State of New Hampshire

Public Employee Labor Relations Board

State Employees' Association of NH, Inc., SEIU Local 1984

v.

State of New Hampshire Veterans Home

Case No. G-0305-1
Decision No. 2022-024

Appearances: Sean Bolton, Field Representative/Negotiator and
Gary Snyder, Esq., General Counsel
State Employees' Association of NH, Inc.
Concord, New Hampshire for the Complainant

Jessica A. King, Esq., Assistant Attorney General
Transportation & Construction Bureau
New Hampshire Department of Justice
Concord, New Hampshire for the Respondent

Background:

On August 9, 2021, the State Employees' Association of NH, Inc., SEIU Local 1984 (SEA) filed an unfair labor practice complaint under the Public Employee Labor Relations Act because the State Veterans Home refused to implement a February 10, 2021 Opinion and Award issued by arbitrator James S. Cooper. The award ordered the reinstatement of Debra Matteau, whom the State terminated on December 2, 2019, as well as other relief.

The SEA claims the State has rendered the CBA grievance procedure unworkable and moot, and has breached the CBA by "refusing to comply with a final and binding arbitration decision pursuant to Article 14.5..." The SEA cites Per 101.02 (b)(stating negotiated terms and conditions are controlling) and (d)(stating disputes over alleged violation, misapplication or misinterpretation of the CBA shall be resolved via the grievance procedure) to rebut the State's

contention that the award is contrary to existing regulation, and contends that it is entitled to enforcement of the arbitrator's Opinion and Award under *Appeal of Merrimack County*, 156 N.H. 35 (2007).

The SEA charges that the State's actions constitute violations of RSA 273-A:5, I (g)(to fail to comply with this chapter or any rule adopted under this chapter); (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 entered into by the public employer making or adopting such law, regulation or rule). As relief, the SEA requests that the PELRB find that the State committed an unfair labor practice and order the State to comply with the arbitrator's award.

The State denies the charges. In general, the State criticizes the arbitrator's interpretation and application of CBA Article 11.8, which sets out the CBA Short Term Disability Income Protection ("STDIP" or the "Plan").[1] The State believes that by ordering the reinstatement of Matteau, the arbitrator created a job protection program which is not provided for in the CBA, in violation of CBA Article 14.5.2. The State asserts that the "Arbitrator went above and beyond the powers granted to him by the parties' collective bargaining agreement by adding to, subtracting from or otherwise altering, changing, or modifying the terms of the agreement, in violation of CBA Article 14.5.2," and "when the arbitrator created an additional job protection program not outlined in the express terms of the agreement, he acted outside his authority conferred in the contract." See State's Answer to SEA's complaint. In its brief, the State contends the award is not enforceable because the arbitrator "exceeded the scope of his authority under Article 14.5" and because the award is "contrary to existing law or regulation." In support of the latter argument, the State cites several sections of the personnel rules: Per 1003, Removal

[1] As noted in the arbitrator's Opinion and Award, the Plan is administered by the STDIP administrator, a third party administrator, and not the head of the Veteran's Home or the State personnel administrator.

for Non-Disciplinary Reasons; Per 1202.02, relating to approval for leave requests; and Per 1205.02, relating to absence without pay.

During the pre-hearing conference the parties requested, and the hearing officer approved, a request to submit this case for decision on stipulations, exhibits, and briefs. See pre-hearing order, PELRB Decision No. 2021-185 (November 5, 2021). All filings have been received, and our decision is as follows.

Findings of Fact

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

2. The SEA is the certified bargaining representative for certain state employees working at the New Hampshire Veteran's Home, including Debra Matteau.

3. The parties submitted the following exhibits into the PELRB record:

Joint Ex. 1:	Arbitration Opinion and Award dated February 10, 2021;
Joint Ex. 2:	State Motion to Reconsider Arbitration Decision filed in the arbitral proceedings;
Joint Ex. 3:	Sea Objection to State Motion to Reconsider Arbitration Decision;
Joint Ex. 4:	Arbitrator's March 15, 2021 Supplemental Decision denying the State's Motion to Reconsider; and
Joint Ex. 5:	2018-19 Collective Bargaining Agreement.

4. The parties' stipulation includes the following:

   a. The nature of the Matteau grievance concerned the non-disciplinary removal of Matteau from her position at the Veteran's Home on December 2, 2019, with regard to her rights under CBA Article 11.8 regarding the Plan.

   b. The SEA filed a grievance at Step IV in accordance with the Parties' grievance procedures on February 24, 2020.

   c. The matter was heard by arbitrator James Cooper, who heard the parties' arguments on February 1, 2021.

5. The arbitrator described the issue submitted to him as follows:

1) Did the State violate the Agreement when it terminated Debra Matteau on December 2, 2019, for non-disciplinary reasons?

2) If not (sic), what shall the remedy be?

6. The 2018-19 CBA includes the following articles:

Article XI
SICK LEAVE

....

11.8. Short Term Disability Income Protection: Effective 1/1/2019 the Employer agrees to provide Short Term Disability Income Protection (STDIP) benefits providing replacement income for full-time Unit Employees who through non-occupational Illness or Injury become Totally Disabled and are unable to perform the duties of their occupation. Specific conditions and benefits are in accordance with Appendix H.

a. The employees' accrued leave may be used by the employee to offset any reduction of the weekly benefit up to 100% of Weekly Base Earnings.

b. An employee who is absent under this provision shall continue to have the employers share of health and dental benefits paid, and shall not have seniority, increment, longevity or leave accrual dates changed. Actual leave accrual will resume on the employee's return to work.

11.8.1. The Employer is authorized to provide additional sick leave to an employee once all benefits approved under short term disability income protection plan have been exhausted under the following conditions:

a. A request for additional sick leave shall be forwarded to the Bureau of Employee Relations by the employee or the Employer stating the reason(s) for the request and the amount of additional sick leave requested.

b. The Bureau of Employee Relations shall request a recommendation from the Employer of the requesting employee/agency. The recommendation shall be made known only to those who will act upon the request.

c. The request and recommendation shall be forwarded to the Labor Management Committee established by Article IV, Section 4.2, who shall approve or deny the request in whole or in part.

d. The response to the request shall be transmitted to the requester by the Bureau of Employee Relations.

e. If the request is approved, the Manager of Employee Relations shall direct the Employer to solicit donations from employees within the requesting employee's agency who wish to contribute unused sick leave up to the amount

of the authorization. Contributed sick leave shall not be counted against time accumulations as provided in Article 11.1. If the request is not approved, no further action shall be taken by the parties or by the requesting employee or Employer on that request.

f. No request shall be approved for more than ninety (90) days, although nothing shall prohibit additional requests.

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Article XIV
GRIEVANCE PROCEDURE

14.1. Purpose: 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.

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14.5. Grievance Procedure - ***STEP IV – ARBITRATION***

14.5.1. If subsequent to the agency head's decision the Association feels that further review is justified a petition may be submitted to the Labor Management Committee for the appointment of an arbitrator as provided in 14.5.4. or for the Labor Management Committee to schedule a meeting to review the petition. Said petition shall be submitted within fifteen (15) working days from the date the employee or Steward was notified of the decision. A copy of the petition must be sent to the Employer at the same time. A decision shall be made by the LMC within 30 days after reviewing a petition. The employee, steward and agency head shall be notified of the decision in writing within 30 days.

14.5.2. Arbitrator's Powers: The arbitrator shall have no power to render a decision that will add to, subtract from or alter, change or modify the terms of this Agreement, and his/her power shall be limited to interpretation or application of the express terms of this Agreement, and all other matters shall be excluded from arbitration. To the extent that a matter is properly before an arbitrator in accordance with this provision, the arbitrator's decision thereon shall be final and binding providing it is not contrary to existing law or regulation nor requires an appropriation of additional funds, in either of which case it will be advisory in nature. The Parties further agree that questions of arbitrability are proper issues for the arbitrator to decide.

.....

7. The following State personnel rules are referenced in the arbitrator's Opinion and Award:

Per 101.02 Scope.

(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.

(c) In accordance with the provisions of RSA 21-I:43, the director shall have sole authority, subject to the appeals process established under RSA 21-I, to adopt and interpret these rules.

(d) In accordance with the provisions of RSA 273-A:4, disputes arising out of an alleged violation, misapplication or misinterpretation of any provision of a collective bargaining agreement shall be resolved in accordance with the grievance procedures contained therein.

Per 1205.02 Unpaid Leave.

(a) Upon written application to, and written approval from, the appointing authority, a permanent employee may be granted a continuous leave of absence without pay for a period not to exceed 3 months.

(b) Leave without pay due to sickness shall not be granted until all of the employee's accumulated sick leave has been exhausted. No annual leave, sick leave, bonus leave or floating holidays shall be accumulated during a leave of absence without pay.

(c) Extension of leave for additional periods may be granted by the governor and council if recommended by the appointing authority, but the total period shall not exceed 12 months, unless otherwise provided by law or approved by governor and council based upon a detailed rationale and recommendation submitted by the appointing authority to governor and council.

(d) Failure on the part of an employee to report to work without acceptable reason on the next business day following the expiration of the approved leave of absence shall be a cause for termination.

(e) If the position of an employee who has been granted a leave of absence without pay is abolished during the absence, such employee shall not be protected from termination.

8. The following additional personnel rules are referenced in the State's brief:

PART Per 1003 REMOVAL FOR NON-DISCIPLINARY REASONS

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 1202.02 Leave Requests.

(a) The appointing authority shall either approve or reject leave requests.

(b) No employee shall be compensated unless the employee has first obtained approval for leave from the appointing authority.

9. The following excerpts are from Arbitrator's factual narrative:

Debra Matteau worked at the State's Veterans home as an accountant. She applied for and was granted FMLA leave on August 29, 2019. At the same time she applied for Short Term Disability Income Protection ("STDIP" or simply the "Plan") as provided by Article XI, Section 11.8 of the Agreement (parenthetical and quotation marks in original)(footnote omitted). The STDIP administrator granted Matteau short term disability income in accordance with the plan per Appendix H of the Agreement (footnote omitted). According to the Veterans Home letter of December 2, 2019, the following series of events occurred between the Veterans Home, Matteau and her health care provider:

- *On September 10, 2019, the Veterans Home received a letter from Matteau's Healthcare provider stating that she would be out of work for eight weeks from August 27, 2019;*
- *On September 30, 2019, the Healthcare practitioner modified Matteau's expected time out of work to 12 weeks;*
- *On November 14, 2019, the Veteran's HR Coordinator contacted Matteau's by telephone and inquired about her return to work date and that her FMLA leave was about to expire (sic) and further wrote that "[w]e had not been informed of any changes to your medical condition or need for leave by you or your Healthcare Practitioner" (brackets and quotation marks in original).*
- *On November 26, 2019 Matteau's health care provider sent a note to the Veterans Home, however the notice, according to the Agency "did not identify a return to work date or refute the conclusion that you are able to return to full duty and perform your essential occupational duties (footnote omitted).*

On December 2, 2019, when Matteau's entitlement to FMLA expired, the head of the Veterans Home notified her that she was terminated for non-disciplinary reasons. This letter noted the following:

> *Please be assured that your removal from your current position reflects no discredit upon your service. Your personnel file will note that your removal was non-disciplinary.*

After her termination, Matteau's health care provider released her for a return to work on January 2, 2020. The Union grieved and the State denied the grievance stating that upon the expiration of the FMLA, Matteau was no longer on approved leave and was appropriately terminated stating that STDIP was not a form of approved leave; that it only provided income protection while she was an employee. Since she was no longer an employee, the STDIP was no longer available. The Union grieved and this arbitration followed.

See Joint Ex. 1.

10. The following excerpts are from the discussion portion of the arbitrator's Opinion and Award:

Prior to the implementation of the STDIP provision of the Agreement, the parties relied on the Labor Management Committee, as referenced above in Article 11.8.1, to accept or reject requests for extended leave benefits based on [the] voluntary donation of sick leave credits from other employees. The STDIP Plan replaced the Labor Management Committee's role for the first 26 weeks of disability. Also prior to the parties' current Agreement, the State had in place leave regulations particularly Personnel Manual Rule [1205.02] which covered unpaid leave (footnote omitted). Under these rules, subject to approval, an employee could request three months of unpaid leave. However, if a Personnel Rule, such as PER 1205.02, conflicted with a provision of a collective bargaining agreement, the terms of that agreement prevails (footnote omitted)..

....

The State's personnel administrator stated that if the employee was no longer on an approved leave per Rule [1205.02], then the State was entitled to terminate the employee for non-disciplinary reasons and they would lose their right to the income under the STDIP because they were no longer an employee. In this case, the State's [personnel] administrator explained that when Debra Matteau exceeded her FMLA leave she was no longer on a permitted leave and therefore appropriately terminated for non-disciplinary reasons. Her loss of income was simply a consequence of failing to be on approved leave. If Debra Matteau had applied for additional leave pursuant to Personnel Rule [1205.02], the Agency could decide whether to grant an additional three months of leave. Since there was no such request, Matteau was absent from work without leave...The State [personnel] administrator said the obligation was on the employee to be familiar with Rule [1205.02] and the Veterans Home had no obligation to notify her.

In this case the provisions of Article XI, Section 11.8 of the Agreement [preempt] the provisions of the Personnel Rule [1205.02]. The STDIP provision is a very new program within the State...In this case the real confusion came because Matteau's healthcare provider's November 26th note did not give the Veterans Home a firm return to work date. If the Veterans Home wanted a firm return to work date and the healthcare provider did not provide such, the Veterans Home's obligation was to notify the STDIP administrator because as such the STDIP administrator is the one who approves or disapproves the employee's physical fitness to return to work and the date for such a return. The STDIP administrator's job was to decide whether "to refute the conclusion that you are able to return to full duty," not the Veterans Home (n.8 I have found that in disability cases there is frequently doubt by employers whether the employee's disability is real or fake and this leads to actions consistent with the belief that the employee is not really fully disabled. But that is one of the reasons why the State negotiated a third party administrator to control the STDIP program. It is the administrator's role to ferret out those who unfairly take advantage of a program designed to protect employees who are sincerely disabled from performing their regular duties). Matteau was not obligated to seek an extension of her FMLA leave because the STDIP provided her the equivalent of such leave until the STDIP administrator rejected the employee's medical evidence underlying the disability and

terminated the income protection. Until that time, the employee was on leave in accordance with the STDIP provisions of the Agreement.

See Joint Ex. 1.

11. The arbitrator subsequently denied the State's motion to reconsider the award, explaining an "arbitrator has no further authority on the merits of the dispute unless such additional jurisdiction is mutually provided."

Decision and Order

Decision Summary:

Under *Appeal of Merrimack County*, 156 N.H. 35 (2007), we conclude that the arbitrator's Opinion and Award is final and binding, and the State has, without justification, failed to implement the specified remedies. Accordingly, the State has committed an unfair labor practice in violation of RSA 273-A:5, I (h). The State shall proceed with implementation of the Award without further delay. The SEA claims filed under sub-sections (g) and (i) are dismissed.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. See RSA 273-A:6.

Discussion:

We begin by addressing the SEA's argument that the State is time-barred, under the 6 month RSA 273-A:6, VII limitation period, from objecting to enforcement of the arbitrator's Opinion and Award. We reject this argument for the following reasons. Cases like the present one typically arise when there is a dispute over enforcement – here, the SEA's complaint was triggered by the State's refusal to implement the award. Conceivably, the State could have independently filed a complaint in response to an SEA demand for implementation. *See, e.g.*, *Appeal of Professional Fire Fighters of Hudson, IAFF Local*, 167 N.H. 46, 55-56 (2014). Assuming that such a complaint would be proper, there is not enough information in the record

to allow a determination of when the SEA demanded enforcement such that the 6 month limitation period governing the filing of a complaint by the State would begin to run. Even then, we are not convinced that a failure to file such a complaint on the State's part would mean it is now precluded from arguing that the Opinion and Award is advisory, and not final and binding.

As to any argument that the State otherwise had a right of appeal to the PELRB following the issuance of the Opinion and Award, we note neither RSA 273-A nor PELRB rules recognize or establish such an appeal process. As reviewed in *Appeal of Silverstein*, 163 N.H. 192 (2012), where the last step of a grievance procedure is not final and binding, the PELRB does have jurisdiction to hear a sub-section I (h)(to breach a collective bargaining agreement) claim *de novo*. However, such cases are not reviews of, or the equivalent of appeals from, an arbitrator's decision and award.

As to the merits, the State is resisting enforcement of the award by arguing that under the CBA grievance procedure, the arbitrator's Opinion and Award must be deemed advisory. A similar employer argument was considered by the court in *Appeal of Merrimack County*, 156 N.H. 35 (2007). The underlying grievance challenged the termination of County employee Melissa Foote, who worked at the county nursing home as a resident assistant and subsequently as a licensed nursing assistant. The arbitral submission was "[w]hether there was just cause for the County to terminate Ms. Foote under the collective bargaining agreement? If not, what shall the remedy be?" *Id.* at 38. Among other things, the arbitrator ordered the County to reinstate Foote, which the county nursing home refused to do. This led to the Union's filing of an unfair labor practice complaint with the PELRB seeking enforcement of the arbitrator's award. The County defended itself, in part, by arguing that the arbitrator's award exceeded his authority under the collective bargaining agreement and therefore the award was not final and binding. *Appeal of Merrimack County* at 39.

The court summarized relevant parts of the county nursing home collective bargaining agreement grievance procedure as follows:

> Article 25 contained grievance and arbitration procedures. In the case of arbitration, this article provided that the arbitrator's decision would be "final and binding" if it was "within the scope of authority and power of the Arbitrator set forth within this Agreement." This article also provided: "The function of the Arbitrator is to determine the interpretation of the specific provisions of this Agreement. It is agreed that the arbitrator shall have no authority to add to, subtract from, or modify any terms of this agreement."

Appeal of Merrimack County at 37-38 (quotations in original). The court went on to describe in detail how the arbitrator's decision should be reviewed in such cases:

> A judicial challenge to arbitral authority requires the reviewing court to consider both the CBA and the arbitral submission. The overriding concern is whether the contracting parties have agreed to arbitrate a particular dispute, not whether the agreement is within the CBA.
>
> While ordinarily we interpret contractual provisions de novo, see Appeal of Town of Durham, 149 N.H. 486, 487, 821 A.2d 1097 (2003), the general rule [is] that the interpretation of a CBA is within the province of the arbitrator, subject to certain exceptions recognized by our case law that are not relevant here. [W]hen the parties include an arbitration clause in their CBA, they choose to have disputes concerning constructions of the CBA resolved by the arbitrator. Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. For this reason, the PELRB does not regularly have jurisdiction to interpret the CBA when it provides for final and binding arbitration.
>
> Our review of the arbitrator's interpretation of the CBA is similarly limited. Just as the court may not reject the arbitrator's factual findings simply because it disagrees with them, neither may the court reject the arbitrator's interpretation of the CBA simply because the court disagrees with it. While the arbitrator cannot ignore the plain language of the CBA, because the parties authorized the arbitrator to give meaning to that language, a court should not reject an award on the ground that the arbitrator misread the contract. [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. The court's task is thus ordinarily ... limited to determining whether the arbitrator's construction of the [CBA] is to any extent plausible.

Appeal of Merrimack County, 156 N.H. at 39-40 (quotations and citations omitted). The court concluding its analysis by stating that "[w]e cannot say that the arbitrator's interpretation of the CBA and the parties' submission is so implausible as to require reversal." *Id.* at 41. These

principles are equally applicable to this case, and they serve to guide our review of arbitrator Cooper's Opinion and Award.

There is no dispute as to arbitrator Cooper's authority to decide whether the State violated the CBA when it terminated Debra Matteau on December 2, 2019, for non-disciplinary reasons. He summarizes this at the outset of his Opinion and Award in his description of the arbitral submission, and neither party has quarreled about it during the course of these proceedings.

As to the *Appeal of Merrimack County* admonition that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision," it is clear that arbitrator Cooper was construing and applying the contract, namely CBA Article 11.8, to decide the question the parties submitted to him. He reviewed relevant CBA history, explaining that CBA Article 11.8, the STDIP provision, "replaced the Labor Management Committee's role for the first 26 weeks of disability." He does not find that Matteau's leave status was not subject to review or termination. Instead, he observed that the State did not follow applicable CBA procedure before concluding that Matteau was no longer on approved leave (the justification given by the State for termination as recounted in his decision):

> If the Veterans Home wanted a firm return to work date and the healthcare provider did not provide such, the Veterans Home's obligation was to notify the STDIP administrator because as such the *STDIP administrator is the one who approves or disapproves the employee's physical fitness to return to work and the date for such a return.* The STDIP administrator's job was to decide whether "to refute the conclusion that you are able to return to full duty," not the Veterans Home (emphasis added).

He considered Per 101.02, which provides that "[u]nless otherwise specified, these (personnel) rules shall apply to all full time classified state employees" and that "[i]n the case of terms and conditions which are negotiated, the provisions of the collective bargaining agreement shall control." He specifically found that the "provisions of Article XI, Section 11.8 of the

Agreement preempts the provisions Personnel Rule 1205.02," which is the personnel rule which addresses employee applications for unpaid leave.

Based on the foregoing, we cannot say that arbitrator Cooper's Opinion and Award is "so implausible as to require reversal." See *Appeal of Merrimack County,* 156 N.H. at 41. Nor, given Per 101.02, do we find that the arbitrator's Opinion and Award is contrary to regulation (i.e. the personnel rules cited by the State). Therefore, we conclude that the State has committed an unfair labor practice in violation of RSA 273-A:5, I (h)(to breach a collective bargaining agreement). The State shall implement the award without further delay. The SEA's claims that the State's actions also violated sub-sections (g) and (i) are dismissed.

So ordered.

February 10, 2022

/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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