



**STATE OF NEW HAMPSHIRE**  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**STATE EMPLOYEES ASSOCIATION OF  
NH, SEIU LOCAL 1984**

**CONSOLIDATED CASES  
S-0438-3 and G-0108-2**

v.

**DECISION NO. 2009-263**

**STATE OF NEW HAMPSHIRE,  
DEPARTMENT OF CORRECTIONS**

**APPEARANCES**

Representing: State Employees Association of New Hampshire, Inc., SEIU Local 1984  
John S. Krupski, Esq., Molan, Milner & Krupski, PLLC  
Concord, New Hampshire

Representing: State of New Hampshire Department of Safety, Division of State Police  
Rosemary Wiant, Esq. and Michael Brown, Esq.,  
New Hampshire Attorney General's Office  
Concord, New Hampshire

**BACKGROUND**

The complaint in Case No. S-0438-3 (the "first case") was filed on August 1, 2008 by the then certified exclusive representative NEPBA Local 255/NH Supervisory Officers. On October 8, 2008 NEPBA Local 250/NH Correction Officers' motion to intervene was granted. These bargaining unit employees are now represented by the State Employees Association of New Hampshire, Inc., SEIU Local 1984 ("SEA"), *see* PELRB Decision No. 2009-102, and all

remaining references with respect to the first case are to the SEA, regardless of whether filings were made by the SEA or the NEPBA. The SEA filed the complaint in Case No. G-0108-2 (the "second case") on July 6, 2009.

In the first case the SEA claims that the subject of shift briefing pay is a term and condition of employment, is a mandatory subject of bargaining pursuant to RSA 273-A:3, and that the affected bargaining unit employees are entitled to attend pre-shift briefings and earn 15 minutes in over-time pay under the terms of the parties' collective bargaining agreement and past practice until such time as the parties bargain a different arrangement. The SEA claims the State improperly made changes in these areas in violation of RSA 273-A (e) and (g).

In the second case the SEA complains that the State unilaterally altered the terms and conditions of employment by eliminating pre-shift briefings and the related over-time pay. The SEA claims these actions directly impact employee wages and result in changes of start and stop time and hours of work and violate RSA 273-A:5, I (e), (g), (h), and (i).

The State denies the charges in both cases and contends that it acted within its management rights in making the disputed changes in accordance with Article 2.1, 6.1.4, and 27.10 of the parties' collective bargaining agreement. The State also argues the board should dismiss the complaint because the board lacks jurisdiction since the dispute is subject to the grievance procedure contained in the parties' collective bargaining agreement, which includes final and binding arbitration, and because the complaints were filed beyond the six month limitation period set forth in RSA 273-A:6, VII.

The proceedings in the first case were stayed at the parties' request pending the outcome of Cases S-0437-1 and S-0438-1, representation proceedings involving the SEA and the NEPBA. On June 29, 2009 the SEA's motion to reactivate Case No. S-0438-3 was granted and

it was subsequently consolidated with Case No. G-0108-2. The board held a hearing in these matters on September 10, 2009 at the offices of the PELRB in Concord at which time 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 October 9, 2009 in order to allow the parties to file post-hearing briefs.

#### FINDINGS OF FACT

1. The State Employees Association of New Hampshire, Inc., SEIU Local 1984 (“SEA”) is the certified exclusive representative of the New Hampshire Department of Corrections’ employees involved in these proceedings.

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

3. The SEA and the State are parties to a July 1, 2007 to June 30, 2009 Collective Bargaining Agreement (the “2007-09 CBA”), which includes the following provisions:

#### Master Agreement - Article VI

#### BASIC WORK WEEK

##### 6.1 Basic Work Week:

6.1.1 The basic work week for every full-time clerical, supervisory and professional employee in the state classified service in each unit, with due allowance for authorized holidays and leaves of absence with pay, shall be thirty-seven and one half (37 ½) hours per week.

6.1.2 The basic workweek for every full-time trade, custodial or other employee in a similar category in the state classified service in each unit, with due allowance for authorized holidays and leaves of absence with pay, shall be either forty (40) hours per week or thirty-seven and one half (37 ½) hours per week.

6.1.3 The basic work period for every full-time law enforcement employee in state classified service in each unit shall consist of one hundred sixty (160) hours in a twenty-eight (28) consecutive day period. The basic work

period for every full-time fire protection employee in state classified service in each unit shall consist of two hundred twelve (212) hours in a twenty-eight (28) consecutive day period.

6.1.4 Work hours beyond the basic workweek or work period are voluntary overtime hours except for full-time law enforcement employees, full-time fire protection employees or where specifically agreed otherwise by the Parties. Such overtime hours may be reduced or eliminated at the discretion of the Employer.

4. Articles 7 and 8 of the Master Agreement also contain detailed information about the administration and implementation of overtime, and cover topics such as whether overtime is voluntary or required and funding for overtime.

5. Article 27.10 of the 2007-09 CBA Sub Unit Agreement, Corrections, provides that “[t]he fifteen minute briefing period required of custodial personnel and nursing personnel shall be compensated as overtime.”

6. The parties’ grievance procedure is set forth in Article XIV, includes arbitration as the fourth step, and provides in part as follows:

14.5.1 If subsequent to the agency head’s decision the Association feels that further review is justified a petition may be submitted to the Labor Management Committee for the appointment of an arbitrator as provided in 14.5.4 or for the Labor Management Committee to schedule a meeting to review the petition. Said petition shall be submitted within fifteen (15) working days from the date the employee or Steward was notified of the decision. A copy of the petition must be sent to the Employer at the same time.

14.5.2 Arbitrator’s Powers: The arbitrator shall have no power to render a decision that will add to, subtract from or alter, change or modify the terms of this Agreement, and his/her power shall be limited to interpretation or application of the express terms of this Agreement, and all other matters shall be excluded from arbitration. To the extent that a matter is properly before an arbitrator in accordance with this provision, the arbitrator’s decision thereon shall be final and binding providing it is not contrary to existing law or regulation nor requires an appropriation of additional funds, in either of which case it will be advisory in nature.

The Parties further agree that questions of arbitrability are proper issues for the arbitrator to decide.

7. The SEA's claims in these proceedings are primarily based upon changes the State made in pre-shift briefing and the availability of overtime, changes which by July of 2009 resulted in the elimination of pre-shift briefings and related overtime compensation.

8. The State asserts that the changes to pre-shift briefings and overtime are justified and required by the amount of funding available in the current budget to pay this expense. The Department of Corrections' efforts to obtain approval for additional funding for this expense were unsuccessful during the budget approval process.

9. The State has employed pre-shift briefings for Department of Corrections' employees since 1979.

## DECISION AND ORDER

### DECISION SUMMARY

The SEA's complaints are dismissed given the nature of the claims in this case and the provisions of Article XIV of the 2007-09 CBA concerning grievance proceedings and the agreed powers of an arbitrator.

### JURISDICTION

Subject to the board's decision on the State's dismissal request, the PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. *See* RSA 273-A:6.

### DISCUSSION

At hearing the State requested dismissal of these cases, claiming the PELRB lacks jurisdiction because the SEA's claims, in substance, are covered by the parties' 2007-09 CBA and therefore must be addressed through the parties' contractual grievance process, which includes final and binding arbitration. The SEA objects, in effect claiming the State raised its

jurisdictional arguments too late and therefore the board should not consider the merits of this dismissal request. However, because the basis for the State's motion to dismiss directly relates to the PELRB's jurisdiction to decide this case the board will consider the State's jurisdictional argument. The board further observes that it can always raise and address its jurisdiction to decide a particular case, regardless of whether a party has raised the issue.

The extent of the PELRB's jurisdiction to interpret collective bargaining agreements depends upon whether the parties' collective bargaining agreement is "susceptible of an interpretation that covers the dispute."

A presumption of arbitrability exists if the CBA contains an arbitration clause, but the court may conclude that the arbitration clause does not include a particular grievance if it determines with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute. Furthermore, the principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties.

*Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998).<sup>1</sup> Further, the PELRB does not have jurisdiction to determine, as a threshold matter, whether a particular dispute is arbitrable when the parties have conferred this power upon an arbitrator, *Appeal of Police Comm'n of City of Rochester*, 149 N.H. 528, 533 (2003).

In this case the parties have agreed that "questions of arbitrability are proper issues for the arbitrator to decide." See Article 14.5.2 of the 2007-09 CBA. However, the board must interpret the parties' 2007-09 CBA to some extent to determine whether there is sufficient merit to the State's jurisdictional argument such that dismissal is required so that an arbitrator can decide, if necessary, the threshold issue of arbitrability and, if applicable, the underlying dispute.

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<sup>1</sup> The board does have jurisdiction to interpret collective bargaining agreements and resolve disputes that are covered by a collective bargaining agreement in the context of an unfair labor practice charge when, for example, the filing of an unfair labor practice complaint with the PELRB is the agreed upon final step in the grievance process, *Appeal of Nashua Police Commission*, 149 N.H. 688 (2003), or when the grievance procedure does not conclude with a final and binding last step, *Appeal of Hooksett School District*, 126 N.H. 202 (1985).

Upon due consideration of the nature of the SEA's claims and the evidence of the parties' contractual relations submitted into the record, the board concludes that it lacks jurisdiction and the complaints are dismissed on that basis. The parties are directed to utilize their contractual grievance process, including arbitration proceedings, to address the disputes that are the basis for these complaints.

It is so ordered.

Signed this 1st day of December, 2009.

  
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Jack Buckley, Chair

By unanimous vote. Chair Jack Buckley presiding with alternate Board Members Sanford Roberts, Esq. and Richard J. Laughton, Jr. also voting.

Distribution:

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