

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD
Before Factfinder Mary Ellen Shea

In the factfinding matter between: *
NH DEPARTMENT OF TRANSPORTATION, *
STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, *
SERVICE EMPLOYEE INTERNATIONAL UNION, LOCAL 1984 *
*
and *
*
STATE OF NEW HAMPSHIRE *

INTRODUCTION

A factfinding was conducted in accordance with NH Laws, Chapter 273, and pursuant to NH PELRB Rule 305.03. The parties to this factfinding are the State of New Hampshire (“State”) and the NH Department of Transportation, State Employees Association of New Hampshire, SEIU, Local 1984, (“SEA” or “Union”). The parties negotiated a master agreement (effective July 1, 2021 through June 30, 2024), which included bargaining over state-wide contract issues as well as bargaining over issues specific to the sub-unit agreements (in this instance, the Department of Transportation sub-unit). The parties resolved the master agreement (which includes across-the-board wage increases for all SEA employees) but reached impasse over several DOT sub-unit issues. The parties submitted to mediation efforts in May 2021, but a number of sub-unit issues remained unresolved and were submitted to factfinding. The State and the SEA participated in a factfinding hearing on September 1, 2021, via zoom, and addressed the unresolved issues.

The Union was represented by Randy Hunneyman, Executive Branch Negotiator. The

Union's team also included Dan Brennan, Mark Hamilton, Jeff Zedalis, Chris Tsoukalas, and Eric Healey. The State was represented by Rudolph W. Ogden, Deputy Labor Commissioner.

The parties had full opportunity to present oral and documentary evidence as well as oral and written argument on the unresolved issues. This report includes a summary of the arguments and evidence followed by the factfinder's analysis and recommendation on each issue. The factfinder's recommendations are based on a comprehensive and thorough review of the parties' presentations.

At the outset, it may be helpful to comment about the decision-making process in factfinding and some of the principles or guidelines that have been applied. Fact finding is an extension of the collective bargaining process and the goal of the neutral factfinder is to make recommendations the parties might have negotiated themselves if they had not reached impasse. For this reason, factfinding tends to be a conservative process:

[T]he neutral cannot impose upon the parties' contractual procedures he or she knows the parties themselves would never agree to. Nor is it their function to embark upon new ground and create some innovative procedural or benefit scheme which is unrelated to the parties' particular bargaining history.

Harvey Nathan, Illinois State Labor Relations Board (August 17, 1988)

A common principle in factfinding is that some changes – especially novel or unusual changes - are more appropriately decided through collective bargaining rather than in factfinding. If the parties have fully engaged in collective bargaining over the disputed issue and were still unable to reach agreement, a recommendation may be made if the proposed change achieves an appropriate degree of comparability or fairness and/or there is a compelling need for the change. Most importantly, the parties' presentations have been considered carefully, and the recommendations made reflect whether this factfinder was persuaded that the proposed changes should be made.

THE ISSUES

The issues that remain unresolved are proposals by the SEA:

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| 1. Article 43.6 | Tool Rental Increase |
| 2. Article 43.11 | Year-Round Maintenance Stipend |
| 3. Article 43.13 | CDL/Drug Testing Stipend |
| Article 43.13.1 | Medical Card Stipend |
| Article 43.13.2 | Medical Card Exemption (current employees) |
| 4. Article 43.15 | Double Pay for Call Out Holidays |
| 5. Article 43.12 | 40 Hour Schedule (select employees) |

UNIT DESCRIPTION

The Department of Transportation has multiple divisions and bureaus, overseeing and maintaining the state's roads and highways, with a bargaining unit of about 1605 employees. DOT responsibilities include highway and bridge maintenance, traffic operations, planning and construction.

PROPOSALS AND RECOMMENDATIONS

SEA Item 1: Tool Rental Increase

43.6. Rental & Fees: The Employer agrees to enter into a tool rental agreement with mechanics wherein the Employer shall pay a fee for the employee's use of such tools in the service of the Employer. The agreement shall be of legal form and shall contain as minimum provisions the following:

- a. Rental fee of ~~four~~ **five** hundred dollars (~~\$400.00~~) (**\$500.00**) per year.
- b. Ownership and use shall remain vested in the employee.
- c. The employee shall furnish tools of less than one (1) inch.
- d. A pro rate termination fee schedule.

SEA Proposal to Increase the Tool Rental Stipend by \$100/year

The Tool Rental stipend applies to approximately 44 fleet mechanics in the Bureau of Mechanical Services. Fleet mechanics are required to provide their own trade-specific tools. The collection of tools required for the job include basic items such as ratchet sets as well as specialty items such as power tools, diagnostic testers, or rethreading tools. According to the Union, a standard tool collection of a fleet mechanic may be valued at more than \$20,000.

The parties first negotiated a “tool rental” stipend in 1981 at the rate of \$200/year. The tool rental stipend is intended to defer some of the costs of maintaining, restocking, and upgrading the required tool set. The current rate of \$400/year has not been adjusted in 10+ years. The rate of inflation in the Northeast Region rose 17% from 2011 to 2020 and the forecast for the inflation rate in 2021 is high. The SEA argues the proposed increase of \$100 is fair and justified.

State of NH Response to SEA Tool Rental Increase Proposal

The State points out that the parties reached a voluntary agreement on the master, state-wide agreement. While the Union may be disappointed with the agreed-upon wage adjustments, the parties were aware then and are aware now of the tight financial parameters the State faces. The State argues that the tool rental fee has always been a “nominal” benefit and is not meant to be tied to inflation or to the actual value of the tool sets employees are required to have.

Alternately, the State notes the first rate (\$200) remained in place for 30 years before it was increased, whereas the current rate (\$400) has been in place for only ten years. Finally, the State argues the Union has not demonstrated the need for a 25% increase in the tool rental stipend. The State argues the proposed change should be rejected.

Factfinder’s Analysis of SEA Tool Rental Increase Proposal

The Tool Rental fee is a unique stipend arrangement requiring it be reduced to writing and be in “legal form”. The “tool rental fee” is money paid by the State to a fleet mechanic “for the use of [the employee’s] tools.” As a condition of their employment, fleet mechanics are required to have the tool collection. In addition, Article 43.6 requires the State to enter into an agreement guaranteeing payment of the rental fee to fleet mechanics. Taken together, it is clear that the “tool rental fee” is an integral part of the fleet mechanic’s overall compensation. The State correctly argues that the parties agreed on an across-the-board wage adjustment in the

master agreement, but the agreement did not address the fleet mechanic's overall compensation package. The value of an across-the-board increase is diminished whenever an integral part of a compensation package remains unadjusted. An adjustment in the tool rental fee is appropriate. The Union proposal for a 25% increase, however, is not supported because it includes an as-yet untested assumption about the 2021 inflation rate.

Factfinder's Recommendation:

The SEA's proposal to increase the tool rental stipend is recommended as modified:
Rental fee of four hundred sixty dollars (\$460.00) per year.

SEA Item 2: Year-Round Maintenance Stipend

- 43.11. Maintenance Activities: In recognition of their ~~obligation~~ **requirement** to respond to ~~winter~~ maintenance call outs, the Employer agrees to pay a stipend of thirty- five dollars (\$35.00) per week to ~~certain~~ **maintenance** employees ~~from the pay period that includes the first day in November through the pay period that includes the last day of March each year~~ in accordance with the following conditions:
- a. The stipend shall be paid to those 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.
 - b. ***Notwithstanding the provisions of Article 7.1,*** ~~Other~~ employees who are not routinely engaged in ~~winter~~ maintenance and ancillary activities but who possess a Commercial Driver's License may volunteer ***at their regular rate of pay*** for placement on the ~~winter~~ maintenance call out list, from the pay period that includes the first day in November through the pay period that includes the last day of March. Provided that any employee who refuses a call to perform ~~winter~~ maintenance and ancillary duties may be removed from the list, may cease to receive the stipend, and may be required to reimburse the Employer for stipends received since the date of the last ~~winter~~ maintenance call out.
 - c. Employees defined in paragraph (a. ***and b.***) above 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.

SEA Proposal regarding Year-Round Maintenance Stipend

The winter maintenance stipend applies to approximately 600+ employees, including Highway Maintainers, Patrol Foreman and Supervisors. The employees' job descriptions now include a requirement that they respond immediately to attend to maintenance and/or traffic emergencies, 24 hours a day, throughout the entire year. Since the parties first agreed to a weekly stipend during the winter months, the need for callouts in response to various emergencies has increased throughout the year, including the non-winter months. The SEA argues the proposal to make the maintenance stipend a year-round benefit is appropriate in light of the increased demand for callouts year round.

State of NH Response to SEA Year-Round Maintenance Stipend Proposal

The State reiterates its argument about the parties' agreement on wages in the master agreement and its concerns about the State's financial constraints. The State acknowledges there are instances of non-winter maintenance calls but argues these are less frequent, shorter in duration, and the conditions less extreme or disruptive as winter maintenance calls. The parties were able to agree to the existing winter maintenance stipend because of the compelling need based on the severe conditions encountered in the winter. The State argues the proposed change should be rejected.

Factfinder's Analysis of SEA Year-Round Maintenance Proposal

The SEA argument that "the demand for callouts has increased" outside the winter months is an assertion that is not supported by evidence. In addition, there is no evidence that callouts during non-winter months are as demanding or the conditions as severe as winter callouts.

Factfinder's Recommendation:

The SEA proposal regarding a Year-Round Maintenance stipend is not recommended

SEA Item 3:

Stipend for Random Drug Testing

43.13 Any employee who holds a Commercial Drivers License (CDL) and is subject to random drug testing shall receive an additional (\$3) three dollars per hour added to their base pay.

CDL Medical Card Stipend

43.13.1 Employees who hold a Commercial Driver's License and have a CDL medical card certification shall receive an additional (\$2) two dollars an hour added to their base pay.

Exemptions to CDL Medical Card

43.13.2 Employees who hold a Commercial Driver's License (CDL) prior to the implementation of this agreement shall be exempt from the requirement to obtain and/or maintain a medical card certification.

Mandatory CDL Medical Cards for new hires Proposed

43.13.3 All employees who are hired after the signing date of this agreement, and who are required to hold a Commercial Driver's License (CDL) as a condition of employment, shall be required to maintain a medical card certification and shall receive the wage adjustments as established in section 43.13 and 43.14 of this article.

SEA Proposals for Wage Adjustments for CDL/Drug Testing and Medical Card

The SEA proposes two hourly stipends as a mechanism for realigning the base pay for highway maintenance drivers, a job the State has chronic problems keeping filled due to the pay rates and stressful nature of the job. The SEA proposes to limit eligibility for the stipends to employees hired prior to the signing of the agreement.

The SEA offered evidence about the difficulty in recruiting and retaining employees with CDLs. For example, Highway Maintenance II positions had the highest rates of turnover among all state agencies from 2011 to 2015. The turnover rate for Highway Maintenance I positions was even higher 2017 through 2020. The SEA points out that the State made no counter offers and the Union is now at factfinding at its “starting” position.

The SEA offered evidence that the Highway Maintenance positions are paid at levels below prevailing rates offered by the private sector construction industry for drivers and equipment operators and that DOT starting rates are below those in municipal departments.

Despite the State's assertion that there is a “funding problem,” the Governor announced a \$280

million dollar surplus in July 2021, at the start of FY2022. The SEA argues the State cannot maintain its bargaining position (keeping wages below the prevailing rate) and expect the Highway and Maintenance Divisions to remain functional.

The SEA offered a 2017 quote from Governor Sununu, “When you don’t pay anyone any more money, it shouldn’t come as a surprise to any of us who believe in capitalism that you’re going to have serious shortages....” The SEA urges its proposals for hourly increases for employees who are subject to random drug testing and who maintain medical cards be recommended.

State Response to SEA Proposals for Wage Adjustments for CDL/Drug Testing and Medical Card

The State contends the SEA proposal is actually a wage proposal and reiterates its position that the parties negotiated wages in the master agreement. The State also reiterates its concerns about the State’s financial constraints and points out that the budget surplus cited by the Union is statewide. The State contends the pyramiding of up to \$5.00 per hour would result in a wage increase of 20-30% depending upon the individual’s hourly rate and the State is not in a position to provide such an increase. The revenue streams that support the Department of Transportation have been softening (fuel consumption is down and traffic volume is lower). The SEA proposal of \$200/week or more for medical cards and random drug testing (required by law) cannot be supported.

The State contends it has not ignored the Union’s concerns regarding recruitment and retention. In fact, through the Division of Personnel, the State adjusted compensation for a number of these positions (HMI, HMII, and HMIII) by 9% in 2019. The State argues the proposed wage adjustment should be rejected.

Factfinder's Analysis of SEA Proposals for Wage Adjustments for CDL/Drug Testing and Medical Card

The SEA presented evidence that the Department of Transportation continues to have high rates of turnover among the HMI, HMII, and HMIII positions. The SEA also presented evidence that hourly rates for these employees are lower than the rates in 6 NH cities and lower than the rates at 5 private companies based in NH. These data are insufficient, however, to establish whether the sampled rates also represent the average hourly rate in NH for comparable positions, which information is needed to determine the variance between the overall average and the current HMI, HMII, and HMIII rates and to then determine an appropriate wage adjustment.

Also, there are factors affecting turnover rates that may not be related to the wage rate that must be considered. First, there is a regional shortage of CDL drivers, a factor that compounds the current recruitment and retention problem for any employer. Second, during the 2019 factfinding, the SEA accurately predicted a spike in turnover since “65% of the [state’s] workforce will be eligible to retire in 2020.”

In addition, the SEA proposal for “realigning” wages uses an indirect and creative mechanism to increase the hourly rate (tied to CDLs and medical cards)but there is no indication the parties have adopted this kind of indirect approach to adjusting wages in the past. I am familiar with contract provisions that use an indirect approach instead of directly adjusting the wage rate (such as the stipends proposed here). The difference is that those were the result of the parties negotiating and agreeing to the provisions in collective bargaining. I am not persuaded that it is appropriate, “to create some innovative procedural or benefit scheme which is unrelated to the parties’ particular bargaining history.”

Finally, I am not persuaded that – if recommended - the SEA stipend proposals would prompt agreement by the parties. There are other mechanisms for addressing the problem. I urge the parties meet and consider appropriate options for improving the recruitment and retention of employees with CDLs, including further bargaining.

Factfinder's Recommendation:

The SEA proposals (#3-6) for Wage Adjustments for CDL/Drug Testing and Medical Card are not recommended.

SEA Item 4: Double OT for working holidays (new)

43.13 Holiday Worked: In addition to the provisions of Article 9.4 and notwithstanding the provision of article 9.4.2, when a full-time employee works on a calendar holiday, he/she shall be paid either: Double to their regular rate for hours actually worked on the holiday or, with mutual consent of the parties, be given compensatory time off equal to double the number of hours actually worked on the holiday. A calendar holiday begins after 12:00 a.m. on the actual day of the holiday and ends at midnight on the same day. Only hours worked on the actual calendar holiday are to be compensated as indicated above.

SEA Proposal: Double Pay for Callout on Holidays

The SEA proposes that Highway Maintainers be paid double time when they are called back on short notice to work on a holiday. The SEA points out that these employees are required to be available 24 hours a day, every day of the year, and must respond immediately to maintenance demands or traffic emergencies when called, which usually entails very little advance notice. According to the Union, this is a condition of employment that is not required of most employees. A majority of DOT employees have experienced callbacks during family gatherings on Christmas, Thanksgiving and New Year's Day. When they are called, the employees are expected to forego their family gatherings and report immediately to work, a

sacrifice for both the employee and their family members. For this reason, the SEA urges the proposal that employees be paid double time when called out on a holiday be recommended.

State of NH Response to SEA Double Pay for Callout on Holidays Proposal

The State contends the existing Holiday Worked provision provides an appropriate benefit. The State feels its leave accruals and associated practices are generous and do not need to be enhanced. The State urges the proposal be rejected.

Factfinder's Analysis of Double Pay for Call-out on Holidays Proposal

The argument that a callout on Thanksgiving, Christmas, or New Years is more disruptive to an employee than on other days is persuasive. It is also significant that these Highway Maintenance employees are (mostly) the only employees who are required to sacrifice time on days that are almost universally considered family holidays. I am not persuaded, however, that the proposal for double pay should apply to all contractual holidays.

Factfinder's Recommendation:

The SEA's proposal for double Pay for Call-out is recommended as modified:
Holiday Worked: In addition to the provisions of Article 9.4 and notwithstanding the provision of article 9.4.2, when a full-time employee works on **Thanksgiving, Christmas, or New Year's Day**, he/she shall be paid either: Double to their regular rate for hours actually worked on the holiday or, with mutual consent of the parties, be given compensatory time off equal to double the number of hours actually worked on the holiday.
The **Thanksgiving, Christmas and New Year's Day** holidays begin after 12:00 a.m. on the actual day of the holiday and ends at midnight on the same day. Only hours worked on **Thanksgiving, Christmas and New Year's Day** are to be compensated as indicated above.

SEA Item 5: Parity for 40-hour schedules

Work Schedule Consistency: To avoid disparity, when the employer designates a DOT Division of Operations position to a 40-hour wage schedule, then all positions with the same position classification within the Division shall be assigned to a 40-hour schedule.

SEA Proposal: Parity for 40-hour Schedules

The SEA proposes that DOT supervisors be assigned to work the same number of hours as the employees they supervise. According to the SEA, most DOT supervisors have 40-hour schedules, but some work a 37.5-hour schedule. All supervisors have subordinates who work a 40-hour schedule. The SEA contends the disparity creates several problems. Supervisors who work a 37.5-hour schedule leave work while their subordinates are still on the clock, and who must then complete their tour of duty unsupervised. In addition, supervisors who work a 37.5-hour schedule do not begin to earn overtime until they have worked 40 hours. If a 37.5-hour supervisor and subordinate both work extra hours, the subordinate earns more than the supervisor for the first 2.5 hours. The SEA asserts the State offered no reason why this proposal would be an operational problem and urges the proposal be recommended.

State of NH Response to SEA Parity for 40-hour Schedules Proposal

The State argues the question of scheduling is a reserved management right and is not negotiable. The State urges the proposal be rejected.

Factfinder's Analysis of SEA Parity for 40-hour Schedules Proposal

The SEA argument is not persuasive. It is not uncommon for a single job classification or position to have different schedules. Even where a supervisor and a subordinate both work a 40-hour week, they could have different starting and ending times, meaning the subordinate will sometimes be on duty without supervision. It is also not uncommon for a newer supervisor (at a beginning step) to receive a lower pay rate than a long-term subordinate (on a higher step).

Factfinder's Recommendation:

The SEA proposal regarding Parity for 40-hour Schedules is not recommended.

SUMMARY OF FACT FINDER RECOMMENDATIONS

Item 1: Tool Rental Increase

The SEA's proposal to increase the tool rental stipend is recommended as modified:

“Rental fee of four hundred sixty dollars (\$460.00) per year.”

Item 2: Year-Round Maintenance Stipend

The SEA proposal regarding a Year-Round Maintenance stipend is not recommended.

Item 3: Commercial Drivers License/Drug Testing Stipend

Medical Card Stipend

Medical Card Exemption

Mandatory Medical Card for New Hires

The SEA proposals for Wage Adjustments for CDL/Drug Testing and Medical Card are not recommended.

Item 4: Proposal for Double Pay for Call-out on Holidays

The SEA's proposal for double pay for call-out is recommended as modified:

“Holiday Worked: In addition to the provisions of Article 9.4 and notwithstanding the provision of Article 9.4.2, when a full-time employee works on Thanksgiving, Christmas, or New Year's Day, he/she shall be paid either: double their regular rate for hours actually worked on Thanksgiving, Christmas, or New Year's Day or, with mutual consent of the parties, be given compensatory time off equal to double the number of hours actually worked on the holiday.

The Thanksgiving, Christmas and New Year's Day holidays begin after 12:00 a.m. on the actual day of the holiday and end at midnight on the same day. Only hours worked on Thanksgiving, Christmas and New Year's Day are to be compensated as indicated above.”

Item 5: Parity for 40-hour Schedules

The SEA proposal regarding Parity for 40-hour Schedules is not recommended.



Mary Ellen Shea, Factfinder