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-0115-14
Decision No. 2023-052

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

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

Background:

On September 26, 2022, the State Employees' Association of New Hampshire, SEIU Local 1984 (SEA) filed an unfair labor practice complaint with the Public Employee Labor Relations Board (PELRB) claiming the State violated the following sub-sections of 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;
> (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; [1] and
> (h) To breach a collective bargaining agreement.

[1] The derivative sub-section (g) claim is based upon the State's alleged non-compliance with RSA 273-A:3, which addresses the obligation of employers and bargaining unit representatives to negotiate in good faith over the terms of employment.

The complaint involves the State's 2022 unilateral update of the 2009 Telework Policy (TWP), which now prohibits out-of-state telework, and the State's 2022 TWP Acknowledgement Form that an employee who teleworks must sign. The SEA claims these actions constitute a violation of the State's bargaining obligations, impermissible direct dealing with represented employees, and an interference with the right of employees to have the SEA negotiate the terms and condition of their employment. The SEA requests that the PELRB find the State has committed unfair labor practices as charged, and order the State to cease and desist from implementation of the out-of-state telework prohibition and the requirement that telework employees sign the 2022 TWP Acknowledgement Form.

The State denies the charges. According to the State, the updates to the 2009 TWP are not a mandatory subject of bargaining as the SEA claims. Instead, the State contends that it falls within the purview of the State's exclusive managerial prerogative under RSA 273-A:1, XI and is, at most, a permissible subject of bargaining. The State maintains that under its exclusive managerial prerogative it is entitled to change and update the existing telework policy, and that in fact it expressly reserved and referenced the right to do so in the 2009 TWP. The State also argues there is nothing improper about the requirement that employees who Telework sign a form that confirms they understand and will follow the 2022 TWP.

As per the pre-hearing order, the parties agreed to submit this case for decision on stipulations, exhibits, and briefs, 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.

3. The parties' stipulations and exhibits, which are detailed and comprehensive, are fully incorporated by reference in these findings of fact.

4. The 2022 TWP (Joint Ex. 2) is an update to the 2009 TWP (Joint Ex. 1). The State did not negotiate the 2009 TWP or the 2022 TWP with the SEA, nor did the State negotiate the 2022 TWP Acknowledgement Form (Joint Ex. 3) with the SEA.

5. The parties' 2021-23 collective bargaining agreement (CBA) does not have any provisions addressing telework. There is also no evidence that the parties ever incorporated the 2009 TWP in any of their collective bargaining agreements, nor is there any evidence that the 2022 TWP is contrary to any provision of the current contract.

6. CBA Article II, Management Rights and Prerogatives, includes the following provisions:

2.1. Rights Retained: The Employer retains all rights to manage, direct and control its operations in all particulars, 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;

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…

7. The 2009 TWP included the following provisions:

Section One – General Telework Information

I. Telework is an authorized work arrangement in which some or all work is performed at a location other than the employee's primary (usual and customary) workplace. The alternate

workplace may include the employee's home or alternative location. The Telework program may be used as a recruitment and retention tool while providing positive impact on the environment and the organization.

....

IV. Telework is a management option and is not an employee right. The duration of permission for the Telework arrangement is entirely at the will and discretion of the appointing authority, which retains the prerogative to determine the time, place and manner of the Telework agreement. The Telework employee is covered by and will adhere to all policies, rules and regulations of the agency, board or commission and State of New Hampshire.

V. An employee's participation in the Telework program is voluntary. The employee, manager, supervisor or other authorized official may terminate the Telework arrangement at any time for any reason; however, advance notice should be given when feasible. Issues regarding approval for participation in the Telework program cannot be appealed, grieved nor are they subject to review.

8. The 2009 TWP includes a "Telework Agreement" form to be signed by the teleworking employee and the employee's manager or supervisor.

9. The 2022 TWP includes the following provisions:

1. Statement of Intent

1.1 This policy is intended to benefit the State of New Hampshire through workforce recruitment and retention, enhanced agency performance, increased customer satisfaction, and reduced environmental impact. It is designed to implement Telework without undue risk or cost to the State of New Hampshire.

1.2 An agency's decision to opt into Telework or to end Telework is at the sole discretion of each appointing authority. Telework is a privilege, not an employee right.

1.3 This policy will be periodically reviewed by the Division of Personnel and is subject to change. The Division of Personnel will provide agencies with an updated policy on an annual basis, or sooner if changes are required.

....

2. Definitions

2.1 Telework: A work flexibility arrangement where an employee is authorized to perform some or all work at an Alternate Worksite instead of the employee's

Primary Worksite. This definition includes what is generally referred to as "remote work" or "telecommuting."....

2.1.1 Primary Worksite: An employee's usual and customary worksite. This is traditionally a State building or a State-leased facility.

2.1.2 Alternate Worksite: An approved worksite *within New Hampshire* where official State business is performed. These locations may include, but are not limited to, employees' home, State satellite offices, federal buildings, or municipal offices. *Alternate worksites cannot be outside of the state of New Hampshire* (emphasis added).

....

10. Responsibilities

....

10.9 Employee compensation and benefits (including leave and holidays) are not affected by Telework arrangements. Telework employees must follow established departmental protocol related to the approval of leave time. Employees who are unable to work any portion of a Telework day shall use applicable annual, compensatory, or sick leave for the hours not worked, subject to supervisor approval.

10. The 2022 TWP has a space for employees to initial and date at the end of each page.

11. The 2022 TWP Acknowledgement Form is similar to the 2009 version in format and substance. Both are based on the underlying TWP and contain restatements of portions of the TWP. Both serve to confirm an employee's familiarity with and understanding of the applicable TWP. The 2022 TWP Acknowledgement Form employee signature box includes the following language above the signature line: "I also acknowledge that I have reviewed, and agree to the terms of, the SoNH Telework Policy."

12. Although the State did not negotiate the 2022 TWP with the SEA, it did confer with, and receive feedback from, the SEA about the policy. These included SEA concerns about language in the TWP Acknowledgement Form and the prohibition on out-of-state telework. In response, the State made some unspecified revisions to the 2022 TWP but did not adjust the in-

state telework requirement. The 2009 TWP did not contain this express restriction on telework location.

13. The State's reasons for the prohibition on out-of-state remote work include the following:

a. Taxation of the State as an out-of-state corporation.
b. Jurisdictional considerations, including subjecting the State to the courts of other jurisdictions and waiving potential immunities, including sovereign immunity.
c. Becoming an employer of another state for purposes of their labor and employment laws, such as leave laws and minimum wage laws.
d. Subjecting the State to other jurisdictions' Workers Compensation Laws.

14. The SEA maintains that a prohibition on out-of-state telework affects employees who live out-of-state in a number of ways. For example, they incur commuting expenses such as fuel and vehicle wear and tear, while state employees who are New Hampshire residents and telework do not. They have less flexibility in their use of leave benefits in the event of illness or weather related travel conditions. In such circumstances, employees who reside in-state may still be able to telework, but out-of-state residents must either report to their primary worksite or take leave. Some out-of-state residents purchased office supplies for their alternate (out-of-state) worksite. Others have left state employment, citing the 2022 TWP as a significant factor for their resignation. Some out-of-state residents have actually rented office space within the state, but closer to their residence than their primary worksite, and incurred related costs, in order to reduce their commute.

Decision and Order

Decision Summary:

The determination of employee work locations, including telework locations, is a matter of managerial policy within the exclusive prerogative of the public employer in this case under RSA 273-A:1, XI, and is a permissive, not mandatory, subject of bargaining. The Telework

Acknowledgment Form is an administrative tool the State is using to implement the 2022 TWP and confirm employee awareness and understanding of applicable state policy. The State's development and use of this form did not constitute negotiations or direct dealing with represented employees in violation of the State's obligation to bargain with the SEA. Finally, there is insufficient evidence or legal argument to sustain a breach of CBA claim. We therefore dismiss the complaint.

Jurisdiction:

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

Discussion:

We begin our analysis with the SEA's decisional bargaining claim – that the State is obligated to negotiate a decision to limit telework to in-state locations, and cannot implement such a restriction unilaterally. Pursuant to RSA 273-A:3, I, the State is subject to a requirement that it negotiate the terms and conditions of employment in good faith with the SEA.

> "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.*

RSA 273-A:1, XI (emphasis added). The court has prescribed a three-part test that we use to classify particular proposals and topics into prohibited, permissive, or mandatory subjects of bargaining:

> 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....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. 716, 724 (1994). This decision covered a variety of subjects, such as wages (mandatory), discipline (permissive), number of personnel (permissive), submission of employee appointment and termination disputes to grievance procedure (permissive if no constitutional or statutory prohibitions), and whether to offer extracurricular school activities (permissive). In particular, the court determined that the SEA's layoff and recall bargaining proposals affected the terms and conditions of employment, but "more directly control managerial policy as defined in the managerial policy exception; that is, the selection, direction, and number of the public employer's personnel. RSA 273-A:1, XI." *Appeal of State,* 138 N.H. 716, 726 (1994). Most recently, the court affirmed the PELRB's determination that a new medical card requirement for certain NHDOT employees is a mandatory subject of bargaining under the three-part test. See *Appeal of NH Dept. of Transportation,* 174 N.H. 610, 617-622 (2021).

In the present case, the SEA's demand that the State negotiate the decision to limit telework to in-state locations passes muster under the first part of the test, but fails the second part, and is therefore a permissive subject of bargaining. In reaching this conclusion, we are mindful of the admonition that the second part of the test "cannot be resolved through simple labels offered by management...or through conclusory descriptions urged by employees..." *Appeal of City of Nashua Board of Education*, 141 N.H. 768, 774 (1997). 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. Consideration of employee interests is still required even though an employer's actions relate to, for example, the "selection" of personnel when "a proposal or action will touch on significant interests of both the public employer and the employees, requiring a balancing to determine whether the impact is primarily on managerial matters or the protected rights of employees." *Appeal of NH Dept. of Transportation* at 620 (citations and quotations omitted).

The State's interests include its RSA 273-A:1, XI authority over the "*programs* and *methods* of the public employer...and the selection, *direction* and number of its personnel, so as to continue public control of governmental functions (emphasis added)." The State seeks to exercise this authority in this case in a manner that it believes will avoid potential liabilities that might arise from out-of-state telework. These include the risk of exposing the State to taxation as an out-of-state corporation, submission to the jurisdiction of courts in other states and the waiver of potential immunities from suit, and subjection to another jurisdiction's labor and employment laws, including Workers Compensation Laws. Although it is hard to know the likelihood of any one of these scenarios in the event there is out-of-state telework, there is nothing in the record indicating that the State is exaggerating relevant legal considerations and associated risks to avoid decisional bargaining over out-of-state telework. A duly authorized representative of the Attorney General's office has identified these liabilities, and any in depth scrutiny of their legal basis is beyond the scope of these unfair labor practice proceedings.

Our evaluation of the "strength and focus" of competing employee interests includes the following observations. A commute (and related expense) is a function of an employee's choice of residence (and employer), and it is technically outside the scope of working conditions. This

diminishes the weight we can assign to this particular concern. Similarly, the purchase of office supplies for alternate worksites, rental of in-state space for use as an alternate worksite, and separation from State service are most appropriately treated as examples of "voluntary employee action" that were not mandated by the State. As to leave benefits, we note they are intended to provide paid time off in circumstances where employees are unable to work for a variety of reasons, including, but not limited to, the ones mentioned by the SEA. This means the SEA is complaining that represented employees are using a benefit (paid leave) provided by the State because of circumstances the State does not control (e.g. illness and travel conditions). These scenarios indicate that employees who reside out-of-state may be affected. However, the record does not identify what portion of the represented workforce resides out-of-state and would otherwise be eligible for telework. In other words, it is difficult to assess the magnitude and extent of this issue.[2]

In these types of cases, proving employee interests are affected by a decision to prohibit out-of-state telework does not necessarily also prove that the impact is primarily on the protected rights of employees such that mandatory decisional bargaining is required. This is such a case. After evaluating the "strength and focus" of the parties' competing interests, we find that while the disputed telework decision has some affect upon the terms and conditions of employment, it primarily relates to "managerial policy as defined by the managerial policy exception," namely a program or method of the employer, and the direction of personnel. See *Appeal of State,* 138 N.H. 716, 726 (1994). See also *Derry Police Patrolman's Association, NEPBA Local 38 v. Town of Derry*, PELRB Decision No. 2011-278 (November 9, 2011)(finding installation and use of Digital In-Car Video Camera Systems and GPS technology in police cruisers was a permissive, not mandatory, subject of negotiation, but Town was required to impact bargain over its effects).

[2] The record does not reflect how many represented employees live out-of-state.

This means the State is not required to engage in decisional bargaining, as the SEA has demanded.

We next address the SEA's complaint about the Telework Acknowledgement Form. This portion of the SEA's complaint is based on many of the same arguments the SEA uses to challenge the decision to prohibit out-of-state telework and which we have already rejected. The SEA also contends that the use of the Form is a sub-section (e) violation based on *Appeal of Franklin Educ. Assoc.*, 136 N.H. 332 (1992). In that case, the City committed an unfair labor practice in violation of RSA 273-A:5, I (e), because it engaged in direct dealing with represented employees and violated its duty to bargain with the Association when it provided teachers with contracts containing a salary that it had not negotiated with the Association.

We are not persuaded by the SEA's argument and supporting evidence as to this claim. The Form is based on the 2022 TWP and does not make any substantive changes to that policy, and we have already decided in the State's favor as to the only challenge the SEA has made to the 2022 TWP. We note that employees are also required to initial and date every page of the 2022 TWP, a requirement the SEA has not contested. The "I also acknowledge that I have reviewed, and agree to the terms of, the SoNH Telework Policy" language in the employee signature area is not enough, by itself, to show that the State has negotiated directly with represented employees and thereby violated its duty to bargain with the SEA. Considered as a whole, the Form is an acknowledgement of State policy established pursuant to the State's managerial prerogative, not a negotiation and agreement to new terms and conditions of employment, as was the case in *Appeal of Franklin*. As part of its administration of the 2022 TWP, the State is entitled to have employees review and sign the Form to document their understanding of, and intent to comply with, the requirements of the policy.

Finally, we address the sub-section (h)(to breach a collective bargaining agreement) claim included in the SEA's complaint. In its complaint, the SEA cites, and therefore apparently relies upon, *Appeal of Franklin Educ. Assoc.*, 136 N.H. 332 (1992) as support. However, *Appeal of Franklin* involved a sub-section (e) violation, as discussed. Further, the SEA does not mention, explain, or develop a sub-section (h) claim in its opening or reply brief. We therefore find that the SEA has failed to provide sufficient evidence and legal argument to prove a sub-section (h) violation.

Based on the foregoing, the SEA's claims that the State has committed unfair labor practices in violation of RSA 273-A:5, I (a),(e),(g), and (h) are dismissed.

So ordered.

March 17, 2023

Andrew B. Eills, Esq.
Chair/Presiding Officer

By unanimous vote of Chair Andrew B. Eills, Esq., Board Member Brian Paquette, and Board Member James M. O'Mara, Jr.

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