This decision was reversed on appeal per July 23, 2010 Supreme Court order in *Appeal of New Hampshire Division of State Police*, NH Supreme Court Case No. 2009-456.

STATE OF NEW HAMPSHIRE

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NEW HAMPSHIRE TROOPERS ASSOC./TROOPER BRIAN DOYLE

CASE NO. P-0754-21

V.

STATE OF NH DEPARTMENT OF SAFETY, DIVISION OF STATE POLICE

AND

NEW HAMPSHIRE TROOPERS ASSOC./TROOPER CHRISTOPHER ST. CYR

CASE NO. P-0754-22
DECISION NO. 2009-068

V.

STATE OF NH DEPARTMENT OF SAFETY, DIVISION OF STATE POLICE

APPEARANCES

Representing: New Hampshire Troopers' Association
Glenn R. Milner, Esq.[1], Molan, Milner & Krupski, PLLC
Concord, New Hampshire

Representing: State of NH, Department of Safety, Division of State Police
Marta A. Modigliani, Esq., N.H. Department of Safety
Concord, New Hampshire

BACKGROUND

In these consolidated cases the New Hampshire Troopers Association filed unfair labor practice complaints on May 19, 2008 alleging that the State of NH Department of Safety,

[1] James W. Donchess, Esq. represented New Hampshire Troopers' Association through the hearing and the submission of post-hearing briefs, and attorney Milner appeared as Association counsel thereafter.

Division of State Police (the "State") committed unfair labor practices in violation of RSA 273-A:5 (h)(to breach a collective bargaining agreement). The Association claims that the State's criticisms of Troopers Doyle and St. Cyr's use of sick leave and of Trooper Doyle's response to call backs violated the parties' 2007-2009 Collective Bargaining Agreement. The criticisms in dispute are contained in annual evaluations and other personnel documentation.

The Association requests that the PELRB: a) declare that the State committed an unfair labor practice when it criticized Trooper Doyle in his January 31, 2008 performance evaluation for being unavailable for immediate call back to duty during his off duty hours when the State was not paying Trooper Doyle to be on standby status; b) declare that the State committed an unfair labor practice when it criticized Troopers Doyle and St. Cyr in their performance evaluations and Trooper St. Cyr in a Memo of Counsel for using sick time in circumstances consistent with the requirements of Section 11.2 of the CBA; c) find that the State is not paying Trooper Doyle to be on standby status in any future promotion or reassignment decisions; d) order the State to cease criticizing bargaining unit members in future performance evaluations who are not available for immediate call back to duty when the State is not paying them to be on standby status; and e) order the State to cease criticizing bargaining unit members in future performance evaluations who use sick time in compliance with the requirements of Section 11.2 of the CBA; and f) grant such other relief as may be just.

The State filed its answer on June 3, 2008 and generally denies the charges. The State also asserts that the requirements for performance evaluations are dictated by the Division of Personnel rules, not the parties' collective bargaining agreement, and that the board has no jurisdiction over the contents of an employee's performance evaluation. The State requests that the PELRB: a) dismiss the charge of unfair labor practice; b) declare that the New Hampshire

Department of Safety, Division of State Police did not commit an unfair labor practice; and c) order such other relief and further relief as it deems just.

The hearing originally scheduled for August 21, 2008 was rescheduled on the State's motion with the Association's consent to October 21, 2008, at which time a hearing was held at the PELRB offices in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The record was held open until November 21, 2008 to allow the parties to submit post hearing briefs. The parties' factual stipulations are set forth as Findings of Fact 7-8.

FINDINGS OF FACT

1. The Association is the board certified exclusive representative for New Hampshire State Troopers below the rank of Sergeant pursuant to RSA 273-A:10.

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

3. The Association and the State are parties to a July 1, 2007 to June 30, 2009 Collective Bargaining Agreement (the "2007-09 CBA"). See State Exhibit 2. The final step of the Article 14 Grievance Procedure is as follows:

> 14.5 STEP IV - Public Employees Labor Relations Board
>
> 14.5.1. 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 Employees Labor Relations Board. A copy of the complaint must be sent to the Employer at the same time. The decision of the Public Employees Labor Relations Board shall be final and binding.

4. Under Article VI of the 2007-09 CBA the "basic work period" is defined as 160 hours in a 28 consecutive day period. Troopers are paid overtime for hours worked in excess of 160 during this time period.

5. Article VII provides as follows:

> 7.3 Employees called back to work without prior notice on the same day after once leaving work or before the next regular starting time, shall be guaranteed a minimum of not less than four (4) hours compensation.
>
> 7.4 Employees called back to work pursuant to 7.3, shall have the hours worked computed from portal-to-portal, plus a twenty (20) minute allowance for preparation time.
>
> 7.5 Standby:
>
> Any employee who is required by the Employer to be available for immediate return to duty, under conditions which do not allow the employee reasonable use of the time waiting to be called back to duty for his or her own purposes, shall be deemed to be in standby status. Time in standby status shall be considered time worked for regular compensation and overtime compensation purposes.

6. Article XII, Sick Leave, provides:

> 11.2 "Sick leave is not intended to supplement other leave provisions of this Agreement and is intended to be used only for the purpose set forth herein.
>
> 11.4 An employee may be required by the Employer to furnish the Employer with a certificate from the attending physician or other licensed health care practitioner when, for reasonable cause, the Employer believes that the employee's use of sick leave does not conform to the reasons and requirements for sick leave use set forth in this Agreement. Such certificate shall contain [a] statement that in the practitioners (sic) professional judgment sick leave is necessary. In addition, the Employer may, at state expense, have an independent physician examine one of his/her employees who, in the opinion of the Employer, may not be entitled to sick leave. The time related to such examination shall not be charged to the employee's leave.

7. Christopher St. Cyr has been a Trooper I since March 19, 2000 and Brian Doyle has been a Trooper I since March 8, 2003.

8. The New Hampshire Troopers Association was formed in 1990. Prior to 1997, troopers were covered by the terms of omnibus state employees' collective bargaining agreements negotiated by a previous exclusive representative, the SEA, and were paid under the SEA law enforcement wage schedule, which later became the troopers' wage schedule.

9. Sergeant Charles Winters completed a February 5, 2008 annual performance evaluation of Trooper St. Cyr, and he rated Trooper St. Cyr "below expectations" "Attendance/Punctuality." State Exhibit 5. The evaluation cites 116 hours of sick leave, including 36 hours of sick-dependent. Sergeant Winters states that:

> Although I did not note any specific pattern, for example, in conjunction with scheduled days off, this total figure is high. Also, I am not aware of any on-going medical issues. This at times, creates extra burdens for the day shift personnel. Tpr. St. Cyr did receive a "Memo of Counsel" from Captain Robert L. Quinn for his excessive/unscheduled absences.

10. Captain Quinn's February 5, 2008 Memo of Counsel states that Trooper St. Cyr is "hereby being issued this Troop Level *Memo of Counsel* for your failure to meet the work standard, due to excessive unscheduled absences. This Memo of Counsel pertains to the time period beginning in 2006 until present." *See* State Exhibit 6.

11. To support his points and conclusions, Captain Quinn included the text of Per 1204.05 Allowable Uses of Sick Leave, and Per 1204.07 Physician's Certificate in the Memo of Counsel, even though these subjects are addressed in Article 11 of the 2007-09 CBA. *See* State Exhibit 6. He also states that:

> Since I am of the belief that you and all other employees of the Division of State Police should be responsible for being at work on a regular basis, effectively immediately, you shall comply with the following:
>
> - If you call in sick you shall speak directly with an on duty Supervisor or the Troop Commander to request that Sick Leave be granted. You shall provide the nature of your illness, where you will be recuperating and your expected return to work date.
>
> - Henceforth, for all Sick Leave you are required to submit a PD-8 form completed in full by you're physician or you're licensed health care practitioner. (sic)
>
> It is clear that from 2006 until present you're use of Sick Leave exceed the norm. (sic) Your attendance is seen as irregular and below work performance expectations set by the Division. Your frequent absences from duty also have the potential of hindering the operations of this Troop.

12. Sergeant Todd Landry completed Trooper Doyle annual performance on December 22, 2007. *See* State Exhibit 8. He rated Trooper Doyle as meeting expectations in "Attendance/Punctuality," and under comments he documented the amount of sick and annual leave Trooper Doyle used during the evaluation period. But see State Exhibit 13.

13. Under "Dependability: The capacity to follow policy guidelines and maintain appropriate confidentiality" Sergeant Landry rated Trooper Doyle as meeting expectations and provided the following comments:

> During Tr. Doyles (sic)* assigned working hours he has the ability, but is inconsistent in taking care of assigned tasks. Of completed tasks, he does them without question and in a timely manner. As a division member assigned to Troop F, there are additional expectations beyond the scheduled duty hours in order to serve the public which include being called out either prior to the scheduled day shift or after the end of the night shift with the switch over time being 0400 hours. In June Tr. Doyle was unable to respond to a callout due (to) having a couple of beers after his shift. Tr. Doyle was counseled on this by Sgt. Beausoleil and a note placed in Tr. Doyles* work file stating the facts and adding that the matter "won't be mentioned in your evaluation unless there is another incident." On 10/12/07 attempts were made to reach Tr. Doyle to respond to a 911 hang-up call in Dalton. The dispatcher made three calls to Tr. Doyles* residence without getting an answer. When asked about this, Tr. Doyle could only offer that he did not hear the phone ringing bud did state that his fiancée heard the phone ring.
>
> Tr. Doyle added that he is familiar with what the Professional Standards of Conduct states about being on Standby and feels that his off duty time is his own time. Tr. Doyles* opinion is that the Division needs to make changes to provide adequate coverage. Tr. Doyle would be correct in regards to his time being his own, however along with Dependability is Dedication.
>
> Tr. Doyles* Dedication to the Division and his patrol partners with respect to this topic is unacceptable. Although Tr. Doyles* stance on this subject cannot be deemed as unacceptable, it should be weighted when making future decisions in promotions and reassignments. As time progresses one would hope that Tr. Doyles* Dedication would improve to a more acceptable level.

14. Sergeant Landry's descriptions of call out expectations outlined in Trooper Doyle's annual evaluation is consistent with the testimony of Lieutenant John Scarinza, Troop

Commander for Troop F (Trooper Doyle is assigned to Troop F), and Colonel Frederick Booth, the Director of the New Hampshire State Police on the subject. There is a clear expectation in the Division of State Police that Troopers will be available for the kinds of "call outs" which Sergeant Landry described in his evaluation. A call out is a request that a Trooper either return to work after the completion of a shift or report to work early. The State uses call outs as necessary to cover gaps in Trooper coverage, with such gaps occurring more commonly occurring overnight when there is no Trooper on duty.

15. Although Trooper Doyle did not respond to the call outs referenced in his evaluation, he responded to three or four other call outs in 2007 and six or more in 2008.

16. On March 19, 2008 Lieutenant Scarinza issued a Memo of Counsel to Trooper Doyle, stating:

> You are hereby being issued this Troop Level Memo of Counsel for your failure to meet the work standard, due to unscheduled absences involving the use of sick leave. This Memo of Counsel pertains to the time period beginning in July of 2006 until the present.

Lieutenant Scarinza's memo listed 12 days of sick leave taken between July 1, 2006 and November 1, 2007 and also included the text of Per 1204.05 "Allowable Uses of Sick Leave" and Per 1204.07 "Physician's Certificate" but did not cite to Article 11 of the 2007-09 CBA. See State Exhibit 13.

DECISION AND ORDER

DECISION SUMMARY

Both Troopers Doyle and St. Cyr used sick leave in accordance with the provisions of the 2007-09 CBA and accordingly the State improperly inserted negative documentation in the Troopers' personnel files concerning such use. Trooper Doyle was entitled to the reasonable use of his time while waiting to be called back to duty, and the board finds that his use was in fact

reasonable in the two disputed instances, even though he was unable to respond to the call backs. The State's negative documentation of the sick leave and call back incidents violated the parties' collective bargaining agreement. The State shall remove all such references from the Troopers' personnel files and cease and desist from administering Article 7 and 11 of the 2007-09 CBA in a manner inconsistent with or contrary to this decision.

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I. PELRB jurisdiction is proper in this case as the Association has alleged violations of RSA 273-A:5, I (h)(to breach a collective bargaining agreement). The parties' collective bargaining agreement provides that as a final step in the grievance procedure the Association may submit an unfair labor practice complaint to the PELRB, and the decision of the PELRB shall be final and binding.

DISCUSSION

The use of sick leave is a subject covered by Article 11 of the 2007-09 CBA, which generally describes how sick leave is accrued and how it may be used. The parties have also agreed to an oversight mechanism in the form of physician's certificates and the like, as described in Article 11.4, which effectively allows the State to monitor the appropriateness of sick leave requests. Even if the State doesn't formally invoke Article 11.4, this provision serves to discourage employees from improper use of the sick leave benefit.

In this case the State never cited Article 11.4, but Captain Quinn referred to similar, if not identical, language contained in personnel rules in his February 5, 2008 Memo of Counsel to Trooper St. Cyr, as did Lieutenant Scarinza in his March 1, 2008 Memo of Counsel to Trooper

Doyle.[2] Prior to these dates the State had not required physician's certificates or similar Article 11.4 documentation in connection with the disputed sick leave that is the basis for the State's commentary documented in the Troopers' personnel files and outlined in Findings of Fact 9-16. The State concluded that Trooper St. Cyr's use of sick leave was "high," qualified as "excessive scheduled absences" and "exceeded the norm." Captain Quinn also informed Trooper St. Cyr that his "attendance is seen as irregular and below work performance expectations set by the Division." Lieutenant Scarinza stated that Trooper Doyle had failed "to meet the work standard, due to unscheduled absences involving the use of sick leave." These comments all relate to the time period prior to the State's notice that it would require a physician's certificate, and they constitute negative commentary based upon these employees' use of a negotiated contract benefit that can reasonably be viewed as likely to have an adverse impact on their employment, including their opportunities for career advancement, and the board also concludes that this was the State's intent.

The State's observations about Trooper St. Cyr and Trooper Doyle's use of sick leave can serve as "reasonable cause" that triggers the requirement of physician's certificates and similar documentation and in effect implements a prospective audit of an employee's use of sick leave. However, the State cannot also use the "reasonable cause" information to judge the appropriateness of Trooper St. Cyr or Trooper Doyle's past use of sick leave, as such a course of action undermines the bargained for oversight process contained in Article 11.4. Of particular significance is the involvement of presumably independent third parties in the Article 11.4 process. Under the bargained for arrangement governing the Article 11 sick leave benefit, Trooper St. Cyr's and Trooper Doyle's use of sick leave must be deemed permissible and in

[2] The board will treat the personnel rule references as Article 11 references for purposes of this case, but the State should cite and rely upon applicable contract provisions when particular issues or subject matter are covered by the terms of the parties' collective bargaining agreement.

accordance with the contract until such time as the State collects information to the contrary under the Article 11.4 process. Accordingly, the adverse documentation about Trooper St. Cyr and Trooper Doyle's use of the Article 11 sick leave benefit was premature. Further, such negative commentary would only be appropriate and timely as to sick leave requested or taken after the State invoked the Article 11.4 physician's certificate requirements and which is based upon information obtained through the Article 11.4 process.

The other Trooper Doyle issue before the board relates to the operation of Articles 7.3, 7.4 and 7.5 of the 2007-09 CBA, and the subject of call back and standby status. In the two instances under consideration, Trooper Doyle did not return to duty in response to a call back because he had, on one occasion, had one or two beers, and on the other occasion was asleep and did not hear the phone ring. He did, however, respond to three or four other call outs in 2007 and six or more in 2008. Article 7.5 provides that only an employee who is denied the "reasonable use of the time waiting to be called back to duty for his or her own purposes shall be deemed to be in standby status" and therefore eligible for compensation. "Standby status" means that an employee is committed to being prepared and immediately responsive to a call for return to duty, whereas an employee subject to call back has more liberty in the use of his time, subject to the reasonableness standard. In this case the State informed Trooper Doyle that he was generally subject to call back after the completion of his shift up to 4:00 a.m., at which time the Trooper scheduled to report on the next shift was subject to call back. Call back in Troop F was an ongoing arrangement because of a gap in coverage between the end of Trooper Doyle's shift and the start of the next shift.

The "reasonable use" standard unquestionably places limitations on Trooper Doyle's activities while waiting to be called back to duty. However, Article 7 does not expressly require

that a Trooper shall respond to all call backs, does not specify that any use of a Trooper's time which will prevent a Trooper from responding to a call back is unreasonable, and does not provide a representative list of reasonable or unreasonable uses of time while subject to call back. The 2007-09 CBA also does not give the State the right to unilaterally determine the reasonableness of a Trooper's use of his time while subject to call back. Subject to the foregoing observations, the reasonableness of Trooper Doyle's use of his time is to be judged, at least in part, by how such use might impair or interfere with his ability to respond to a call back to duty, but at the same time a distinction must be maintained between a Trooper who is subject to call back and a Trooper who is on standby.

In evaluating the reasonableness of Trooper's Doyle's actions, the board considers the relative infrequency of call backs, less than one per month annually, and therefore the relatively low probability that Trooper Doyle would receive a call back to duty on any particular night, as well as the absence of any contractual obligation that Troopers are required to respond to all call backs. The board also notes that the evidence suggests Trooper Doyle did not anticipate that he would in fact be called back to duty on the two occasions under consideration, and he in fact responded to call backs on a number of other occasions in 2007 and 2008. In these circumstances, having one or two beers on this one occasion was a reasonable use of Trooper Doyle's time while waiting to be called back to duty. However, the board observes that as the probability of a call back increases, the reasonableness of alcohol consumption decreases, as in such circumstances the employee is rendering himself unfit for a more likely request that he return to duty. The board also emphasizes that it is not addressing a situation where Trooper Doyle has failed to respond to call backs on more than one occasion because of alcohol consumption.

The board also finds that Trooper Doyle was using his time "reasonably" in the one instance when he slept through a call back. Article 7 does not impose the requirement that Troopers carry a pager or phone on their person during call back periods, and the absence of such requirements create the possibility that, as happened here, a Trooper will not receive the call back. It was also reasonable for Trooper Doyle to sleep after returning home, as it appears that such behavior had not previously interfered with his ability to receive and respond to a call back. The board has no reason to doubt Trooper Doyle's explanation of the event.

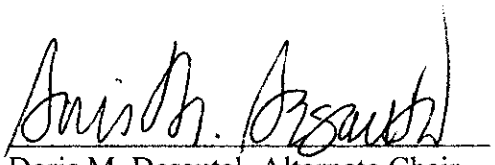
Accordingly, as to the two call backs at issue, the evidence is that Trooper Doyle was making a reasonable use of his time and acting in compliance with the provisions of Article 7 during the period when he was waiting to be called back to duty, even though such use prevented him from responding to the call backs in these two instances. The State improperly interpreted and applied these contractual provisions when Sergeant Landry inserted adverse commentary about these two call back situations in Trooper Doyle's annual performance evaluation.

The State's contention that the content of personnel evaluations and similar employee evaluation material are somehow immunized from this board's scrutiny, and that the board lacks jurisdiction, is without merit when the substance of such content is contrary to the provisions of the parties' collective bargaining agreement, as is the case here. The State's motion to dismiss on that basis is denied.

The board finds that the Association has sustained its complaint that the State has committed an unfair labor practice in violation of RSA 273-A:5, I (h))(to breach a collective bargaining agreement). As a remedy, the State is ordered to remove all adverse and negative references from any and all personnel files of Troopers St. Cyr and Doyle relating to their use of sick leave and Trooper Doyle's lack of response to the two disputed call backs during the time

periods at issue in this case. Such adverse and negative references include, but are not necessarily limited to, the content referenced in Findings of Fact 9, 10, 11, 13 and 16. The State is also ordered to cease and desist from administering the provisions of Article 7 and Article 11 of the parties' 2007-09 collective bargaining agreement in a manner inconsistent with or contrary to this decision.

It is so ordered.
Signed this 7th day of April, 2009.



Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Member Carol Granfield and alternate Board Member Kevin E. Cash also voting.

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