The appeal of this decision was declined. See January 6, 2011 court order in *Appeal of New Hampshire Troopers Association on behalf of Trooper First Class Karen Therrien,* NH Supreme Court Case No. 2010-0804.

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

New Hampshire Troopers Association/Trooper Karen Therrien

v.

New Hampshire Department of Safety, Division of State Police

Case No. G-0097-7
Decision No. 2010-165

Appearances:

John S. Krupski, Esq.,
Molan, Milner & Krupski PLLC, Concord, New Hampshire for the Complainant

Marta Modigliani, Esq.,
State of New Hampshire, Department of Safety, for the Respondent

Background:

The New Hampshire Troopers Association (Association) filed an unfair labor practice complaint against the New Hampshire Department of Safety, Division of State Police (State) on February 2, 2010. The complaint involves TFC Therrien's attempt to take annual leave on September 17, 2009, her planned last day of employment, and her related goal of obtaining full credit for the month of September, 2009 for retirement purposes. The Association claims that the State improperly determined that annual leave cannot be used on the last day of employment. The Association also claims that the State is obligated to provide TFC Therrien with a mileage reimbursement and wages at one and on-half times her normal pay rate because she was effectively ordered to report to work on her last day of employment and was required to provide

her own transportation. The Association asserts that the State's actions violated RSA 273-A:5, I (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) and (h)(to breach a collective bargaining agreement).

The State denies the charges and seeks dismissal of the complaint. The State argues that as a former employee TFC Therrien is not entitled to have her claims addressed through the contractual grievance procedure and/or by this Board. The State also claims that the State Government Human Resources System has not accepted annual leave for an employee's last day of employment for legitimate reasons since 1999. The State contends that in this case, by turning in her cruiser and related equipment on September 11, 2009, TFC Therrien effectively established that date as her last day of employment, notwithstanding her intent to take annual leave from September 14 to 17, 2009, because she no longer possessed the equipment necessary to fulfill the law enforcement responsibilities required of her position. The State also contends that it worked cooperatively with TFC Therrien by arranging for her to report to work on September 17, 2009 at State Police headquarters in Concord where she performed administrative tasks and thereby established September 17, 2009 as her last day of employment for purposes of the New Hampshire Retirement System.

The Board held a hearing in this matter on May 4, 2010 at the offices of the PELRB in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties have filed post-hearing briefs. The parties' respective objections to the relevancy of certain stipulations of fact as reflected by their joint filing are overruled.

Findings of Fact

1. The New Hampshire Troopers Association is the certified exclusive representative of the bargaining unit for the sworn officers of the New Hampshire Division of State Police up to and including the rank of Sergeant.

2. Trooper First Class Karen Therrien is a former trooper who was employed by the New Hampshire Department of Safety, Division of State Police.

3. The New Hampshire Department of Safety, Division of State Police is a public employer within the meaning of RSA 273-A:1, IX.

4. In 1999 the State Manager of Employee Relations announced a decision of the State Labor Management Committee, comprised of four representatives of the State and four representatives appointed by the State Employees' Association, to eliminate employee use of annual leave for the purpose of extending employment and extending and continuing insurance coverage to which the employee was otherwise not entitled. This decision was implemented through a change to the State's Government Human Resource System (GHRS) which was modified to "indicate that a person's last day of work is their actual physical last day of work and not a date indicated by using accrued leave" and by October, 1999 was being applied "throughout the classified service." State Exhibits 5 and 6.

5. In August, 2009, after approximately 21 years of service, TFC Therrien began making arrangements to leave state service, with the intention of obtaining state service credit for the entire month of September, 2009 for purposes of the New Hampshire Retirement System. To do so she would need to continue her employment at least through September 16, 2009, and TFC Therrien intended to remain a state employee through September 17, 2009. She was not scheduled to work on September 12 and 13.

6. 16-H.1.1 A. of the Professional Standards of Conduct states:

> Any member voluntarily resigning shall submit a letter addressed to the Director setting forth the date of the last intended duty day and a brief statement as to the reason for resignation.

7. On August 28, 2009 TFC Therrien submitted a separation of employment memo addressed to Colonel Booth through Lt. Aucoin stating "[a]fter completing more than 21 years of service with the Division of State Police as a trooper this writer is retiring. My last work day is September 17, 2009."

8. On August 28, 2009 TFC Therrien submitted an annual leave slip to her patrol supervisor for September 14-17, 2009.

9. Article 10.3 of the current collective bargaining agreement states:

> Leave requests will be accepted by the Employer at reasonable times. The Employer agrees to provide copies of leave requests to the requesting employee. Additionally, employees shall be notified as to the approval or denial of their leave request within three days. Annual leave will be granted by the Employer at such times as, in the opinion of the Employer, will least interfere with the efficient operation of the Division. However, every reasonable effort will be made to accommodate the employee's request. To the extent possible, every employee will be afforded the opportunity to take two consecutive weeks of accumulated leave, at least once per calendar year. The Employer may direct employees to take at least one full calendar week of annual leave in a calendar year.

10. TFC Therrien's August 28, 2009 leave slip does not indicate that September 17, 2009 would be her final day of employment. Sergeant Wagner approved the annual leave request on August 30, 2009. Association Exhibit G.

11. Article 10.3.1 of the current collective bargaining agreement states:

> Once an employee's annual leave has been approved, his/her leave shall not be cancelled or modified for any reason, except with mutual agreement, or in the case of an emergency as defined by section 2.2. Employees whose annual leave has been cancelled in the case of an emergency shall have those hours worked compensated at one and one-half (1 ½) times the regular rate.

12. On September 3, 2009 the State documented TFC Therrien's last day of work as September 17, 2009.

13. During their state service State Troopers like TFC Therrien take their cruiser and gear home and work "portal to portal."

14. Based upon the fact that she was not scheduled to work September 12 and 13 and had received approval to take annual leave from September 14 to 17 TFC Therrien understood that her last physical day at work was September 11, 2009. She turned in all her state issued equipment on that date, including her cruiser and gear. After September 11, 2009 TFC Therrien no longer possessed the equipment necessary to carry out the law enforcement responsibilities of her position.

15. On September 14, 2009 the State issued a notice about TFC Therrien's employment status, Association Exhibit E, stating:

> Trooper First Class Karen B. Therrien retired effective September 12, 2009. She has completed 21 years of dedicated service to the Division of State Police. Her last official work day was on Friday, September 11, 2009.

16. On September 15, 2009 Major Forey emailed TFC Therrien about the situation, and stated:

> Upon conferring with a case manager at the New Hampshire Retirement System today, they advised that the employee (you) should give your retirement representative a call to confirm whether you will need to work on the 17th in order to receive service credit for the full month of September...If you find through this call that you will in fact need to work on September 17th to attain that service credit, please contact Major Conte at 271-2830. Major Conte will provide you with an administrative assignment at Headquarters on September 17th enabling you to meet the NHRS requirement for the benefit of your retirement plans.

17. Around this time TFC Therrien also learned that the GHRS would not accept an annual leave entry for an employee's final day of employment, although State personnel dealing with TFC Therrien's situation at that time were apparently not completely familiar with the

1999 GHRS modifications and did not and probably could not provide her with a more full and complete explanation. However, in order to achieve her goal of full service credit for the month of September, 2009 she in fact reported for work on September 17, 2009 in accordance with Major Forey's proposal. She provided her own transportation to and from work on that day and performed filing functions.

18. Article 19.4.2 of the current collective bargaining agreement states:

> The Parties agree that employees who are required to use their private vehicles for State business shall be reimbursed for all miles incurred at the maximum rate then allowable by the U.S. Internal Revenue Service for the first mile of travel. The Parties further agree that changes in the mileage reimbursement rate, as a result of U.S. Internal Revenue Service action, shall be made prospectively. The Parties further agree that an employee shall record mileage incurred on State business from the odometer readings on his/her vehicle and the Employer shall reimburse for all reasonable travel incurred. In no instance, however, shall the Employer reimburse for travel incurred from an employee's home to or through the site of his/her official headquarters, or vice versa, unless such reimbursement is specifically authorized by this Agreement.

19. TFC Therrien was paid straight time for her work on September 17, 2009. She did not request and did not receive mileage reimbursement.

20. Article 6.3 of the current collective bargaining agreement provides:

> The Employer may alter scheduled days off and the Employer may relieve a bargaining unit employee of duty during the employee's regularly scheduled shift hours for reasons of safety or effectiveness.

21. Article 2.2 of the current collective bargaining agreement states:

> For purposes of this section "emergency" is defined as any conditions or situation out of the ordinary which requires immediate action to avoid danger to life, property, or to prevent losses affecting the Employer, the employee or the general public.

22. Section 14.5.1 of the CBA provides as follows:

> If subsequent to the Director's decision the Association feels that further review is justified an unfair labor practice complaint may be submitted to the Public Employee Labor Relations Board. A copy of the complaint must be sent to the Employer at the same time. The decision of the Public Employee Labor Relations Board shall be final and binding.

Decision and Order

Decision Summary:

The Association's requests for relief are denied and the complaint is dismissed. The Board does have jurisdiction to consider the merits of the claims presented, but finds there is insufficient evidence to prove a violation of RSA 273-A:5, I (e) or (h).

Jurisdiction:

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

Discussion:

The Board first addresses the State's claim that the Association cannot maintain a grievance or an unfair labor practice charge on behalf of a former employee for events that occurred during the course of employment. The State's request for dismissal on this basis is denied. TFC Therrien's change in status from an active State employee to a retired or resigned employee does not deprive this Board of jurisdiction to address the merits of an unfair labor practice charge based upon events which occurred during the course of her employment. *See, e.g., Rochester School Board v. Public Employee Labor Relations Board,* 119 N.H. 45 (1979).

As to the merits, the Board rejects the Association's argument that denial of annual leave on the final day of employment is improper unless such action is mandated by a law, administrative rule, or past practice. Instead, the Board concludes that annual leave requests should be processed in accordance with Article 10.3 of the collective bargaining agreement. This provision does not establish an entitlement to annual leave on the final day of employment but does state that "[a]nnual leave will be granted by the Employer at such times as, in the opinion of the Employer, will least interfere with the efficient operation of the Division.

However, every reasonable effort will be made to accommodate the employee's request." Due consideration should also be given to generally accepted and applicable state wide practices, such as the 1999 decision of the Labor Management Committee, which was designed to eliminate the use of annual leave on the final day of employment to extend employment and continue insurance coverage not otherwise available and which resulted in changes in the statewide GHRS which prevents the use of annual leave on the final day of employment.

In this case TFC Therrien's application for annual leave on her planned final day of employment was granted by Sergeant Warner, in error as it turns out, and the State initially identified September 17, 2009 as her final day in state service. As her leave slip was processed TFC Therrien learned that the GHRS could not accept an annual leave entry on the last day of employment for reasons the Board attributes to the implementation of the 1999 Labor Management Committee decision. At this point TFC Therrien had already turned in her cruiser and equipment. The State concluded the proper date of TFC Therrien's last day of employment should be identified as September 11, 2009 and the State issued a September 14, 2009 notice to this effect. A consultation between the State and TFC Therrien at this juncture, before the issuance of the September 14, 2009 notice, might have been helpful, but does not appear to have taken place. The confusion over TFC Therrien's status and the last day of her employment for purposes of the New Hampshire Retirement System was eventually addressed when arrangements were made for TFC Therrien to work on September 17, 2009.

The Association contends that TFC Therrien is entitled to wages for the work she performed on September 17 at one and one-half times her regular rate of pay as well as reimbursement for travel expense because she provided her own transportation to and from work on that date. These requests for relief are denied. Under Article 10.3.1 the State is liable for the

increased rate of pay if TFC Therrien was called back to work on account of an emergency, but not if she returned to work by mutual agreement. The Board finds that TFC Therrien was not ordered or improperly forced back to work on September 17, 2009 for emergency or other reasons as claimed. Instead, she accepted the proposal outlined in Major Forey's September 15, 2009 email. Her appearance at work on September 17, 2009 was her informed, reasonable, and prudent choice and decision made in consultation and cooperation with the State. As a result, the parties were able to address and resolve the conflict between the State's designated date of TFC Therrien's final day of employment and her goal of obtaining full service credit for the month of September, 2009. Additionally, TFC Therrien never filed for a travel expense reimbursement, and her failure to do so is not excused by the possibility that her request would have been futile. Her request for such relief from the Board is denied on that basis.

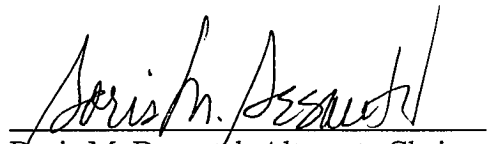
In summary, TFC Therrien was able to obtain service credit for the full month of September, 2009 and avoid a potential future dispute with the New Hampshire Retirement System about her employment dates and also avoid a diminished future benefit. In an ideal situation she would not have endured the uncertainty and confusion about her employment status as she completed her final weeks of employment after 21 years in state service. However, the Board finds there is insufficient evidence to prove the State committed an unfair labor practice in violation of RSA 273-A:5, I (e) or (h) and the Association's unfair labor practice complaint is dismissed.

Notwithstanding the foregoing, the Board hopes this case has resulted in relevant administrative improvements to avoid similar problems in the future. Additionally, the Board strongly believes that both parties should have exerted themselves more strenuously to find a non-adjudicatory resolution to this disagreement. It seems there were a number of non-

prejudicial arrangements that could have been made in the September, 2009 time frame to satisfy both parties' interests which would have avoided the attention this case has received from the parties, counsel for the parties, and the Board.

So ordered.

September 15 ,2010.



Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Member Carol Granfield and alternate Board Member Richard J. Laughton also voting.

Distribution:
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