive Director/Presiding Officer

Distribution: Marc G. Beaudoin, Esq.
Jessica A. King, Esq.
Marta A. Modigliani, Esq.