THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0416

Appeal of New Hampshire Department of Transportation

(State Employees' Association of NH, SEIU Local 1984 v. State Of New Hampshire, Department Of Transportation)

APPEAL FROM A DECISION OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD

REPLY BRIEF FOR THE NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION

STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

By Its Attorneys,

JOHN M. FORMELLA
ATTORNEY GENERAL

Daniel E. Will
Solicitor General
N.H. Bar No.: 12176

Jill A. Perlow
Senior Assistant Attorney General
N.H. Bar No.:15830

Jessica A. King
Assistant Attorney General
N.H. Bar No.: 265366

New Hampshire Department of Justice
33 Capitol Street, Concord, N.H. 03301-6397
(603) 271-3675

(Fifteen Minute Oral Argument)

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

ARGUMENT 4

I. THIS COURT MAY OVERTURN *APPEAL OF CITY OF NASHUA* WITHOUT DISTURBING THE RULING IN *APPEAL OF STATE*. 4

II. THE SUBJECT OF RSA 21-G:9 WAS SPECIFICALLY PRESERVED FOR APPEAL ON A MOTION FOR REHEARING. 8

III. IF NOT PROHIBITED, THE CDL MEDICAL CARD REQUIREMENT IS AT MOST A PERMISSIVE SUBJECT OF BARGAINING 9

IV. THE BARGAINING HISTORY DOES NOT SUPPORT APPELLEE'S ASSERTIONS 12

CONCLUSION 14

CERTIFICATE OF COMPLIANCE 16

CERTIFICATE OF SERVICE 17

TABLE OF AUTHORITIES

Cases

Appeal of City of Nashua Board of Education,
141 N.H. 768 (1997)..4, 6, 14

Appeal of N. New England Tel. Operations, LLC, 165 N.H. 267 (2013) 8

Appeal of the State of New Hampshire, 138 N.H. 716 (1994) ....passim

Appeal of Town of North Hampton, 166 N.H. 225 (2014).......................... 11

In re Kennedy, 162 N.H. 109 (2011) 9

In re Pittsfield School Dist., 144 N.H. 536 (1999)..............................6, 7, 10

Statutes

RSA 273-A:1, XI...4, 5, 6, 7

RSA 541:3 8

Rules

N.H. Admin R. Pub 205.03 8

N.H. Admin. R. Pub 205.02 8

ARGUMENT

I. THIS COURT MAY OVERTURN *APPEAL OF CITY OF NASHUA* WITHOUT DISTURBING THE RULING IN *APPEAL OF STATE.*

Appellee asserts that this Court cannot overturn *Appeal of City of Nashua Board of Education*, 141 N.H. 768 (1997) ("*Appeal of City of Nashua*") without rendering the test developed in *Appeal of the State of New Hampshire*, 138 N.H. 716 (1994) ("*Appeal of State*") moot. AB 16-17.[1] However, the two cases can be easily reconciled while also granting meaning to legislature's words contained in RSA 273-A:1, XI.

When *Appeal of State* was decided, the Court established a new standard "to assist public employers and employees in settling between them which proposals are subject to mandatory bargaining, which ones may be negotiated, and which, if any, proposals are prohibited subjects for negotiation." *Appeal of State*, 138 N.H. at 722. The Court recognized that statutes could not possibly cover every managerial policy exception, nor list out every term and condition of employment subject to mandatory bargaining. *Id*. at 720 ("Our cases interpreting the managerial policy exception in different contexts illustrate the variety of interests of public employers and employees that affect the application of the exception."). The test in *Appeal of State* is not meant to detract from the exclusive authority of the public employer, but to help employers and employees

---

[1] Citations to the record are as follows:
"AB__" refers to the Appellee's Brief and page number;
"SB__" refers to the State's Brief and page number; and
"CR__" refers to the Certified Record and page number.

understand what must be bargained when the subject is not clearly reserved to the exclusive authority of the employer by the constitution, statute, or regulation.

The State's assertion that RSA 273-A:1, XI provides a statutory grant of exclusive managerial prerogative does not invalidate the test in *Appeal of State*. Appellee states that the three prongs correspond to different aspects of the statute. AB 16. While this appears to be true, Appellee fails to state exactly how giving meaning to the exclusivity provisions in RSA 273-A:1, XI "invalidat[es] or render[s] redundant the second and/or third prong of the test" or "blend[s] the requirements of the first and second prongs." AB 17-18. *Appeal of State*'s first prong examines whether the subject is reserved to the exclusive managerial authority of the public employer by constitution, statute, or regulation. *Appeal of State*, 138 N.H. at 722. If not, the Court then weighs the effect of the subject on terms and conditions of employment rather than managerial policy. The Court does not evaluate whether subject itself is a managerial prerogative outlined in RSA 273-A:1, XI or another statute. That is done in prong one of the test. Rather, the Court employs a balancing test to determine the primary impact of the subject: the terms and conditions of employment or matters of broad managerial policy. This balancing test is only necessary if the subject does not fit into the categories reserved to management by statute. Finally, if the subject primarily affects the terms and conditions of employment, the Court must examine whether the subject interferes with the public control of governmental functioning. It is the final check on the proposal to ensure public governance is not unduly burdened by collective bargaining.

If the Court overrules *Appeal of City of Nashua* and holds that RSA 273-A:1, XI is a grant of exclusive managerial authority, none of the above would change. The analysis of a subject that falls within the purview of RSA 273-A:1, XI would simply stop at prong one. The analysis of a subject that falls outside a grant of exclusive managerial authority would continue to prongs two and three.

For example, the implementation of an employee evaluation plan is not contained in the definition of managerial policy within the exclusive prerogative of the employer because it does not restrict the selection or direction of personnel and is not otherwise reserved to the exclusive authority of the public employer by any other statute. *See In re Pittsfield School Dist.*, 144 N.H. 536, 540 (1999).[2] Therefore, the Court must then analyze the primary effect of teacher evaluations under prong two. The Court does not evaluate whether the evaluations themselves are matters of managerial policy as this is done in prong one, but evaluates only the impacts of the evaluations. If the evaluations primarily affect matters of managerial policy like selection, they are only a permissive subject of bargaining. If the evaluations primarily affect terms and conditions of employment like wages, then the Court moves on to prong three. In prong three, the Court considers if requiring the evaluations would interfere with the public control of governmental functioning.

Appellee misinterprets the test in *Appeal of State*. Prongs two and three do not concern whether or not a subject is reserved exclusively to the

---

[2] The Court determined that the subject was not reserved to the exclusive prerogative of the employer. However, the Court did not move on to prongs two and three because the subject was already covered by the parties' collective bargaining agreement. *Id*.

State—that is accomplished in prong one. The second and third prongs evaluate the impacts of subjects that are not clearly within the exclusive prerogative of the employer in order to help employers and employees understand what subjects are mandatory in public collective bargaining. Thus, even if RSA 273-A:1, XI were a statutory authority for exclusive management prerogative, the test in *Appeal of State* remains intact.

As explained in the State's Brief, RSA 273-A:1, XI clearly reserves the selection, direction, and number of employees to the exclusive prerogative of the public employer. SB 22-27. The CDL medical card requirement placed standards on the hiring, promoting, and transfer of positions within the Department of Transportation. This is intrinsic in the selection of personnel for the functioning of the State. *See In re Pittsfield School District*, 114 N.H. at 540-41 (defining the "standards by which the district may hire teachers" as the "selection" of personnel). Thus, the *Appeal of State* analysis stops at prong one because the selection of personnel is reserved to the exclusive prerogative of the State.

II. THE SUBJECT OF RSA 21-G:9 WAS SPECIFICALLY PRESERVED FOR APPEAL ON A MOTION FOR REHEARING.

Appellee contends that "[o]n appeal, the State now raises the argument that RSA 21-G:9 provides for a reserved managerial right concerning requiring CDL medical cards." AB 20. To the extent that Appellee contends the State first raised this argument on appeal, the State asserts that RSA 21-G:9 was preserved for appeal in the State's Motion for Rehearing. CR 269. The Motion for Rehearing addressed the Board's holding that no statute reserved the CDL medical card requirement to the exclusive managerial authority of the State. *See* RSA 541:3[3] ("Within 30 days after any order or decision has been made by the commission, any party to the action … may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order … ."). The issue was fully briefed before the Board. Arguments "may be raised on appeal if they relate to any matter determined in the action or proceeding, were included in an application for rehearing within thirty days of any order or decision, and the agency's ruling on the application was timely appealed to this court." *Appeal of N. New England Tel. Operations, LLC*, 165 N.H. 267, 272 (2013) (citation and quotation omitted). Here, the subject of RSA 21-G:9 was properly preserved for appeal.

[3] The Board's rules provide that Motions for Rehearing should be filed under RSA 541:3 and appeals taken pursuant to RSA 541:6. *N.H. Admin. R.* Pub 205.02 & 205.03.

III. IF NOT PROHIBITED, THE CDL MEDICAL CARD REQUIREMENT IS AT MOST A PERMISSIVE SUBJECT OF BARGAINING.

If the subject is not reserved to the exclusive prerogative of the public employer under prong one of the test in *Appeal of State*, the Court must then move on to prong two: whether the subject primarily affect the terms and conditions of employment rather than matters of broad managerial policy. Appellee argues that the Board correctly determined that the CDL medical card requirement primarily impacted terms and conditions of employment. AB 24-25. As outlined in the State's Brief, the Board and Appellee apply the wrong standard by assessing the overall value of the proposal itself rather than examining the primary effect of the subject on competing interests. *Appeal of State*, 138 N.H. at 716 ("Determining the *primary effect* of the proposal requires an evaluation of strength and focus of the *competing interests*.") (emphasis added); *see also In re Kennedy*, 162 N.H. 109, 113 (2011) ("Here, even assuming the first and third prongs of this test are satisfied, we cannot conclude that the second is satisfied; this is, we cannot conclude that the school district's action *primarily* affected the terms and conditions of employment, rather than matters of broad managerial policy.") (emphasis in original). The Board is in no position to substitute its judgment for that of the State when evaluating how best to ensure the medical fitness of State CDL drivers. However, the Board can use its expertise to assess the competing interests of the parties. Here, the Board was unjust and unreasonable when it focused solely on the advisability of a long-term plan of action rather than the competing interests of employer and employee.

Thus, while there may exist an indirect effect on wages via the cost of the CDL medical card, the primary effect of the requirement is to promote the selection of a safe workforce. It is a core managerial function to develop selection criteria. *See In re Pittsfield School District*, 114 N.H. at 540-41. The primary effect of the CDL medical card is to aid the State in the selection of personnel, with only incidental impacts to the terms and conditions of employment. The State maintains that it is not required to bargain the implementation of the CDL medical card, however, acknowledges that it may be required to impact bargain incidental effects on the terms and conditions of employment.

In fact, Appellee's cited case law supports the State's position. Appellee relies on *Appeal of State* to demonstrate that promotion and transfer procedures were important to job advancement, which is closely connected to terms and conditions of employment. AB 22. However, when *Appeal of State* considered a proposal for a seniority system for layoffs and recalls, the Court held that "although the proposals in the section affect the terms and conditions of employment, they more directly control managerial policy as defined in the managerial policy exception; that is, the selection, direction, and number of the public employer's personnel." 138 N.H. at 726. The Court recognized that while the seniority system tangentially affected the terms and conditions of employment, its *primary* effect was on managerial policy. Regarding the "promotion and transfer" language cited by Appellee, the Court only considered the implementation of a notification system for employees to apply for advancement. *Id*. at 728. That proposal is distinguishable from the facts at hand because it was strictly procedural and the only interest examined was the employees' interest in receiving notice

about opportunities for advancement. *Id*. There was no competing managerial interest cited by the Court.

Appellee also cites *Appeal of Town of North Hampton*, 166 N.H. 225 (2014), to demonstrate that "even though it is in the managerial prerogative to create new positions and programs, it is not in its prerogative to unilaterally impose wages associated therewith." AB 23. Appellee ignores a central holding of the case. The Court did not determine that the primary effect of the proposal was on the terms and conditions of employment, but "that the matters of wages, hours, and conditions of employment for firefighter/paramedics may be considered separately from other aspects of the program." *Appeal of Town of North Hampton*, 166 N.H. at 230. Again, the State acknowledges that it may be required to impact bargain incidental effects on the terms and conditions of employment such as wages, but maintains that the implementation of the CDL medical card requirement primarily affects broad managerial policy, and as such, is at most a permissive subject of bargaining.

IV. THE BARGAINING HISTORY DOES NOT SUPPORT APPELLEE'S ASSERTIONS.

Appellee asserts an alternative theory of an unfair labor practice, alleging that the State unilaterally changed a previously bargained for provision of the collective bargaining agreement. AB 38-40. Appellee misinterprets the language of the contract and misstates the Board's findings.

The contract does not include any language stating that the CDL medical card reimbursement is a voluntary program. The contract language states, "Employees defined in paragraph (a.) above[4] who obtain and maintain a valid CDL medical card and provide an acceptable copy to the NHDOT's Driver Qualifications Specialist shall receive an additional ten dollars ($10) per week in accordance with the above provisions." SB 79. This language demonstrates that there exists an incentive in the form of a stipend to obtain a CDL medical card, but there is no express agreement that the program must remain voluntary. In fact, the memo implementing the CDL medical card requirement did not change this provision of the contract in any way. SB 63-65. The language remained centered on monetary reimbursement, with no mention of a voluntary program.

Further, the Board discussed the bargaining history in its findings and found that the parties agreed to provide ten dollars per week to employees who voluntarily obtained and maintained their CDL medical card. However, the Board did not hold that the parties agreed the stipend

[4] Employees who are determined by the Employer to be routinely engaged in winter maintenance and ancillary activities and are on the Employer's winter maintenance call out list.

was a “voluntary program” as asserted by Appellee. SB 50-51; AB 39. The State did not unilaterally change the terms of the contract because there were no terms restricting the CDL medical card to a voluntary program. The State maintained its obligations under the contract. Any assertion by Appellee to the contrary is unpersuasive.

CONCLUSION

In sum, the CDL medical card requirement is a prohibited subject of bargaining, or, at most, a permissible subject. Appellee states that "[s]hould this court overrule *Appeal of City of Nashua*, even long held bargain-able subjects like wages would become potentially prohibited subjects of bargaining under the State proposed interpretation." AB 34. This is hyperbole from Appellee. *Appeal of State* can be reconciled easily with the language of RSA 273-A:1, XI to create a system where the statutory language is actually given meaning, but the test is preserved. The statute is clear: selection of personnel is within the *exclusive* prerogative of the employee. To read it any other way would dismiss the plain language of the statute. Further, even if the Court holds that the CDL medical card requirement is not prohibited, it is at most permissive. The requirement primarily effects broad managerial policy. While it may tangentially touch and concern the terms and conditions of employment, those effects may be impact bargained. The policy itself, however, is not a subject of mandatory negotiation. For these reasons, the Court should overturn the Board's unjust and unreasonable order and hold that the State may act unilaterally in implementing a CDL medical card requirement.

Respectfully submitted,

STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

By its attorneys,

THE OFFICE OF THE NEW HAMPSHIRE
ATTORNEY GENERAL

June 15, 2021

/s/Jessica A. King

Jessica A. King
N.H. Bar # 265366
Assistant Attorney General
New Hampshire Department of Justice
33 Capitol Street
Concord NH 03301
(603) 271-3675

CERTIFICATE OF COMPLIANCE

I, Jessica A. King, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this reply brief, exclusive of tables, contains approximately 2,537 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

June 15, 2021 *<u>/s/Jessica A. King</u>*
Jessica A. King

CERTIFICATE OF SERVICE

I, Jessica A. King, hereby certify that a copy of the State's Reply Brief shall be served on Gary J. Snyder, Esquire, counsel for the State Employees' Association of New Hampshire, SEIU, Local 1984, through the New Hampshire Supreme Court's electronic filing system.

June 15, 2021

/s/Jessica A. King
Jessica A. King