



NH Supreme Court affirmed in part, reversed in part this decision on July 27, 1994, Slip Opinion No. 93-001, 138 NH 716 (1994).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES' ASSOCIATION :
 OF NEW HAMPSHIRE, SEIU, LOCAL :
 1984 :
 :
 Complainant :
 :
 v. :
 :
 STATE OF NEW HAMPSHIRE :
 :
 Respondent :
 :

CASE NO. S-0369:3
DECISION NO. 92-125

APPEARANCES

Representing State Employees' Association of N.H.:

Christopher Henchey, Chief Negotiator

Representing the State of New Hampshire:

Douglas N. Jones, Esq., Counsel

BACKGROUND

On November 18, 1991, the State Employees' Association of New Hampshire Inc., SEIU, Local 1984 (Association) filed unfair labor practice (ULP) charges against the State of New Hampshire and the State Negotiating Committee (State) alleging violations of RSA 273-A:5 I (e) and (g) when the State allegedly unilaterally denominated certain union negotiating proposals involving layoff/recall, discipline and promotion/transfer to be "prohibited" subjects of bargaining within the merit system exclusion and refused to negotiate these issues. The State responded with an answer and Motion to Dismiss dated November 27, 1991 and filed December 2, 1991. This matter was then set for hearing before the Board on March 24, 1992. Before the commencement of that hearing, the parties waived hearing and submitted their respective arguments by briefs filed March 24, 1992.

FINDINGS OF FACT

1. The State Employees' Association of New Hampshire (Association) is the duly certified bargaining agent for employees employed by the State of New Hampshire.
2. The State of New Hampshire (State) is a public employer as defined by RSA 273-A:1 X.
3. During a negotiating session on October 29, 1991, the Association made proposals relative to: (1) layoff and recall, (2) discipline, and (3) promotions and transfers. All three proposals would have involved new contract language, the contents of which are hereby incorporated by reference.
4. During a negotiating session on November 5, 1991, the State Negotiating Committee (SNC) informed the Association that they considered the proposals to be "prohibited" subjects of bargaining under RSA 273-A:3 III and declined to negotiate them.

DECISION AND ORDER

The Association asserts two arguments relative to the vitality of its negotiating proposals at the present time. First, the Rules of the Division of Personnel expired under the provisions of RSA 541-A:2 IV and, therefore, cannot be used as a bar to negotiations. Second, the reorganization of the Personnel Commission to the Division of Personnel in the Department of Administrative Services eliminated the separation of powers between the executive department and a "politically neutral board of the merit system." We disagree with both contentions. Expiration of the State's administrative rules cannot be used as mechanism of determining appropriate subjects of bargaining. If that were to be the case, the progress, or lack thereof, in the bargaining process would be subject to artificial restraints depending on projected rule expiration dates. This is contrary to the purposes of RSA 273-A:3 requiring the parties to bargain in good faith and of encouraging progress with that process. The reorganization of the Personnel Commission likewise cannot be a "blank check" on bargaining or a cause to cancel all the traditional rules concerning proper mandatory subjects of bargaining. It is protected by RSA 273-A:1 XI. Merit systems are inevitably "managed" by management; this is an inherent characteristic. It is not the "management" of merit systems which is controlled by RSA 273-A:3 III; it is their content. The remainder of this decision will be devoted to that content as it impacts negotiability.

RSA 273-A:3 III exempts the following from bargaining:

Matters regarding the policies and practice of any merit system established by statute, charter or ordinance relating to recruitment, examination, appointment and advancement under conditions of political neutrality and based on principles of merit and competence shall not be subjects of bargaining under the provisions of this chapter. Nothing herein shall be construed to diminish the authority of the state personnel commission or any board or agency established by statute, charter or ordinance to conduct and grade merit examination from which appointments or promotions may be made.

Management is also protected from having negotiable "terms and conditions of employment" defined so broadly as to lose control over governmental functions. RSA 273-A:1 XI proclaims that "terms and conditions of employment" means "wages, 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." "Managerial policy within the exclusive prerogative of the public employer" is defined statutorily "to include but shall not be limited to the function, 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." It is against the standards of RSA 273-A:3 III and RSA 273-A:1 XI that we must now proceed to measure the Association's bargaining proposals.

Layoff, recall and the role of seniority are all subjects common to the parlance of labor relations. To the extent they speak to or attempt to control the merit system (recruitment, examination, appointment and advancement) and/or to impact on the employer's prerogatives relating to organizational structure and the selection, direction and number of its personnel, they are not negotiable. On the other hand, once decisions as to recruitment, examination, appointment, advancement, selection, direction and number of personnel have been made, then the manner in which personnel may be laid off and/or recalled, from among the existing work force represented by the certified bargaining agent, is negotiable. Our examination of the Association's proposal regarding "Layoff and Recall" is not intrusive of the rights protected unto management under RSA 273-A:1 XI and RSA 273-A:3 III; therefore, its proposal, as written, is negotiable.

This Board has spoken to similar issues in State Negotiating Committee v. State Employees Association (Decision No. 77-08,

February 24, 1977). In an appeal of that decision, the Supreme Court told us that we erred when we "ruled that 'none of the provisions of RSA 98 or the rules published by the Personnel Commission' are bargainable." (118 N.H. 885 at 890) The Court, found that the legislature, when it enacted RSA 273-A:3, III, did not intend "to exempt from the State's bargaining obligation all matters covered by personnel commission rules.... The merit system exception excludes only 'matters regarding the policies and practice of any merit system;' it does not exclude everything that the personnel commission has passed upon.... The mere existence of a commission rule does not ipso facto bring the subject of that rule within this [managerial policy] provision. Only that part of the subject which deals with managerial policy within the sole prerogative of the employer or managerial policy which by statute or regulations is confided to the sole prerogative of the employer is excluded from negotiation." (118 N.H. 885, 889-890) With these restrictions in mind, we have reviewed the Association's proposal as to "Layoff and Recall" and find that it intrudes neither on the merit system exception nor on the managerial policy exemption.

The Association's proposal as to "Discipline" provides merely that the employer may do so for "just cause." This Board has recently spoken to the negotiability of just cause in both International Brotherhood of Police Officers Local 435 v. City of Concord (Decision No. 92-51, March 26, 1992) and City of Concord v. Concord Firefighters, Local 1045 (Decision No. 92-58, May 6, 1992) Upon review of the Association's proposal, our finding is identical to the I.B.P.O. case, supra. That proposal:

"...did not involve recruitment, examination, appointment or advancement under conditions of political neutrality, the grading of examinations, or the functions, programs and methods of the public employer, the use of technology, the public employer's organizational structure or the selection, direction and number of its personnel under RSA 273-A:3 III and RSA 273-A:1 XI, respectively."

Likewise, our conclusion is identical: the proposal is negotiable. In reaching this conclusion, we note that the State relied, in part, on RSA 21-I:42 1 wherein the Division of Personnel is charged with administering a "centralized personnel operation which shall provide for the recruitment, appointment, compensation, promotion, transfer, layoff, removal and discipline of state employees." Since the element of compensation is included in the foregoing authority and is and has been negotiated between the Association and the State, we do not find that the listing of "discipline" under RSA 21-I:42 1 is a grounds, per se, for excluding it as a negotiable subject of bargaining.

The Association's proposal with respect to "Promotions and Transfers" is negotiable in part and non-negotiable in part. It is negotiable to the extent it speaks to posting notices of vacancies (not limited to a given department or area), giving notice of selection or non-selection to applicants, and disposition of permanent employees (already covered by the collective bargaining agreement) who fail a promotional probationary period. It is not negotiable as it attempts to direct or compel the filling of vacancies, selection or sequence of personnel to fill those vacancies, or the department(s) from which they must be selected or in which notices must be posted if no "departmental employee" is selected.

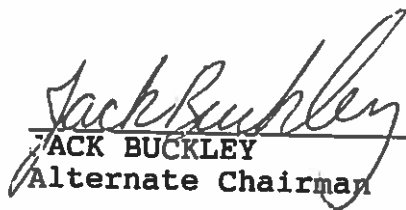
We find that the State violated its obligation to bargain under RSA 273-A:3 I and RSA 273-A:1 XI as it defines "terms and conditions of employment," and thus committed an unfair labor practice under RSA 273-A:5 (e) when it refused to bargain those subjects or topics identified herein as negotiable.

The State is directed to CEASE AND DESIST from refusing to bargain those subjects identified herein as negotiable.

The parties are directed to recommence negotiations on those subjects identified as being negotiable forthwith as soon as one party demands of the other to recommence those negotiations.

So ordered.

Signed this 21st day of July, 1992.



JACK BUCKLEY
Alternate Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.