This decision was reversed on appeal per August 19, 2010 Supreme Court order in *Appeal of New Hampshire Division of State Police, NH* Supreme Court Case No. 2009-496.

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NEW HAMPSHIRE TROOPERS ASSOCIATION / TROOPER LOU COPPONI ET AL.

v.

CASE NO. P-0754-23
P-0754-25

NEW HAMPSHIRE DEPARTMENT OF SAFETY, DIVISION OF STATE POLICE

DECISION NO. 2009-088

APPEARANCES

Representing: New Hampshire Troopers Association/Trooper John Mirabella, et. al., John S. Krupski, Esq., Molan, Milner & Krupski, PLLC Concord, New Hampshire

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

BACKGROUND

On May 19, 2008 New Hampshire Troopers Association and Troopers Lou Copponi, Greg Deluca, Greg Ferry, Robert Lima, Paul Massaro & Lance Myrdek (the "Association") filed an unfair labor practice complaint, docketed at the PELRB as Case No. P-0754-23, (hereinafter "Case 23"), alleging that the State of NH Department of Safety, Division of State Police (the "State") committed an unfair labor practice when it unilaterally and without negotiation with the

Association issued an order requiring specific residency requirements of troopers and as a consequence requiring troopers to relocate their residences or be reassigned to other troop areas and work shifts. The Association asserts that such action by the State violates provisions of RSA 273-A:5,I (a) by restraining, coercing or otherwise interfering with its employees in the exercise of their rights, (b) by dominating or interfering in the... administration of its association, (d) by discharging or otherwise discriminating against any employee because the employee has filed a complaint, affidavit or petition, or given information or testimony under this chapter, (h) by breaching the parties' collective bargaining agreement, and (i) by making a regulation, or by adopting a rule relative to the terms and conditions of employment that would invalidate any portion of the parties' agreement.

In a separate complaint filed on October 8, 2008, by the Association and John Mirabella, docketed as PELRB Case No. P-0754-25 (hereinafter "Case 25"), the Association restates the allegations set forth in Case 23, among other allegations, and claims that the State's actions resulted in the termination of Trooper John Mirabella in violation of RSA 273-A:5,I(h) and specifically breaching Article 21.7 of the parties collective bargaining agreement ("CBA"). In both Case 23 and Case 25 the Association also alleges that the State's actions resulting in the reassignments of troopers and the termination of Trooper Mirabella violated the parties' long standing past practice.

The Association requests that the PELRB declare that the State's actions violated the statute and the terms of the parties' agreement. As a consequence the Association requests that the PELRB order the reversal of the disputed troop transfers (Case 23) and order the reinstatement of Trooper Mirabella (Case 25) with an award of back pay to him.

The State filed its answer in Case 23 on June 3, 2008 and in Case 25 on October 23, 2008 and generally denied all charges. The State asserts that the transfers, what the Association characterized as reassignments or relocations, are within the scope of its rights under Article II (Management Rights) of the CBA and that the transfers effectuated the intent of Section 21.7 of the CBA. The State requests that the PELRB dismiss or deny the Association complaints of unfair labor practice and allegations of breach of the CBA involved in either or both Case 23 and Case 25. The State also filed a Motion to Dismiss Case 25, claiming that Trooper Mirabella was a probationary employee and therefore not a "public employee" within the meaning of RSA 273-A:1, IX.

Preliminary proceedings resulted in the PELRB dismissing, without prejudice, the Association's request for declaratory ruling contained within the complaint in Case 23 (PELRB Decision 2008-147); granting a motion to continue Case 23 (PELRB Decision 2008-161); and consolidating a separate request for declaratory ruling, Case No. P-0754-24 ("Case 24"), with Case 23 (PELRB Decision 2008-199).

At a subsequent pre-hearing held December 29, 2008, all three cases were consolidated for pre-hearing and hearing. The State's request that the board conduct a separate hearing on its motion to dismiss Case 25 was denied. The Association was ordered to file an amended and restated complaint in Case 25, a Statement as to the status of the individual claimants named in Case 23, and a Statement notifying the board as to whether it planned to proceed with or withdraw Case 24. A further pre-hearing was scheduled for January 20, 2009. (PELRB Decision No. 2008-262.) On January 8, 2009 the Association withdrew Case 24 and it was dismissed (PELRB Decision No. 2009-004).

On January 20, 2009 a further pre-hearing was held on the remaining consolidated Cases 23 & 25. The Association's Amended and Restated Complaint was allowed and the State was ordered to raise its defenses and objections in its Answer to the Amended and Restated Complaint. At the pre-hearing conference, the Association further clarified that as a remedy it continued to seek the reassignment of Troopers Lima, Shirley, and Monahan to their former Troops but no longer sought the reassignment of, now, Sergeant Copponi nor Troopers Deluca, and Massaro. The deadline to file the agreed stipulation of facts and exhibits, witness and exhibit lists was extended. (PELRB Decision 2009-012.) On January 27, 2009 the PELRB granted a motion to continue and the adjudicatory hearing was rescheduled to March 19, 2009.

On March 19, 2009 the board conducted an adjudicatory hearing at the offices of the PELRB in Concord at which the parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. Preliminary to the hearing on the merits, the State's Motion to Dismiss Case 25 was argued by counsel, was taken under advisement by the PELRB and the parties directed to proceed. At the parties' request, the record was held open to allow the State to file the affidavit of Sergeant Duffy and an appropriate response by the Association and to allow the parties to file post-hearing briefs. No affidavit or other post hearing evidence was submitted for consideration. The parties submitted their post-hearing briefs on April 3, 2009 and the record closed. The parties' stipulated facts are set forth, in part, as Findings of Fact 1- 11. The PELRB, upon the request of the parties, also took official notice of the New Hampshire Division of Personnel Rules, RSA 21-P:7, and RSA 106-B:5

After considering the witnesses' testimony and credibility of each witness, the parties' respective exhibits, offers of proof and all submissions, according appropriate weight to such

representations and offerings, the parties' stipulated facts and joint exhibits, the PELRB finds as follows:

FINDINGS OF FACTS

1. The New Hampshire Troopers Association (the "NHTA") is the certified bargaining unit for the sworn officers of New Hampshire Division of State Police up to and including the rank of Sergeant. The address of the NHTA is 107 North State Street, Concord, NH 03301.

2. Trooper Louis Copponi (now Sergeant), Trooper Greg DeLuca, Trooper Robert Lima, Trooper Paul Massaro, Trooper Eric Shirley and Trooper Kevin Monahan are (or were) troopers employed by the New Hampshire Department of Safety, Division of State Police.

3. John Mirabella was employed by the New Hampshire Department of Safety, Division of State Police as a full time Probationary Trooper effective August 10, 2007.

4. The New Hampshire Department of Safety, Division of State Police (the "DSP") is located at 33 Hazen Drive, Concord, NH 03301.

5. The State of New Hampshire is officially located at the State House, Concord, New Hampshire 03301.

6. Section 21.7 of the Collective Bargaining Agreement between the New Hampshire Troopers Association and the State of New Hampshire (the "CBA") provides as follows:

> Any employee may live within a town within a patrol area to which she/he is assigned or within a reasonable distance from his/her assigned patrol area.

7. NHTA members assigned to road patrol are assigned within six troop areas in the State of New Hampshire consisting of Troop A, Troop B, Troop C, Troop D, Troop E, Troop F.

8. Trooper Shirley failed to file a grievance, Troopers Copponi, DeLuca Lima and Massaro have completed Step III grievances pursuant to the grievance procedure in the CBA with respect to the issues raised in this Complaint. Pursuant to the CBA, the next step in the grievance

process is submitting a complaint to the PELRB. Section 14.51.1 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.

9. On August 8, 2008, John Mirabella was contacted by Lt. Nedau and informed to report to headquarter at 3:00 o'clock in the afternoon on the following day, August 9, 2008 (Saturday).

10. On August 9, 2008, John Mirabella attended the meeting with his Union Representative Robert Lima.

11. John Mirabella was terminated on August 9, 2008.

12. John Mirabella was employed 40 hours per week during the boating season as a Marine Patrol Supervisor.

13. John Mirabella had not completed his probationary year at the time of his termination.

14. The terms contained in the parties' present CBA Article 21.7 permitting troopers to live a reasonable distance of their assigned area has been in a sequence of previous CBA's between the parties; it was characterized by Thomas Manning, the State's Chief Negotiator, as a "legacy provision" that pre-dated the formation of the troopers as a separate association of state employees in or about 1996.[1] The language appeared in a CBA between the State and a prior exclusive bargaining representative of New Hampshire State Troopers in 1989. (Joint Exhibit #8)

15. Considerations for the State in its negotiations regarding residency were to address the situation necessitated by "call backs" of troopers to cover non-scheduled hours within their area and to save the required contract costs of paying for troopers to move when adjustments of patrol

[1] NB – The Troopers were certified as a separate bargaining unit in 1990.

areas might be required. After negotiations, other considerations also included the costs of a trooper commuting to his assigned area and general gasoline usage.

16. Prior to the filing of the complaint in Case 23 another trooper's request to purchase a house outside her assigned area was initially denied by Col. Booth and later that denial was changed to allow the trooper's request.

17. In and about the time of the reversal of the trooper's denial to live out of her assigned area, Col. Booth discovered that a survey analyzing current trooper residences and their assigned areas indicated that 14 of 28 troopers assigned to Troop A were not living within their assigned area. The survey was expanded to examine all troop areas which revealed that other troopers assigned to specific areas were also not living within the areas to which they were assigned. Sgt. Copponi was one of those troopers living outside Troop A by about 10 miles, but assigned to the Troop A area.

18. Based, in part, upon the results of that survey, ideas of efficiencies to be achieved in the division of labor through reassignments and savings in gas usage, Col. Booth determined that a "patrol realignment" was necessary.

19. At approximately the same time as transfers were being considered, the State decided to specify, by a change to the Division's Professional Standards of Conduct, that a "reasonable distance" from a trooper's duty assignment would be a distance equivalent to that which the trooper's commute into the assigned area did "not exceed a cost to the Division over one hundred dollars ($100) per year." (Joint Exhibit 4). One troop commander calculated the resulting distance to be two miles. (Union Exhibit #5)

20. Gas prices have decreased since the time the decision was made focusing on gas savings.

21. The savings in gasoline expenditures by reason of the trooper transfers alone have not been substantial. Many other actions and non-actions existing or implemented within the Division of State Police have contributed to a reduction in gasoline consumption.

22. The patrol realignment decision was implemented through a January 28, 2008 notice of change in certain employee radio call numbers and a transfer directive, dated February 11, 2008, allowing troopers until February 15, 2008 to meet the requirements of their transfer.

23. The CBA does not define the word "residence."

24. The CBA does not define "reasonable distance" from the trooper's assigned patrol areas.

25. The "Management Prerogatives" clause of the parties' CBA reads, in Article II, §2.1:

> The Employer retains all rights to manage, direct and control its operations, subject to the provisions of law, personnel regulations and the provisions of this Agreement, to the extent they are applicable... [including] §2.1.2, Appointing, promoting, transferring, assigning,...employees.

26. The Division's Professional Standards of Conduct also provide at § 1.7.2.1 (Assignments) that, "Sworn Division Members are required to reside within a reasonable distance of their duty assignment..."

DECISION AND ORDER

DECISION SUMMARY

In Case 23, the board finds that the State's promulgation of residency requirements as reflected in the January 28, 2008 directive constituted improper unilateral action in violation of the statute, the parties' prior agreement to negotiate the reasonableness of residency, and a long-standing open practice between the parties. The troopers who remain as complainants requesting relief are to be restored to their *status quo ante* the

directives if they choose to do so at this time. In Case 25 the State's motion to dismiss is granted because John Mirabella was, at all relevant times, a probationary employee as defined in RSA 273-A:1, IX (d) and therefore cannot maintain this type of improper labor practice complaint.

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate violations enumerated within RSA 273-A:5, I between the duly elected "exclusive representative", as that designation is applied in RSA 273-A:10, of a certified bargaining unit comprised of public employees, and a "public employer" as defined in RSA 273-A:1, I. (See RSA 273-A:6, I). In addition to this authority, jurisdiction in this matter is also vested in the PELRB by the prior assent of the parties as expressed in the grievance procedure of their CBA that an alleged breach of the parties' CBA may to be submitted to the PELRB as an unfair labor practice complaint and that the PELRB's decision is "final and binding". §14.5.1, Joint Exhibit #1, Collective Bargaining Agreement 2007-2009.

DISCUSSION

We first consider Case 25 which involves the termination of John Mirabella. Mr. Mirabella began his employment as a Probationary Trooper on August 10, 2007 and he was terminated from employment on August 9, 2008, one day short of the completion of twelve months. Accordingly, at the time of his termination Mr. Mirabella was still a probationary employee. His complaint is brought before the PELRB under the provisions of RSA 273-A. This statute grants the PELRB jurisdiction over public employees. An employee who is in probationary status is specifically excluded by the statute from the definition of "public

employee." See RSA-A:1, IX (d). Since Mr. Mirabella was a probationary employee at the time of his termination the State's Motion to Dismiss filed in Case 25 is granted.

We next consider Case 23 which involves the State's transfer or reassignment of certain troopers who are not probationary troopers. The CBA contains two provisions that are particularly relevant. The first is found in Article II, Management Prerogatives, where the parties have negotiated that the State retains the rights enumerated in § 2.1 subject to the provisions of the parties' CBA. The parties have agreed that among these enumerated rights is the transfer and assignment of personnel, see §2.1.2. However, the parties have also bargained a residency clause and included it later in their CBA at Article XXI and which provides that troopers "may live within a town within a patrol area to which she/he is assigned or within a reasonable distance from his/her assigned patrol area". (See, §21.7) Therefore, while the State may have retained the right to transfer and assign personnel, it is also bound by its agreement to permit troopers to live "within a reasonable distance" of their assignment area.

The specific action complained of is the State's decision to unilaterally define "reasonable distance," a term contained in Section 21.7 of the CBA, in a manner that resulted in the reassignment of certain troopers. This was done through the issuance of a directive and notice of transfers of some troopers from one troop area to another area. In turn the impact of these transfers resulted in some change of shift assignment as well. The State maintains that such actions are within the body of prerogatives generally referred to in labor relations as "management rights."

This is not the first time we have been called upon to examine the issue of management rights versus good faith negotiating and the existence of past practice and management's ability to unilaterally change that practice. Our departure point on the issue of management rights and

good faith bargaining is well settled. As we have often referenced, the court has provided us with a three-pronged test to resolve issues of negotiability. *Appeal of State of N.H.*, 138 N.H. 716, 722 (1994).

> 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.

Id. "A matter that fails step one is a prohibited subject of bargaining. A matter that satisfies step one but fails either step two or three is a permissible topic of negotiations. A matter that satisfies all three steps is a mandatory subject of collective bargaining. *Appeal of New Hampshire Troopers Association,* 145 N.H. 288, 292 (2000)(citing *Appeal of City of Nashua Board of Education,* 141 N.H. 768, 774 (1997)).

Evidence has not been presented to us, nor do we find, that the constitution, or any statute or any statutorily adopted regulation has reserved to the State the right to unilaterally determine trooper residency or whether individual troopers are living "within a reasonable distance" from an assigned patrol area. Therefore, the issue of the establishment of a reasonable distance from an assigned area is not a prohibited subject of bargaining as it meets the first prong of the court's three pronged test.

As to whether the subject of trooper residency and "reasonable distance" is a permissive or mandatory subject of bargaining, the board notes that the State has already bargained to some extent on the topic as reflected in §21.7. Additionally, to determine whether the second prong of the *Appeal of State* test is met, we examine first, the directive modifying the term reasonable distance and specifically establishing it at approximately two miles and the order of transfers and

then decide whether those actions primarily affect a term and condition of work or primarily affect broad managerial policy. For us the delineation of a required location for an employee to make his or her residence constitutes a term or condition of work. This becomes even more acute when we consider the consequence of the residency directive. The difference of a couple of miles can result in a transfer which places the involved employee on a different shift with the consequent disruption to important life arrangements and established schedules for no reason other than an indeterminate amount of gasoline savings. We find the State's argument based on gasoline utilization unconvincing against the heavier balance of evidence showing that the parties had negotiated the "reasonable distance" provision in their agreements previously . We find that the issue of reasonableness in distance from an assigned patrol area is one that primarily affects the troopers' terms and conditions of work, and also satisfies the second prong of the test.

Under the third prong set forth in *Appeal of State,* trooper residency and the "reasonable distance" requirement is a mandatory subject of bargaining unless the resulting contract provision or grievance process interferes with the public control of government. There was insufficient evidence presented to convince us that allowing the parties to negotiate what constitutes a "reasonable" distance in the context of this case interferes with the public control of government. Therefore, we find that the third prong of the court's test is satisfied as well.

In addition to the foregoing the board notes the fact that the parties have had several opportunities to modify the language in §21.7 of the CBA over more than two decades and have chosen not to do so. This is not to say that the parties should not consider doing so as specificity in language use can obviate ambiguity and eliminate the need for this type of hearing. These parties have also not infrequently used the term "reasonable" in different clauses of their CBA. While the proliferation of such a term throughout an agreement may provide flexibility it also

increasingly becomes an invitation to litigation. This board strongly endorses the role that self-determination can play in long-standing labor relationships. But if the parties do not negotiate an agreement with adequate specificity when they have the opportunity to bargain , they abdicate an important function of the collective bargaining process which is deciding between themselves the "what's and how's" of their employment relationship. But in any case, we find that alteration to the term "reasonable" as used in Article XXI, §21.7 is not a management right and must be negotiated. By not negotiating the modification to the language before directing that reasonable distance would be defined as a distance from an assigned area measured by the cost of fuel to the exclusion of any other delineation, the State violated its obligation to bargain in good faith. "A public employer's unilateral change in a term or condition of employment . . . is tantamount to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations." *Appeal of City of Nashua*, 141 N.H. at 772 (quotation omitted).

We find that the State's actions amount to a breach of the CBA and an improper labor practice, as the State has violated RSA 273-A: 5,I (h) and RSA 273-A:5,I (i). We do not find sufficient evidence of anti-union animus as alleged by the Association nor to support violations of the remaining sub-sections of RSA-A:5,I..

As relief, we make the following order:

(1) A copy of this decision shall be immediately posted in the several troop barracks and headquaters and immediately distributed to any troopers transferred to shifts, patrol areas, or troop areas pursuant to the State's unilateral actions;

(2) The State is to cease and desist from enforcing any changes to the Professional Standards of Conduct of the Division of State Police embodied in Chapter 41-GC 1.1 or

elsewhere related to the further definition of "reasonable distance' of a trooper's assigned area or duty area as used in that section;

(3) The State is to void any transfers of troopers made on the basis of its unilateral action as described above upon the written request of any trooper transferred from one assigned area to another assigned area as a result of said unilateral action and named in the February 11, 2008 memorandum. (Joint Exhibit #6).

(4) Any eligible trooper who was subject to the transfers appearing in said memorandum referenced in #3, above, and who desires to be returned to his or her assignment status prior to the February 15 transfers shall file that request, in writing, within fifteen (15) days of the date of this order;

(5) Upon receipt of a written request as described above, the State shall have thirty (30) days from the date of any such request to restore the requesting trooper to his or her assignment status prior to the February transfers with all rights restored as if the transfer had not occurred.

So ordered.

Signed this 30th day of April, 2009.

Charles S. Temple, Esq., Chair

By unanimous vote. Chair Charles S. Temple, Esq. presiding with Board Members Carol M. Granfield and Kevin E. Cash also voting.

Distribution: John S. Krupski, Esq.
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