



State of New Hampshire
Public Employee Labor Relations Board

State Employees' Association of NH, SEIU Local 1984

v.

State of New Hampshire, Department of Transportation

Case No. G-0240-2
Decision No. 2020-128

Appearances: Gary Snyder, Esq. Concord, New Hampshire
for State Employees' Association of NH, SEIU Local 1984

Jill Perlow, Esq. and Jessica King, Esq., Attorney General's Office,
Concord, New Hampshire for the State

Background:

On April 30, 2019, the State Employees' Association of NH, SEIU Local 1984 (SEA) filed an unfair labor practice complaint because of the State's unilateral implementation of a Commercial Driver's License (CDL) medical card¹ requirement for certain Department of Transportation (DOT) employees. The new requirement must be met by current employees in order to complete a position change like a promotion, temporary promotion, lateral transfer, and demotion. The SEA claims that the State has failed to negotiate a mandatory subject of bargaining and improperly implemented a unilateral change in the terms and conditions of employment for the affected DOT employees. The SEA charges that the State has violated RSA

¹ State and local governments are exempt from the federal CDL medical card regulations since the Federal Motor Carrier Safety Administration (FMCSA) has no regulatory authority over "intrastate" driving.

273-A:5, I (a)(to restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter); (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 (g)(to fail to comply with this chapter or any rule adopted under this chapter).² The SEA requests that the PELRB order the State to cease and desist from requiring CDL medical cards for current employees and order the State to bargain in good faith with the SEA over the terms and conditions of employment.

The State argues that whether to require certain current DOT employees to obtain CDL medical cards in connection with a position change is a matter of managerial prerogative and is a prohibited subject of bargaining. The State emphasizes that obtaining a CDL medical card is not a condition of employment for current DOT employees as long as such employees do not change positions. However, the State claims that it is entitled to mandate that in connection with a position change, such as a promotion or temporary promotion, a lateral transfer,³ or a demotion,⁴ the affected current DOT employee must obtain, but is not required to renew or maintain, a CDL medical card. The State maintains that it did not violate its bargaining obligations and it was entitled to unilaterally adopt the new CDL medical card requirement for current employees.

The board held a hearing on February 18, 2020⁵ and both parties have filed post hearing briefs. The board's decision in this case is as follows.

² The SEA's September 9, 2019 motion to amend its complaint, which included the withdrawal of a sub-section (h) claim (to breach a collective bargaining agreement), was granted by prior Decision No. 2020-036.

³ Performing the same job at a different location.

⁴ For example, in the event of a layoff employees who exercise contractual bumping rights may be demoted.

⁵ Three earlier hearing dates were continued for various reasons.

Findings of Fact

1. The State is a public employer within the meaning of RSA 273-A:1, X.
2. The SEA is the certified exclusive bargaining representative for certain classified DOT employees, including those to whom the CDL medical card requirement applies.
3. The parties' most recent collective bargaining agreement was executed on June 7, 2018 and "shall remain in full force and effect through June 30, 2019 or until such time as a new Agreement is executed." (2018-19 CBA). See Joint Ex. 1.
4. Federal Motor Carrier Safety Administration (FMCSA) CDL medical card requirements are set forth in 49 CFR 391 and do not apply to the New Hampshire DOT bargaining unit employees involved in this case.
5. CDL medical cards are issued by federally approved medical examiners who determine an individual driver's physical qualifications based on criteria listed in federal regulations.⁶ The cost of the required medical exam ranges from \$65 to \$150 and is similar to a routine physical. It covers areas like health history, vision, hearing, pulse, blood pressure, and general physical condition. A CDL medical card qualifies a driver for as little as three months or up to two years, depending on the medical examiner's rating.
6. The parties' bargaining history includes a 2013 State proposal to require a CDL medical card for all employees whose positions require a CDL. See SEA Exhibit 1. The State's proposal anticipated possible loss of employment for employees unable to meet the medical card requirement. The SEA rejected this proposal.
7. In 2015 the parties agreed to a State counter proposal that provided eligible employees who voluntarily "obtain and maintain a valid CDL medical card" with an additional ten dollars per week from November 1 through the pay period that includes the last day of March. See SEA

⁶ See 49 CFR 391.41.

Ex. 2. This language is included in CBA Article 43.11 of the 2018-19 DOT sub-unit agreement. See Joint Ex. 1.

8. In 2017 the SEA made two CDL medical card proposals that would have exempted employees with ten years of service from the medical card requirement and also provided a wage increase to those employees required to hold, or who voluntarily have, a CDL medical card. See SEA Exhibits 3-4. The State rejected both proposals.

9. In early April of 2019 the DOT Commissioner issued a written notification which reviewed the revisions to Job Classification and Supplemental Job Descriptions for Highway Maintainer I, II, and III, Assistant Highway Patrol Foreman, Highway Patrol Foreman, Construction Foreman, and Maintenance Supervisor (collectively the “CDL medical card positions”). DOT employees in these positions operate a variety of vehicles which require a commercial driver’s license, including, for example winter maintenance equipment like large plow trucks. The Commissioner’s notification included a new CDL medical card requirement applicable to current employees which was not negotiated with the SEA. See Joint Ex. 2.

10. As justification for the new CDL medical card requirement, the State has raised general concerns about roadway safety and employee health and maintains that the medical card will address certain risks the State perceives in these areas. The State did not support these explanations with any data or specific examples which indicate the State has identified a problem area which can be effectively addressed through the CDL medical card requirement. The State also explained that its prior bargaining about CDL medical cards was part of an effort to maintain good relations and persuade unit employees to “buy-in” to a CDL medical card program via the CBA Article 43 DOT sub-unit stipend.

11. The new CDL medical card requirement means that a DOT employee who currently holds a CDL medical card position is not required to obtain a medical card as a condition of continued employment in their current position. But, in the event of promotion, temporary promotion, lateral transfer, or demotion, this CDL medical card position employee will be required to possess or obtain a CDL medical card, and the CDL medical card exam fee is the employee's responsibility. However, there is no requirement that the employee renew or maintain the medical card once it expires as a condition of continued employment.

12. A "demotion" position change from one of the CDL medical card positions to another will trigger the CDL medical card requirement, and it can occur in the event a CDL medical card position employee is notified of layoff, and the employee exercises so-called "bumping rights" under CBA Article 16.10, which provides as follows:

Rights at Lay Off: A bargaining unit employee who has ten (10) or more years of continuous full-time state service who receives a notice of layoff shall be entitled to displace (bump) another employee within the same division under the following conditions:

1. The employee receiving the notice of layoff notifies the Employer of the intent to bump an employee within the same division within five (5) working days of receipt of the notice of layoff; and,
2. The employee who is to be bumped has less than ten (10) years of continuous full-time state service and is in a position with a lower salary grade; and,
3. The employee receiving the notice of layoff and wishing to bump an employee within the same division is certified by the Employer as qualified for the position of the employee who is to be displaced.
4. An employee who receives a notice of lay off and fails to notify the Employer of an intent to bump another employee within the same division within the five (5) working days shall lose the right to bump.

13. A current CDL medical card employee could also be transferred "laterally" from an existing work location to a new work location. This CDL medical card position employee would

continue in the same position, but would now be subject to the CDL medical card requirement. In this scenario, a failure to obtain the card could conceivably lead to loss of State employment.

Decision and Order

Decision Summary:

The CDL medical card requirement for current employees qualifies as a mandatory subject of bargaining under the *Appeal of State* three step analysis. The CDL medical card requirement is not a prohibited subject of bargaining, it primarily affects the terms and conditions of employment for current employees, and not matters of broad managerial policy, and requiring the State to bargain on the subject will not interfere with public control of governmental functions. Accordingly, the SEA's request for a cease and desist order is granted. The State is directed to refrain from applying the new CDL medical card requirement to current employees.

Jurisdiction:

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

Discussion:

In general, the State is obligated to negotiate in good faith the "terms and conditions of employment" with the SEA. Terms and conditions of employment means:

[W]ages, hours and other conditions of employment other than managerial policy within the exclusive prerogative of the public employer, or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. The phrase "managerial policy within the exclusive prerogative of the public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.

See RSA 273-A:1, XI and 273-A:3, I. During bargaining, or as a consequence of unilateral action by a public employer, disputes may arise over the extent of the employer's bargaining obligations, as has happened in this case. These issues are settled by the application of the court's three step analysis which sorts potential bargaining subjects into three categories: prohibited, permissive, or mandatory.

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. *A proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.* (emphasis added).

Appeal of State, 138 N.H. 716, 724 (1994). As to the first part of the test, the "by statute" reference contained in the RSA 273-A:1, XI phrase "managerial policy...confided exclusively to the public employer *by statute*" means a statute other than RSA 273-A:1, XI (emphasis added). See *Appeal of Nashua Board of Education*, 141 N.H. 768, 774 (1997). In *Appeal of Nashua*, the court rejected the city's prohibited bargaining argument when it evaluated the city's obligation to negotiate the reorganization of its custodial workforce:

Applying the three-step inquiry to the facts of this case, we hold that the city's reorganization was a mandatory subject of collective bargaining. First, the parties cite no *independent statute*, or any constitutional provision or valid regulation, that reserves to the city the exclusive authority to lay-off full-time employees and replace them with part-time employees. *We reject the city's bootstrapping attempt to utilize the statutory managerial policy exception as the statute that determines the scope and applicability of the managerial policy exception* (citations omitted)(emphasis added).

Id. And in *Appeal of State*, the State's attempt to rely on RSA 21-I:42, I, and :43, II(j) and (k) for the proposition that employee discipline and removal are prohibited subjects of bargaining failed

because the cited statutory provisions “do not state that the listed functions of the (division of personnel) or the subjects of the (division’s rules) *are reserved exclusively for the State*” (emphasis added). *Appeal of State*, 138 N.H. at 723.

In the present case, the State has not identified any “independent statute, or any constitutional provision or valid regulation” that states that subjects like CDL medical cards *are reserved exclusively for the State*. The only statute the State has cited to support its prohibited subject of bargaining argument is RSA 273-A:1, XI itself, which is legally insufficient under the cited authorities. Therefore, the first step in the analysis is satisfied, and the subject of CDL medical cards is not a prohibited subject of bargaining.

As to the second part of the test, we must determine whether the State’s actions “primarily affect the terms and conditions of employment or matters of broad managerial policy.” *Appeal of State* 138 N.H. at 723. This part of the test “cannot be resolved through simple labels offered by management...or through conclusory descriptions urged by employees...” *Appeal of Nashua*, 141 N.H. at 774. Often, both parties will have significant interests affected by the disputed action, and “determining the primary effect of the action requires an evaluation of the strength and focus of the competing interests.” *Appeal of State*, 138 N.H. at 722.

In evaluating the strength and focus of the parties’ respective interests in this case we take into account the numerous ways certain DOT employees are affected, including costs to employees, how the card requirement effects opportunities for advancement or movement to a preferred location, and job security. For example, this program is being implemented at the individual employee’s expense and has effect of a wage reduction. Employees are responsible for the CDL medical card exam fees and an employee who takes the exam multiple times in an effort to obtain a medical card will incur multiple exam fees. There is no right to reimbursement

included in the medical card mandate, presumably because the State recognizes that reimbursement is a cost item which is subject to mandatory bargaining. But the cost to employees and the implementation of the medical card requirement are inextricably intertwined and one cannot be separated from the other and examined in isolation for purposes of our analysis. In other words, the State cannot disregard or ignore the costs to employees, and justify the card mandate as a simple exercise of managerial prerogative. In this regard, the CBA Article 43 stipend provides no refuge. This is a bargained contract provision that is part of an incentive program pursuant to which eligible DOT employees who choose to obtain a medical card wholly independent of, and unrelated to, any change in position, will receive a temporary stipend during the specified period.

The medical card requirement affects other areas of employment as well. A successful CDL medical card exam is now required before an employee can obtain a promotion or accept a temporary promotion. The card is required before affected DOT employees can complete a lateral transfer (same position in a different location). This means an employee could, for example, remain at the employee's current location (e.g. Nashua) and continue to operate a plow truck without a CDL medical card, but the employee cannot laterally transfer to Concord to perform the same job without obtaining the CDL medical card. Additionally, if such an employee obtains a three month card and transfers to Concord there is no requirement that the employee "renew" the medical card as a condition of continued employment at the Concord location. In effect, the employee will revert to the same medical card status (no card) the employee was in before the transfer. This clearly dilutes the utility of the medical card as a tool to monitor DOT employee fitness for the duties of their positions, and undermines any argument

that the medical card requirement is somehow necessary to maintain and promote safety on the roads.

The CDL medical card requirement also creates a potential barrier to the exercise of contractual "bumping rights" in the event a laid off employee who is already operating a plow truck is willing to accept a demotion into another plow truck operator position that requires a CDL medical card.

These significant employee interests must be weighed against the State's interests in imposing the new CDL medical card requirement and we must, therefore, evaluate how the CDL medical card requirement serves and advances the interests of management. Per RSA 273-A:1, XI, the State's managerial prerogative includes "the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel." The CDL medical card requirement clearly relates to the "selection" of personnel, which happens when an employee is first hired into state service. However, this does not apply to current DOT employees. Whether "selection of personnel" can reasonably be said to describe the promotion, temporary promotion, lateral transfer, or demotion of current personnel is less clear because those actions involve the reassignment or movement of existing personnel into different positions or locations. In terms of the value of the CDL medical card to the State, there was scant, if any, evidence at hearing which showed that there has been an increase in accidents or incidents involving DOT employees attributable to any of the areas covered by a CDL medical exam. Also, as discussed, there is no medical card renewal requirement. Finally, there was also little or no evidence that existing supervisory systems are inadequate to address a particular DOT employee's fitness to safely

perform the duties of a particular position. See, e.g., Admin. Rules, Per 1003, Removal for Non-Disciplinary Reasons, which provides as follows:

Per 1003.01 Purpose. The purpose of this rule shall be to provide for the removal of a full-time employee for non-disciplinary reasons, when:

- (a) The employee is physically or mentally unable to perform the essential functions of the position to which appointed;
- (b) The employee's physical or mental condition creates a direct threat or hazard for the employee, the employee's co-workers or clients of the agency which cannot be eliminated except by removing the employee from the position;
- (c) The employee's presence in the workplace, because of the medical condition, is deleterious to the employee's health; or
- (d) The employee is a qualified individual with a disability who, with or without a reasonable accommodation, is unable to perform the essential functions of the position to which appointed.

After due consideration of the parties' respective interests, we conclude that the CDL medical card requirement primarily affects the terms and conditions of employment of current employees, and not matters of broad managerial policy. The SEA's argument that CDL medical cards for current employees is a mandatory subject of bargaining passes the first two steps of the *Appeal of State* analysis.

As to the third step in the analysis, we find that there is insufficient evidence to show that treating the CDL medical card requirement as a mandatory subject of bargaining will interfere with public control of governmental functions. The State's interests in the physical fitness of DOT employees to perform their job duties is already adequately addressed in PER 1003, and there is a dearth of evidence which demonstrates that the introduction of a medical card requirement is needed or significant to any meaningful degree to the fulfillment or advancement of any State objectives to improve employee health or roadway safety.

In accordance with the foregoing, we find that any CDL medical card requirement for current DOT employees is a mandatory subject of bargaining under *Appeal of State*. We note that the SEA also argues there is another basis for ruling that the State has violated its bargaining obligations, which is that the parties have already bargained about CDL medical cards and reached agreement to establish a voluntary program with an employee stipend as an incentive as evidenced by CBA Article 43. While we believe there is merit to this argument, we base this decision on the more fundamental bargaining obligations of the State under *Appeal of State*, as discussed.

In accordance with the foregoing, we find that the State has committed an unfair labor practice in violation of 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); (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 (g)(to fail to comply with this chapter or any rule adopted under this chapter). The affected bargaining unit employees were entitled to have the subject of CDL medical cards negotiated, and the State's unilateral action violated its duty to bargain. The SEA's request for a cease and desist order is granted. The State shall not implement any requirement that current DOT employees in any of the affected positions obtain a CDL medical card as a condition of a promotion, temporary promotion, transfer, or demotion.

So ordered.

Date: June 23, 2020

/s/ Andrew Eills
Andrew Eills, Esq., Chair

By unanimous vote of Chair Andrew Eills, Esq., Board Member James M. O'Mara, Jr., and alternate Board Member Glenn Brackett.

Distribution: Gary Snyder, Esq.
Jill Perlow, Esq.
Jessica King, Esq.