Appeal to NH Supreme Court withdrawn on 09/26/2014. (NH Supreme Court Case No. 2013-0839)

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

State Employees' Association of New Hampshire, Inc., SEIU Local 1984

v.

State of New Hampshire, Liquor Commission

Case No. G-0202-1
Decision No. 2013-168

Appearances:

Richard E. Molan, Esq.
Molan, Milner & Krupski
Concord, New Hampshire for the Complainant

Michael E. Brown, Esq.
New Hampshire Attorney General's Office,
Concord, New Hampshire for the Respondent

Background:

On December 6, 2012 the State Employees Association of New Hampshire, SEIU Local 1984 (SEA) filed an unfair labor practice complaint under the Public Employee Labor Relations Act (the Act). The SEA complains that the State has refused to recognize the SEA as the exclusive representative of certain part time employees of the New Hampshire Liquor Commission in accordance with the PELRB's 1976 Liquor Commission bargaining unit certification. The 1976 certification unit description is "all classified employees of the Liquor Commission, State of New Hampshire." According to the SEA, the State has violated 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); (b)(to dominate or to interfere in the formation or administration of any employee organization); (c)(to discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging

membership in any employee organization); and (g)(to fail to comply with this chapter or any rule adopted under this chapter). The SEA asks the PELRB to: 1) find that the State has committed an unfair labor practice; and 2) order the state to recognize the SEA as the exclusive representative of part time employees of the Liquor Commission.

The State denies the charge. The State contends that the SEA does not represent all part time Liquor Commission employees. According to the State, there are part time Liquor Commission employees who are "persons in a . . . temporary status, or employed seasonally, irregularly or on call." The State argues these employees are therefore excluded from the definition of public employee under the Act, are not covered by the 1976 Liquor Commission bargaining unit certification, and are not represented by the SEA.

A hearing was held on March 28, 2013 at the offices of the PELRB in Concord. The State filed a motion to dismiss at the outset of the hearing, arguing that the SEA is collaterally estopped from proceeding with the charge in this case given the prior ruling in *State Employees Association of New Hampshire, Inc. v State of New Hampshire,* PELRB Decision No. 83-02 (Case No. S-0363, February 24, 1983). The board deferred action on the State's motion to dismiss in order to allow the SEA to file a written objection. Both parties have submitted post-hearing briefs and the SEA filed an objection to the State's motion to dismiss. The decision in this case is as follows.

Findings of Fact

1. The State of New Hampshire Liquor Commission is a public employer within the meaning of RSA 273-A:1.

2. The SEA is the exclusive representative of "all classified employees of the Liquor Commission" exclusive of employees of the Bureau of Enforcement. See parties' stipulations

(citing the PELRB's December 7, 1976 certification) and PELRB Decision No. 2009-273 (recognizing the New England Police Benevolent Association as the exclusive representative of certain Bureau of Enforcement and Licensing employees).

3. The parties' current collective bargaining agreement expired on June 30, 2013. Joint Exhibit 1.

4. By 1982 the State Liquor Commission employed approximately 276 part time employees in its stores.[1] Because of budgetary constraints which favor the use of part time employees over full time employees the number of part time employees has increased to the current level of approximately 916. There are currently approximately 213 full time employees. Based on the examples provided at hearing, operation of the State's 74 retail liquor stores, at least as currently configured, relies heavily on part time employees.

5. Both parties agree that there is a group of part-time employees who are scheduled to work on a seasonal basis and who do not qualify as public employees under the Act. These part time employees only work during the busy seasons (November to January and July to September) and are not scheduled to work the rest of the year. The status of seasonal employees is reflected in their employment paperwork (State Exhibit 1), in which they are expressly designated as seasonal employees.

6. Duties of part time employees range from serving as a cashier to stocking shelves and unloading freight. Some part time employees perform "managerial" duties related to the opening and closing of a store, including matters like unlocking and locking the store, dealing with the store alarm, handling money used and received in store operations, and preparing financial records, or the "books."

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[1] *See* PELRB record material filed with SEA objection to motion to dismiss.

7. State liquor stores operations have evolved over the last 30 years to the point where they are now open seven days a week, including on holidays. These hours of operation are conducive to the use of a large part time work force.

8. Full time employees work 40 hours per week. Part time employees work up to 28 hours per week and at times are scheduled to work up to 35 hours per week. Full and part time employees are expected to work when scheduled, but exceptions are made to accommodate matters like weddings, vacations, illness, and the like.

9. Part time employees fall into two general categories: those who are scheduled to work on a year round basis and those who are only scheduled to work during the two busy seasons.

10. Work schedules are prepared at least 3 weeks in advance by the store managers, who are full time employees. State Exhibit 3 is a store schedule for the 2 week period from September 7, 2012 to September 20, 2012 and for the 4 week period from September 28, 2012 to October 25, 2012. This schedule is typical of the manner in which full and part time employees are scheduled at all stores. It reflects the schedule of 2 full time employees and upwards of 6 part time employees.

11. As reflected by State Exhibit 3, none of the full time or part time employees are assigned to work the same day and shift every week, and part time employees are not necessarily scheduled to work the same number of hours each week. Although the parties did not submit scheduling information for all stores throughout the state, the topic was generally discussed by various witnesses and it appears this format represents the scheduling practice followed throughout the state.

12. Discipline for Liquor Store employees is administered in accordance with the State personnel rules. Under these rules full time employees are entitled to specific process in

connection with certain disciplinary process that part time employees do not enjoy. For example, a full time employee who is terminated can request and obtain a review of that decision. A part time employee who is terminated is not entitled to request or obtain a similar review.

13. Matt Newland is the current State Manager of Employee Relations. In mid-2012 he concluded that part time employees who don't work the same shift and hours each week should be designated as "irregular" employees under the Act. The implementation of this decision meant the State no longer treated such part time employees as "public employees" for purposes of the Act. The State notified the SEA of its determination by an August 28, 2012 Memorandum (State Exhibit 2).

14. Prior to July, 2012 all part time and full time employees who worked Sundays or holidays received "premium" pay (time and one-half) as per the 2011-13 CBA. This benefit had been available to part time employees for at least the past 12 years. Whether it had been available in years prior to 2001 was disputed by various witnesses at hearing in a manner that does not allow for a specific finding.

15. Beginning in July, 2012 the State discontinued premium pay for those part time employees it viewed as irregular. At that time the State also refused to recognize the SEA as the representative of such employees. These actions represented a change in how the parties had previously understood the status of the affected part time employees.

16. The SEA filed a grievance on behalf of the affected part-time employees. The State denied the grievance on the grounds that the part-time employees were employed "irregularly" and were not in the bargaining unit. The State also refused to process a related Association grievance on the same grounds.

Decision and Order:

Decision Summary:

The State committed an unfair labor practice on account of its failure to recognize the SEA as the exclusive representative of part time Liquor Commission retail store employees (except those excluded from the definition of public employee as discussed in more detail in this decision) and on account of its failure to recognize the part time employees as members of the bargaining unit. The State is ordered to give full recognition to the SEA and the involved employees.

Jurisdiction:

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

Discussion:

I. State's Motion to Dismiss:

The State argues its motion to dismiss should be granted on collateral estoppel grounds because the parties previously litigated the scope of the "all classified employees" unit description in *State Employees Association of New Hampshire, Inc. v State of New Hampshire,* PELRB Decision No. 83-02 (Case No. S-0363, February 24, 1983)(unit description of "all classified state employees" did not cover part time employees "except to the extent that they are considered public employees under the provisions of RSA 273-A:1, IX (d)").

At its core, the doctrine of collateral estoppel bars a party to a prior action, or a person in privity with such a party, from relitigating any issue or fact actually litigated and determined in the prior action. Three basic conditions must, then, be satisfied before collateral estoppel will arise: the issue subject to estoppel must be identical in each action, the first action must have resolved the issue finally on the merits, and the party to be estopped must have appeared as a party in the first action, or have been in privity with someone who did so. These conditions must be understood, in turn, as particular elements of the more general requirement, that a party

against whom estoppel is pleaded must have had a full and fair prior opportunity to litigate the issue or fact in question.

Daigle v. City of Portsmouth, 129 N.H. 561, 570 (1987)(citations omitted). The Act defines "public employee" under RSA 273-A:1, IX as follows:

> "Public employee" means any person employed by a public employer except:
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> (a) Persons elected by popular vote;
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> (b) Persons appointed to office by the chief executive or legislative body of the public employer;
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> (c) Persons whose duties imply a confidential relationship to the public employer; or
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> (d) *Persons in a probationary or temporary status, or employed seasonally, irregularly or on call.* For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more than 12 months or who has an individual contract with his employer, nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed. (emphasis added)

Given the evidence and arguments the SEA is making to support its position and our understanding of the current dispute we conclude that the issue for decision in this case is not the same as in PELRB Decision 83-02, and we find that the principal of collateral estoppel does not bar the SEA's current unfair labor practice charge. The SEA does not claim in this case that it represents all part-time Liquor Commission employees, including those employed "seasonally" or "irregularly." Instead the SEA claims that since the early 1980's the Liquor Commission has hired and relied more on part time than full time employees to staff retail store operations, a trend that grew out of budgetary pressures and constraints in the 1980's and that there are now many part time employees who meet the Act's definition of "public employee." The record reflects that today there are over 900 part time Liquor Commission employees, and we do not believe PELRB Decision 83-02 determines or resolves the current dispute. Given the passage of time, the change in the configuration of the workforce, and the fact that the SEA's legal position

is not inconsistent with the ruling in PELRB Decision 83-02, the State's motion to dismiss is denied. The SEA is entitled to make its case that today there are hundreds of part-time retail store part time employees covered by the 1976 certification and that the State has violated the Act by refusing to recognize the public employee status of these employees and by refusing to recognize the SEA

as their exclusive representative.

II. Alleged Violations of RSA 273-A:5, I (a), (b), (c), and (g):

The SEA acknowledges that some part time employees are "seasonal" employees and therefore are excluded from the Act's definition of public employee, are not in the bargaining unit, and are not represented by the SEA. We find this group of part time employees consists of those individuals hired as "seasonal" workers as per their employment paperwork (State Exhibit 1) and those only scheduled to work during the November to January and July to September busy seasons. All other part time employees are "public employees" absent evidence that they are "persons in a . . . temporary status, or employed . . . irregularly or on call." *See* RSA 273-A:1, IX (d) and PELRB Decision 83-02.

The basic facts in this case are not in dispute. However, the parties have reached different conclusions as to what these facts reveal about the public employee status of the involved part time employees. The SEA contends that the hundreds of part time employees who are scheduled to work on a year round basis are public employees because they are not in a temporary status, employed irregularly or on call. The State disagrees and, among other things, contends that the work schedules demonstrate that the part time employees work "irregular" schedules and therefore should be treated as "irregular" employees under the Act. The State also points out that under the State's personnel rules, full time employees enjoy certain rights and

protections that are not extended to part time employees, including, for example, the right to certain procedures and review in connection with termination action. The State argues this is also proof of the irregular and/or temporary status of part time employees. The State also argues that the part time employees are "temporary" employees within the meaning of RSA 273-A:1, IX (d) because they do not have a "reasonable expectation of continued employment."

The court has applied dictionary definitions for the terms "irregular" and "on call" used in RSA 273-A:1, IX (d), stating that "[i]rregular is defined as 'lacking continuity or regularity of occurrence, activity, or function and [o]n call means ready to respond to a summons or command. *In re Town of Stratham*, 144 N.H. 429, 431 (1999). In *Stratham* part-time officers worked "substantial hours" but had no set day to work and only worked when a shift opened because a full-time officer was unavailable. They were excluded from the bargaining unit under consideration because they were deemed "on-call employees who work on an irregular basis." In *Brentwood Police Union, NEPBA and Town of Brentwood,* PELRB Decision No. 2008-247 (December 5, 2008), a part time officer who worked 25 hours or less a year and had only recently been scheduled to begin working the last Monday of each month was deemed an irregular employee. In *International Brotherhood of Teamsters, Local 633 and the State of New Hampshire, Administrative Office of the Courts*, PELRB Decision No. 2009-048 (March 10, 2009) the work schedules of per diem court security officer work schedules were reviewed to determine whether any were employed on an irregular or on call basis within the meaning of RSA 273-A:1, IX (d). Ultimately, and with some exceptions, those per diem court security officers who worked 44 weeks (or were on track to work that amount) per year and were employed during the preceding six months were deemed eligible for inclusion in the unit because they were not "irregular" or "on call" employees. It was also noted that the "fact that some per

diem CSOs work as little as 1-2 days per week is not determinative. A reduced work schedule is the sine qua non, or essence, of part-time employment, and the fact of part-time employment is not enough, by itself, to exclude an employee from a proposed bargaining unit."

In *Appeal of the University System Board,* 147 N.H. 626 (2002) the court upheld the PELRB's determination that adjunct faculty at Keene State College were not temporary employees because they had a reasonable expectation of continued employment.

We are dealing in this case with state employees working in a retail environment. These are not employees hired to work for a department or agency that operates on a Monday to Friday basis with conventional office hours. Stores are now open weekends and holidays, and there are day shifts, night shifts, and weekend shifts. We conclude that variation in weekly work schedules for such employees is to be expected, particularly given the heavy reliance on a part time work force. We also note, as reflected by State Exhibit 3, that the work schedules of both full time and part time employees are not consistent from week to week. More importantly, the fact that part time employees don't always work the same number of hours each week, or work on the same day, or work the same shift every week does not mean that their employment lacks "continuity or regularity of occurrence, activity, or function." Many part time employees are regularly scheduled to work on a year round basis, and not just during the busy seasons. It is clear the Liquor Commission could not staff its retail operations if this were not the case.

Also, the differing treatment of full time and part time employees under the personnel rules does not establish that part time employees are not public employees under the Act. There is nothing in the 1976 certification, the Act, or any court or PELRB decision which serves to exclude part time employees from the definition of public employee or from the certified bargaining unit on this basis. Further, part time employees have a "reasonable expectation of

continued employment" and are not "temporary" employees excluded from the Act's definition of public employee. The fact that part time employees may be employees at will who are not entitled to any administrative review of a change in their employment status does not make them temporary employees under the Act. There is otherwise a lack of evidence indicating that such employees are regularly or frequently terminated, or usually or typically only hired for a limited period of time, or other similar evidence which would support a finding that such employees are "temporary." This is not to say that part time employees are guaranteed employment of any particular duration, nor is to say that their employment can only be terminated for cause. However, we don't equate "at will employment" with "temporary" employment under the Act.

In accordance with the foregoing we find that the State has committed an unfair labor practice by violating the provisions of RSA 273-A:5, I (a), (b), and (g). There is insufficient evidence to support the alleged violation of sub-section (c), and that portion of the complaint is dismissed. The State is ordered to cease and desist its refusal to recognize the public employee and bargaining unit status of the non-seasonal part time Liquor Commission retail store employees and its refusal to recognize the SEA as the statutorily authorized exclusive representative of such employees with the right, per RSA 273-A:11, I (a) to represent such employees in collective bargaining and in the settlement of grievances.

So Ordered.

September 23, 2013

David J.T. Burns, Esq., Chair

By unanimous vote of Alternate Board Member David J.T. Burns, Esq. and Board Members Kevin E. Cash and James M. O'Mara, Jr.

Distribution:

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