

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

In the factfinding matter between: *
NH LIQUOR COMMISSION, RETAIL DIVISION, *
STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, *
SERVICE EMPLOYEES 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 Liquor Commission, Retail Division, 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 Liquor Commission, Retail Division sub-unit). The parties resolved the master agreement (which includes across-the-board wage increases for all SEA employees) but reached impasse over several 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 Norman Girouard, Melissa Powell, Shelly Duggan, and Ralph

Mecheau. 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.

UNIT DESCRIPTION

The Liquor Commission, Retail Division, has several divisions and operates 76 retail outlets throughout the state, with a bargaining unit of about 1961 employees, and serves an estimated 12 million customers each year. There are about 299 full-time employees and 1661 part-time employees in a variety of positions, including retail cashier, store clerk, retail laborer, warehousing, marketing, finance and human resources. The Liquor Commission, Retail Division, is a significant revenue source for the State of New Hampshire General Fund.

THE ISSUES

The issues that remain unresolved are proposals by the SEA:

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| 1. Article 37.3 | Water at Cash Registers |
| 2. Article 37.17 | Involuntary Transfers |
| 3. Article 37.18 | Portal to Portal Call Back (PT employees) |
| 4. Article 37.18.1 | Premium Pay and Hourly Minimum Call Back |
| 5. Article 37.19 | Increase to Base Wages (retail employees) |

PROPOSALS AND RECOMMENDATIONS

SEA Item 1: Proposal to Allow Water at Cash Registers

37.3 The Employer should provide a refrigerated water fountain in each retail store.
Nothing shall prohibit employees from having water at the register in a sealable beverage container.

SEA Proposal to Allow Water at Cash Registers

The SEA proposes that retail employees be allowed to have water at their register and while working. The SEA rejects the State's assertion that water bottles at the registers appear unprofessional, would lead to delays in service or pose a hazard to the electronic equipment. The SEA points out that employees who work at computers in the Division's offices are allowed to have drinks at their desk. The SEA asserts that chain stores such as Shaw's and Home Depot do not restrict cashiers from having something to drink without detracting from customer service or their professionalism.

State of NH Response to SEA Proposal to Allow Water at Cash Registers

The State argues the proposal is not necessary because the collective bargaining agreement provides for breaks and water fountains at each location. The State does not agree to allow more breaks than already negotiated. According to the State, water bottles at the cash registers do not project a professional image and can result in spills and possible damage to terminals. The State urges the proposal be rejected.

Factfinder's Analysis of SEA Proposal to Allow Water at Cash Registers

The SEA arguments are persuasive. The State's argument that a water bottle near the registers poses a risk of damage to the registers is at odds with its policy allowing office workers to keep drinks near their computer terminals. The State's argument that keeping a water bottle at the register appears unprofessional is nor is it supported by evidence of a common practice in many retail stores to allow water bottles at a cash register.

Factfinder's Recommendation:

SEA Proposal to Allow Water at Cash Registers is recommended.

SEA Item 2: Involuntary Transfers

37.17 The Employer shall not permanently transfer a unit employee involuntarily to any worksite location that is more than thirty miles (30) from the worksite to which the employee is currently assigned.

Any involuntary transfer of an employee from their current assigned worksite to another worksite shall be done in writing and shall be considered as temporary and said assignments shall not exceed a distance of thirty miles (30) and shall not be for a period of more than ten (10) working days.

Temporary transfers may be extended beyond ten (10) working days through mutual written agreement between the employee and the employer.

SEA Proposal regarding Involuntary Transfers

The SEA contends the NH Liquor Commission has more part-time employees than any other state agency and a history of inequitable treatment of part-time employees, as compared to

full-time employees. The SEA seeks to address the inequity issue as it concerns part-time employees. When retail employees are hired, they are assigned a “home” store location. The location of the home store is a major factor when someone initially decides to take the job. The use of involuntary transfers has increased and become a problem due to staffing shortages. As a way of keeping a store open and functional, the State temporarily and involuntarily transfers employees from their home store. In more populated areas where there are more stores, a transfer may not cause an issue for the employee. In the more rural parts of the state, however, a transfer from one’s home store can mean 30+ miles and longer drive times added to the employee’s commute. The SEA has sought to negotiate parameters to limit transfers that place an unreasonable burden on the employees, such as limits on the length of the transfer and the distance from the employee’s home store. The State acknowledged the burdens on employees but rejected Union proposals.

State of NH Response to SEA Proposal regarding Involuntary Transfers

The State points out that transfers are a reserved management right, although the collective bargaining agreement does require employees be given prior notice of an involuntary transfer to a work location more than 30 miles from their home store. The State is not interested in further encroachment of its managerial right to manage the workforce. The State urges the proposal be rejected.

Factfinder’s Analysis of SEA Proposal regarding Involuntary Transfers

The SEA arguments for its involuntary transfer proposals are not persuasive. First, the SEA has not offered data to support its argument that involuntary transfers have increased significantly, are of significantly longer duration, or are significantly further from an employee’s home store than transfers made in the past. Without such evidence, I am not persuaded that there

is a compelling need to recommend changes to the transfer language. It is also a reality that a retail business with dozens of retail outlets, may need to transfer employees from time to time. It is assumed that volunteers are sought first, but when there are no volunteers, the employer must be able to staff its retail operations.

Factfinder's Recommendation:

The SEA Proposal regarding Involuntary Transfers is not recommended.

SEA Item 3: Portal to Portal Call Back for Part-Time Employees

37.18 In addition to the provisions of Article 7.3.1.1, any part-time employee who is called back to their place of work or other site away from their home shall have the "hours worked" computed from portal to portal.

SEA Proposal for Portal to Portal Call Back for Part-Time Employees

The SEA points out that the vast majority of Liquor Commission, Retail Division employees are part-time employees and do not have the same benefits and job protections enjoyed by full-time employees. In stores with low staffing, the employer has given keys to part-time employees and assigned them the responsibility of opening and closing stores. On occasion, the employee assigned to hold the key is called back to open the store for varying reasons during non-business hours (repairs, alarms, etc.). Full-time employees who get called back after hours (to reset an alarm, for example) are paid portal to portal, but part-time employees are not. The SEA argues this is an unfair and unreasonable difference that takes advantage of part-time employees.

State Response to SEA Proposal for Portal to Portal Call Back for Part-Time Employees

The State contends the SEA argument for parity (that part-time employees should be entitled to the same benefits as full-time employees) is misguided. The benefits provided to full time employees were the subject of previous bargaining and there is no interest in the expansion of such benefits. The State asserts the SEA's repeated "parity" argument assumes that anytime

the State reaches an agreement with anyone, that negotiated benefit must necessarily be offered to everyone at some time thereafter. The State urges the proposal be rejected.

Factfinder's Analysis of SEA Proposal for Portal to Portal Call Back for Part-Time Employees

The SEA argument that portal to portal pay for callbacks be extended to part-time employees is persuasive. The State correctly argues that full-time benefits are different from part-time benefits. The rate or amount of pay for a particular task or work assignment, however, is not a "benefit." The value assigned to a particular task or work assignment is the price (or the rate of pay) for that work. Whether viewed as the price (to the employer) or the rate of pay (to the employee), the value assigned to that work is not a "benefit" as suggested by the State. The price (or rate of pay) is the value assigned to that work in the form of wages.

A callback to deal with an after-hours matter (for example, to reset the store alarm) is a particular task or work assignment of importance to the employer. The task can be performed by either a part-time or a full-time employee, but the employee's status (full or part time) does not alter the requirements to perform the task or the importance to the employer of the completing the task. The employee's performance of the task does not alter their status as a part-time or full-time employee. Whether performed by a full or part-time employee, the task is the same and the degree of skill or proficiency required are the same and the work must be compensated. The State has determined that the value of an after-hours callback includes compensation for a minimum number of hours and portal to portal pay. The State has not established a reasonable basis for compensating full-time and part-time employees differently when they are required to perform same work under the same conditions.

Factfinder's Recommendation:

The SEA Proposal for Portal to Portal Call Back for Part-Time Employees is recommended.

SEA Item 4: Premium Pay and Hourly Minimum Call Back for Part-Time Employees

37.18.1 In addition to the provisions of Article 7.3.1, part time employees who are called back to his/her place of work or other site away from his/her home without prior notice on the same day after once leaving work or before the next regular starting time, shall be compensated at one and one half time the hourly rate for the hours worked and shall be guaranteed a minimum of not less than three (3) hours of premium pay

SEA Proposal for Premium Pay and Hourly Minimum Call Back for Part-Time Employees

The SEA proposes that part-time employees who are called back after store hours be paid a minimum number of hours at the premium rate (1.5). The SEA makes the same arguments here as they made for the portal to portal pay for callbacks proposal and need not be repeated.

State of NH Response to SEA Proposal for Premium Pay and Hourly Minimum Call Back for Part-Time Employees

The State responded to this proposal with the same arguments opposing the portal to portal pay for callbacks proposal and need not be repeated.

Factfinder's Analysis of SEA Proposal for Premium Pay and Hourly Minimum Call Back for Part-Time Employees

The SEA argument that premium pay and an hourly minimum for callbacks be extended to part-time employees is also persuasive and for the same reasons discussed above. The value of a callback to open a store after-hours has been calculated to include premium pay, a minimum number of hours and portal to portal pay. This value (or "rate") constitutes wages, is not a "benefit" and has been the established rate for full-time employees. The State has not established a reasonable basis for a different rate for part-time employees who are subject to the same callback requirement, the same disruption of their personal time, and who are required to perform the same duties applying the same skill and knowledge.

Factfinder's Recommendation:

The SEA Proposal for Premium Pay and Hourly Minimum Call Back for Part-Time Employees is recommended.

SEA Item 5: Increase to Base Wage for Retail Employees

37.19 All temporary wage enhancements put into effect for full and part-time NHLC employees in 2020 shall be made permanent and shall be incorporated into a salary schedule that will be included in Appendix A.

SEA Proposal to Increase Base Wage for Retail Employees

The SEA proposes a 10% increase to base wages for retail employees. The SEA notes that the licensing and sale of alcohol is one of the main sources of revenue for the State of New Hampshire. In the Spring of 2020, a number of retail stores had to be closed due to pandemic-related staffing shortages. In March 2020, the Governor declared that the retail workers were “essential employees” and instituted a 10% wage enhancement as an incentive to continue working. During the pandemic, many retail businesses increased their hourly rates to meet staffing needs. For example, NH employers such as Wendy’s, McDonald’s, Aldi’s and Lowes all raised their cashier rates to \$14/hour.

The emergency declaration and the 10% wage enhancement was discontinued in June 2021, despite SEA proposals that it be made permanent. The SEA notes that the starting rate for retail laborers and clerks is now \$12.31 and \$12.68, respectively. The Liquor Commission has been experiencing increased turnover due to competition for retail workers. The SEA argues that the State needs to match or exceed the wages offered by other retailers to maintain the staffing needed to operate its retail stores. Since the Liquor Commission is a self-funding agency and generated a new record in net sales and profits in 2020, the SEA argues the state’s revenue and the employees’ low rate of pay justify making the 10% adjustment permanent.

State of NH Response to SEA Proposal to Increase Base Wage for Retail Employees

The State argues the emergency wage adjustment was made in response to heightened risk of exposure to COVID and, by its terms, was clearly a temporary measure. To the extent this proposal is used as a lever to effect economic realignment, the State points out that a universal wage offer was accepted during master contract negotiations and further enhancements are not offered at this time. The State urges the proposal be rejected.

Factfinder's Analysis of SEA Proposal to Increase Base Wage for Retail Employees

The SEA has presented persuasive evidence that the current hourly rates for Liquor Commission retail employees is lower than the rate for similar retail work and, given the very low unemployment rate in NH, the hourly rates are not competitive when recruiting new hires. The Liquor Commission has increasing difficulty filling and retaining enough retail employees to fill its available positions (1627 positions are filled, 500+ are vacant). Part-time positions comprise 85% of the bargaining unit.

The evidence establishes the Liquor Commission's profits have increased every year since it was established more than 50 years ago (Exhibit #9: chart titled, "Net Profits over the Years.") with a record profit exceeding \$200m in 2020. The evidence also establishes that a significant portion of the State's general revenues come from the Liquor Commission (more than \$158m per Exhibit #9).

It is not surprising that the Governor declared that a wage enhancement to Liquor Commission employees was necessary because the state's liquor stores are "essential to the core missions of the State" and their operation is necessary to avoid "fiscal harm to the State." The SEA also established that the NH Liquor Commission is a self-funded agency and the State offered no evidence that extending the 10% wage enhancement could not be supported or would

reduce revenues to the general fund. For these reasons, I am persuaded that base wages for retail employees must be increased by extending the 10% wage enhancement.

Factfinder's Recommendation:

The SEA proposal to increase base wages for retail employees is recommended.

SUMMARY OF FACT FINDER RECOMMENDATIONS

Item 1: Water at Cash Registers

The SEA's proposal to allow water at cash registers is recommended.

Item 2: Involuntary Transfers

The SEA proposal regarding Involuntary Transfers is not recommended.

Item 3: Portal to Portal Call Back for Part Time Employees

The SEA proposal for portal to portal pay is recommended.

Item 4: Premium Pay and Hourly Minimum Call Back

The SEA's proposal for premium pay and hourly minimum call back for part-time employees is recommended.

Item 5: Increase to Base Wages for Retail Employees

The SEA proposal for an increase to base wages is recommended.



Mary Ellen Shea, Factfinder

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