



State of New Hampshire
Public Employee Labor Relations Board

State Employees' Association of New Hampshire, SEIU Local 1984

v.

State of New Hampshire

Case No. G-0115-13
Decision No. 2022-102

Appearances: Gary Snyder, Esq., Concord, New Hampshire for the
State Employees' Assoc. of NH, SEIU Local 1984

Robyn A. Guarino, Esq. and Jessica A. King, Esq.,
Office of the Attorney General,
Concord, New Hampshire for the State

Background:

On November 19, 2021, the State Employees' Association of NH, Inc., SEIU Local 1984 (SEA) filed an unfair labor practice complaint¹ with the Public Employee Labor Relations Board (PELRB) against the State under the Public Employee Labor Relations Act (Act). In substance, the SEA alleges the State violated its duty to bargain a mandatory subject of bargaining when, in lieu of negotiations, the State used RSA 99:8 and N.H. Admin. R. Per 904.01 procedures to provide temporary wage enhancements to certain bargaining unit employees.² As a result, the SEA claims the State has violated the following sub-sections of RSA 273-A:5, I:

¹ The SEA filed an amended complaint on January 31, 2022.

² The complaint concerns certain bargaining unit employees of Health and Human Services, Division of Children, Youth and Families (HHS/DCYF), the New Hampshire Hospital (NHH), the Department of Corrections (DOC), and the Office of Professional Licensure and Certification (OPLC).

- (a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;
- (b) To dominate or to interfere in the formation or administration of any employee organization;
- (e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations;
- (g) To fail to comply with this chapter or any rule adopted under this chapter; and
- (h) To breach a collective bargaining agreement.

Additionally, in its opening brief the SEA claims a violation of sub-section (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). According to the SEA, this is because of the "State's argument that RSA 99:8 does, in fact, restrict the SEA's authority to bargain wages, and the State can unilaterally change wages that exist in the CBA..."

The SEA requests that the PELRB find that the State has committed unfair labor practices as charged, order the State to cease and desist from making unilateral wage enhancements or other wage changes that the parties have not negotiated, and order the State to bargain in good faith concerning mandatory subjects of bargaining like wages.

The State denies the SEA's charges. The State argues the board lacks jurisdiction because the disputed wage enhancements were provided pursuant to RSA 99:8 and that, under *Appeal of State*, 138 N.H. 716 (1994), the disputed wage enhancements are a prohibited subject of bargaining or, at most, a permissive subject of bargaining. As to the alleged sub-section (i) violation referenced in the SEA's opening brief, the State maintains the PELRB should reject this claim because it was not raised in the SEA's original or amended complaint, RSA 99:8 does not actually invalidate any part of the parties' collective bargaining agreement, and RSA 99:8 was not adopted or implemented during the term of the current collective bargaining agreement.

The PELRB held a pre-hearing conference on December 21, 2021, at which time the parties agreed to submit this case for decision on stipulations, exhibits and briefs. The parties have submitted their filings, 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 in numerous state agencies, including the HHS/DCYF, NHH, DOC, and the OPLC.
3. The parties' stipulations and exhibits, which are detailed and comprehensive, are fully incorporated by reference in these findings of fact.
4. The parties' 2021-23 collective bargaining agreement (CBA) includes Appendix C, which provides negotiated wage adjustments for Law Enforcement, Non-Standard, and Fire Protection classifications of 20% unless otherwise indicated. The reason for the wage adjustments is not stated. See Joint Ex. 1 and 1a.
5. The State has provided Per 904.01 and RSA 99:8 temporary wage enhancements that were not negotiated with the SEA (wage enhancements) numerous times since 2006. Between 2013 and 2022, the number of employees receiving age enhancements increased from approximately 17 to 1,028.
6. In this case, the SEA is complaining about the following wage enhancements the State provided in late 2021 and early 2022:

HHS/DCYF	(8 to 18% wage enhancements provided to 452 positions)
NHH	(15% wage enhancement provided to 160 positions)
DOC	(35% wage enhancement provided to 33 positions)
OPLC	(30% wage enhancement provided to 2 positions and 68% wage enhancement provided to 2 positions)
7. This case is the first time the SEA has filed an unfair labor practice complaint based on

the State's provision of unilateral RSA 99:8 wage enhancements.

8. In 2016, the State rejected an SEA proposal to make a Temporary Nursing Enhancement permanent, and during 2019-2021 contract cycle negotiations, the State rejected the SEA's wage adjustment proposals for Mental Health Workers.

9. The parties stipulate that the disputed wage enhancements were made for the purpose of recruitment and retention. They also stipulate that the disputed wage enhancements were approved by the Governor and Executive Council (G&C) upon the recommendation of the Director of the Division of Personnel and upon a finding that a substantial number of vacancies existed in these positions which vacancies required an increase in salary for recruitment of qualified personnel.

Decision and Order

Decision Summary:

Given the provisions of RSA 99:8 and the record for decision, we conclude the State did not violate its duty to bargain wages or otherwise commit an unfair labor practice as charged. Accordingly, the SEA's complaint is dismissed.

Jurisdiction:

The State argues that whether or not the State is entitled to provide RSA 99:8 wage enhancements to bargaining unit positions is not subject to PELRB review, and this case should accordingly be dismissed for lack of jurisdiction. RSA 99:8, Increases for Recruitment Purposes³, states:

Upon request of the appointing authority, the governor and council are hereby authorized and empowered, notwithstanding any other provisions of the law to the contrary, upon a finding by them and a recommendation from the director of personnel that a substantial number of vacancies exist in any class of authorized positions which vacancies require an increase in salaries for recruitment of qualified personnel therefor, to increase salaries of

³ N.H. Admin. R. Per 904.01 contains related specific procedures which implement RSA 99:8.

such classified positions, any such increases to be a charge against the salary adjustment fund. Source. 1967, 353:6. 1974, 52:6. 1986, 12:4, 1, eff. Mar. 27, 1986.

Whether or not the State has complied with RSA 99:8 is not at issue. The SEA is not making such a claim, and the parties have otherwise stipulated to the State's compliance with RSA 99:8's requirements. See Finding of Fact 9. There is, therefore, no need to consider whether G&C actions approving the disputed wage enhancements were a proper exercise of its RSA 99:8 authority, nor is there any need to evaluate the facts and recommendations provided by the Director of Personnel to the G&C. The SEA's complaint is premised upon the argument that the State's RSA 273-A bargaining obligations always preclude the State from taking unilateral action with respect to wages, regardless of whether such action is taken pursuant to RSA 99:8 or otherwise.

It is axiomatic that duty to bargain cases are within the PELRB's purview. See RSA 273-A:5, I (e), II (d); *Appeal of State*, 138 N.H. 716 (1994). Moreover, the fact that an unfair labor practice complaint may involve independent authority like RSA 99:8 does not automatically require dismissal on jurisdictional grounds. Relevant precedent shows that consideration of other laws is sometimes necessary and incidental to PELRB decision making. See, e.g., *State Employees' Association of NH, Inc., SEIU Local 1984 v. State Department of Health & Human Services*, Decision No. 2014-184 (July 31, 2014)(PELRB had jurisdiction to decide whether the State violated RSA 273-A:5 as charged by the SEA, notwithstanding the State's arguments based upon RSA 99:8 and N.H. Admin. Rule Per 904.01); *Appeal of New Hampshire Department of Transportation*, N.H. Sup. Ct. Slip Op. No. 2020-416 (October 28, 2021)(affirming PELRB Decision 2020-128 (June 23, 2020) and 2020-176 (August 18, 2020)(PELRB reviewed RSA 21-G:9, II (c) to determine whether CDL medical cards are a prohibited subject of bargaining); *Sugar River Education Association, NEA-NH v. Claremont School District*, Decision No. 2016-

176 (September 20, 2016)(PELRB reviewed RSA 189:1-A, II to determine whether a school's class schedule is a prohibited subject of bargaining); *Manchester School District v. Manchester Education Association/NEA*, PELRB Decision No. 2017-050 (March 17, 2017)(PELRB arbitrability analysis involved consideration of RSA 189:14-a and b relating to teacher non-renewal).⁴ We are satisfied that exercising jurisdiction in this case is consistent with these authorities and RSA 273-A:6, I's provision that the PELRB has primary jurisdiction over all alleged violations of RSA 273-A:5. Therefore, we deny the State's motion to dismiss for lack of jurisdiction.

Discussion:

As to the merits, both parties argue that the three part test set out in *Appeal of State*, 138 N.H. 716 (1994) supports their characterization of the State's bargaining obligations as to the disputed wage enhancements. The SEA maintains that all wages, no matter how configured, are a mandatory subject of bargaining under *Appeal of State*, and there should be no exception for the disputed wage enhancements at issue in this case. The State contends that RSA 99:8 renders the disputed wage enhancements into a prohibited subject of bargaining or, at the very least, into a permissive subject of bargaining.

The classification of bargaining topics into mandatory, permissive, or prohibited subjects involves the following analysis:

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....

⁴ For an example of a case the PELRB dismissed for lack of jurisdiction, see *State Employees' Association of New Hampshire, SEIU Local 1984 v. State of New Hampshire*, Decision No. 2021-074 (April 30, 2020). This case would have required an evaluation of the Governor's authority to issue certain emergency orders pursuant to RSA 4:45, III (b), and the PELRB concluded that the SEA had raised substantive matters beyond the PELRB's jurisdiction.

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. at 721-723.

The "statute or statutorily adopted regulation" referenced in the first step does not include the "managerial policy exception" described in RSA 273-A:1, XI.⁵ *Appeal of City of Nashua Board of Education*, 141 N.H. 768, 774 (1997)(rejecting "the city's bootstrapping attempt to utilize the statutory managerial policy exception as the statute that determines the scope and applicability of the managerial policy exception"); *Appeal of NH Dept. of Transportation*, N.H. Supreme Ct. Slip Op. No. 2020-0416 (October 28, 2021)(rejecting the State's request to overrule *Appeal of City of Nashua Board of Education's* independent authority requirement). Additionally, the independent law relied upon to sustain a prohibited subject of bargaining argument must expressly reserve the matter in dispute to management's exclusive authority. In *Appeal of NH Dept. of Transportation* (DOT), the court stated "the general grant of authority in RSA 21-G:9 does not expressly reserve to DOT the exclusive authority to create a new CDL medical card requirement," noted that the State did not identify any other independent authority which did so, and therefore found that the new CDL medical card requirement is not a prohibited subject of bargaining. *Id.* And in *Appeal of State*, the court found that employee discipline was

⁵ RSA 273-A:1, XI provides that "Terms and conditions of employment" means wages, 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.

not a prohibited subject of bargaining under RSA 21-I:42, I and :43, II(j):

[W]hile the cited statutes establish a division of personnel and mandate that the director of personnel adopt rules, *they do not state that the listed functions of the division or the subjects of the rules are reserved exclusively for the State*. Second, the cited statutes also list compensation of employees as a function of the division of personnel and mandate rule-making on compensation. Compensation is included in the public employer's obligation to bargain as a term and condition of employment and is not a subject reserved exclusively for managerial policy. RSA 273-A:3, I, :1, XI. *Therefore, the mere inclusion of "discipline" in RSA 21-I:42, I, and "discipline" and "removal" in RSA 21-I:43, II(j) and (k) do not mean that those subjects are within the sole prerogative of the State as employer.*

Appeal of State, 138 N.H. at 723 (emphasis added). Likewise, in the present case, RSA 99:8 does not expressly reserve to the State the exclusive authority to provide wage enhancements.⁶ Since the disputed wage enhancements pass the first step in the *Appeal of State* analysis, they are not a prohibited subject of bargaining.

As to the second part of the test, we must decide whether the State's actions "primarily affect the terms and conditions of employment or matters of broad managerial policy." *Appeal of State* 138 N.H. at 723. This part of the test "cannot be resolved through simple labels offered by management...or through conclusory descriptions urged by employees..." *Appeal of Nashua*, 141 N.H. at 774. Often, both parties will have significant interests affected by the disputed action, and "determining the primary effect of the action requires an evaluation of the strength and focus of the competing interests." *Appeal of State*, 138 N.H. at 722. A balancing of the parties' respective interests that are affected allows the PELRB to determine "whether the impact is primarily on managerial matters or the protected rights of employees." *Appeal of NH Dept. of Transportation*, N.H. Supreme Ct. Slip Op. No. 2020-0416 (October 28, 2021)(citations omitted).

⁶ It may be true that only the State can seek wage enhancements using RSA 99:8 procedures, but the parties can also negotiate and structure a wage schedule which includes provisions akin to RSA 99:8 wage enhancements through the collective bargaining process, albeit without the involvement of the G&C or resort to the salary adjustment fund.

The interests of employees in wages is not usually subjected to this balancing test, since it is settled law that wages are a term and condition of employment and must be negotiated. *Appeal of State*, 138 N.H. at 723. However, this case introduces an additional variable which must be taken into account - RSA 99:8 wage enhancements, which the law states can be provided "notwithstanding any other provisions of the law to the contrary." This provision not only requires a review of the competing interests of the parties' respective interests in wages, it tips matters in the State's favor. This is because in the case of RSA 99:8 wage enhancements, which the State is using to recruit qualified personnel to address substantial vacancies in authorized positions, the legislature has, in effect, determined that management interests outweigh the competing interests of employees, as reflected by the "notwithstanding..." language. In other words, RSA 99:8 establishes that addressing substantial vacancies through a relatively expedited process is a significant enough component of managerial policy to justify an exception to the general requirement that the State must negotiate wages with the SEA.

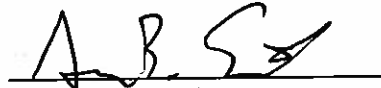
Accordingly, the disputed wage enhancements fail the second step of the *Appeal of State* test and are not a mandatory subject of bargaining. They are a permissive subject of bargaining, which means, for example, the State may, but is not required to, negotiate wage schedules with the SEA for inclusion in a collective bargaining agreement that include the types of wage enhancements at issue. The State may also, but is not required to, negotiate with the SEA over matters relevant to a RSA 99:8 submission to the G&C, such as the amount of the enhancements and the affected positions.

Based on the foregoing, we dismiss the SEA's claims that the State has committed unfair labor practices in violation of RSA 273-A:5, I (a),(b),(e),(g), or (h) are dismissed. We also dismiss any alleged violations of RSA 273-A:5, I (i) raised by the SEA in its opening brief. The

SEA did not plead sub-section (i) violations in its original or amended complaint, and we decline to consider a violation that the SEA has raised for the first time in its opening brief.

So ordered.

July 7, 2022



Andrew B. Eills, Esq.
Chair/Presiding Officer

By unanimous vote of Chair Andrew B. Eills, Esq., Board Member Brian Paquette, and Board Member Carol M. Granfield.

Distribution: Gary Snyder, Esq.
Robyn A. Guarino, Esq.
Jessica A. King, Esq.