NH Supreme Court affirmed in part, reversed in part this decision on July 27, 1994, Slip Op. 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. 92-186

APPEARANCES

Representing State Employees' Association of NH:

Christopher Henchey, Chief Negotiator

Representing State of New Hampshire:

Douglas N. Jones, Esq., Counsel
Thomas F. Manning, State Negotiator

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) allegedly violations of RSA 273-A:5 I (e) and (g) and when the State alledgedly 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. The PELRB then issued Decision No. 92-125 on July 21, 1992. The State filed a Motion for Reconsideration on August 10, 1992. The Association filed a Motion to Deny Motion for Reconsideration on August 21, 1992. The PELRB granted the Motion for Reconsideration after which the case was scheduled for rehearing on November 24, 1992.

FINDINGS OF FACT

1. No testimony or evidence was offered on rehearing to warrant reversal of or modifications in the PELRB's findings of fact in Decision 92-125 dated July 21, 1992. Therefore, findings numbered one through four, inclusive, in Decision 92-125 are hereby reaffirmed and incorporated by reference.

2. The bargaining proposals under scrutiny in this case involve the areas of; (1) lay off and recall, (2) discipline and (3) promotions and transfers. Although the PELRB recognizes that certain variations of proposals involving these three subject areas could be written in such a way as to infringe on the merit principle and be excludable from bargaining under RSA 273-A:3 III, such was not the case with the proposals at hand. Our examination of the specific wording and content of the proposals advanced by the Association in this case leads us to find that those proposals did not infringe on the "merit principle" as protected under RSA 273-A:3 III. Likewise we find that the wording of the Association's proposals, as qualified in our Decision No. 92-125, does not impair the protected prerogatives set forth in State Negotiating Committee v. State Employees Association (Decision No. 77-08, February 24, 1977) wherein the PELRB referred to the three protected areas of "what the government is to do, how it is to do it, or who is to perform it."

3. The State adopted Rules for the Division of Personnel effective April 27, 1992, between the date of the commencement of litigation in this case and the date of rehearing, November 24, 1992, and after the date the case was originally submitted to the PELRB on brief, March 24, 1992.

4. The New Hampshire Supreme Court spoke to the

issue of negotiability of (1) employee classification, (2) contracting out, (3) employee promotion, transfer and layoff, (4) employee training and education, (5) employee discipline and involuntary separation, and (6) wage and salary administration in State Employees' Association v. P.E.L.R.B., 118 NH 885, 887 and 890 (1978), when it held that the PELRB erred in deciding that none of these subjects was bargainable but that the PELRB was correct "in giving broad meaning to the terms 'managerial policy.'" That decision further admonished the PELRB that it "should in the future decide as a matter of fact which contract proposals are proper subjects of negotiation. In doing so, however, we caution that body not to construe the merit system exception quite so broadly."

5. The parties have negotiated and the Legislature has funded prior collective bargaining agreements which have contained "final and binding" grievance arbitration over "grievances and disputes arising with respect to interpretation or application of any provision" of those agreements. Likewise, those agreements have continued a "Management Prerogatives" article which has delineated as protected rights activities such as "appointing, promoting, transferring, assigning, demoting, suspending and discharging employees....laying off unnecessary employees..."

6. The PELRB's prior findings with respect to the Association's proposal on just cause and those portions of its (1) lay off and recall and (2) promotions and transfers proposals which the PELRB found negotiable in Decision No. 92-125 dated July 21, 1992 are reaffirmed because and to the extent their content "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."

DECISION AND ORDER

We believe the Association is correct in its assertion on

rehearing that the State has the burden of showing errors in fact in our prior decision (Decision 92-125), later-discovered evidence warranting reconsideration and/or modification, and/or faulty conclusions in our earlier rationale. It has not succeeded in any of these efforts. We are not convinced of any factual errors or erroneous conclusions in our earlier decision. There is no later-discovered evidence or intervening event which would cause us to change our thinking from that set forth in Decision No. 92-125.

We categorically reject the notion that the adoption of the Personnel Rules on April 27, 1992 should have any bearing on this case. The facts decided in Decision No. 92-125 were as plead in November of 1991. Thereafter, one party cannot be permitted to take unilateral action which would guarantee a desired outcome regardless of the decision rendered by this agency. Labor relations throughout this State would be chaotic if public management were permitted to amend charter documents or internal administrative rules or procedures during the bargaining process in such a way as to influence the negotiability of subjects already properly and legitimately proposed to be topics of collective bargaining. The "level playing fields" of Timberlane Regional School District v. Association, 114 N.H. 245, (1974) and Appeal of Franklin Education Association ____N.H.____ (No. 90-478, November 10, 1992) would be non-existent. The public employers' "actions [may not] unlawfully shift the balance of power guaranteed by Chapter RSA 273-A [to its] favor...." Franklin, supra, (slip opin. at p. 5).

The newly adopted Personnel Rules raise the collateral issue of a "workable grievance procedure" as contemplated in RSA 273-A:4. A "workable" grievance procedure must be both functional and fair. An essential ingredient of this fairness is the assurance that the ultimate decision maker(s) at the end of the grievance chain are independent from the parties and can approach the decision making process without pre-conceived notions or commitments. Likewise, it would be equally inappropriate for one side to be able to create or modify a grievance process without the consensus of the other side. Upon review of the contract, we find that the parties have an effective, workable and negotiated grievance procedure now, ending in final and binding arbitration under terms agreed by the parties. We affirm that process and find that the just cause proposal if agreed to, would be a proper augmentation to it and its need to be a "workable" procedure which, consistent with earlier analysis, is not barred by the statutory prohibitions cited by the State. See also I.B.P.O. v. City of Concord (Decision No. 92-51, March 26, 1992).

We conclude our analysis by reiterating the mandate which we followed in Decision 92-125:

> [The Legislature 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 negotiations."

State Employees Association of N.H. v. P.E.L.R.B., 118 N.H. 885, 889-890 (1978) See also State Employees' Association of N.H. v. Belknap Comm'rs, Decision No. 79-05; March 21, 1979) as to the negotiability of promotion, transfer, layoff and discipline.

We believe our deliberations in Decision 92-125 and in this case are consistent with this mandate. Thus, we affirm both our conclusions and our order in Decision 92-125 without modification.

So. Ordered.

Signed this 10th day of December, 1992.

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members Richard Roulx and Arthur Blanchette present and voting.