

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD
before Fact-Finder Mary Ellen Shea

In the fact-finding matter between: *
*
TEAMSTERS, LOCAL 633 *
and *
STATE OF NEW HAMPSHIRE *

INTRODUCTION

In accordance with Chapter 273, the State of New Hampshire (“State”) and Teamsters, Local 633 (“Teamsters” or “Union”) participated in hearings to address the impasse in their collective bargaining for a successor agreement for the period July 1, 2019 through June 30, 2021. Hearings were conducted on August 1, 2019, August 6, 2019, October 9, 2019, and October 23, 2019¹ in Concord, New Hampshire.

The State of New Hampshire was represented by Mathew Newland as Chief Negotiator. The State’s team also included Liz McCormack, incoming Chief Negotiator; Commissioner Lindsey Stepp, Department of Revenue; Deputy Commissioner Rudy Ogden, Department of Labor; Deputy Commissioner Richard Lavers, Employment Security; MJ Shapiro, Employee Relations Specialist; retired Director Michael Wilkey, Insurance Department; and Director Deborah Pendergast, Fire Academy.

Teamsters, Local 633 was represented by Jeffrey Padellaro and Attorney William Cahill as Chief Negotiators. Also, in attendance were the Local’s Business Agent, Keith Judge; and bargaining team members Frank Logan, Tom Macholl, Erik Turner, and Ryan Goulette.

¹ By mutual agreement, the October hearing dates included confidential mediation efforts by the factfinder.

The parties had full opportunity to present oral and documentary evidence as well as oral and written argument on all the issues in dispute. This report provides the Factfinder's recommendations on all the issues based on a comprehensive and thorough review of the evidence and arguments presented by the parties.

ISSUES

The issues that remain in dispute are summarized in the lists below. Each issue is addressed in detail in the Discussion section.

The following are proposals by the Teamsters to the State:

- Wages
- Article VII Overtime (Force Restriction)
- Article VII Overtime in Excess of 16 hours
- Article XVIII Longevity
- Article XVII Shift Differentials
- Article XXI Hazardous Duty Pay

The following are proposals by the State to the Teamsters:

- Article 7.1.2 and 8.3 Time Worked
- Article 11.8.2 Family Medical Leave Insurance
- Article 19.8 Health Insurance – Step Therapies

DISCUSSION

In this section, each party's proposals are explained and their arguments and evidence summarized. Next is a summary of the other party's responses to the proposals with a summary of the opposing party's evidence and argument. These are followed by the factfinder's analyses and recommendations for resolving the disputed issues.

At the outset, it is appropriate to comment about the process of making decisions in factfinding and some of the principles or guidelines that have been applied here. First, it should be noted that factfinding is an extension of the collective bargaining process. The factfinder aims

to make recommendations the parties might have negotiated themselves if they had not reached impasse. Also, it is generally understood that factfinding is 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.

[Factfinding] must be a natural extension of where the parties were at impasse.

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

Due to the conservative nature of the process, a common principle is that some proposed changes are more appropriately decided through collective bargaining rather than in factfinding. For example, a proposal to eliminate or reduce an existing benefit or contract provision should be hammered out at the bargaining table. 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 there is a demonstration of a compelling need; evidence the existing practice or language is unworkable and inequitable; or there is an appropriate quid pro quo for the change. Finally, the arguments of each party have been considered and a recommendation has been made where the testimony and evidence were persuasive.

PROPOSALS AND RECOMMENDATIONS

Teamsters' Wage and Overtime Proposals:

The Teamsters propose the following wage increases:

Year one (1) a ten percent (10%) wage increase

Year two (2) a five percent (5%) wage increase

The Teamsters' proposals are all monetary items and all relate to the staffing shortage in the Department of Corrections. The Teamsters argue that significant wage increases are appropriate, "Due to the critical staffing shortage of the New Hampshire Department of Corrections." According to the Teamsters, the wage increases are essential if the Department is

ever going to recruit the numbers they need to meet critical minimums. The staffing shortage in the Department fails to meet the “absolute minimum number” needed for security and safety based on the 2010-2011 audit of conditions at the Men’s Correctional Facility in Concord.

The Union proposes compensation increases to address the severe staffing shortage, which has created an unsustainable situation where employees are severely stressed and fatigued due to working inordinate numbers of hours of overtime. In many cases, employees are mandated to work overtime to make sure that critical posts are covered. The Union explained that many employees volunteer for overtime early in their work week, not because they are eager to work so many hours, but in the hope of avoiding mandatory overtime later in the week, depriving them of family time or much-needed down time. As an indication of the seriousness of the situation, arrangements have been made for employees to sleep at the facility because they are working so many shifts, they sometimes do not have enough time to travel home and return for the next one.

According to the Union, some employees work 8-hour overtime shifts as often as 4 and 5 times a week. The Union explains that the job is inherently stressful and it is made even more difficult by continuously requiring employees to work well beyond their 40-hour week. Employees are stressed and fatigued, which increases the risk to security and safety in the facility. Altogether, these conditions negatively affect employees’ performance in terms of their cognitive ability, response time and their judgment. These conditions also negatively affect the State’s ability to attract and retain the staffing that is needed. Despite the 9.1% increase in the last contract, the salary remains insufficient to attract and hire the minimum number needed. With 40% of the current employees eligible to retire within 5 years, the situation will only get worse. The safety of both the employees and the inmates is at risk.

In the last round of negotiations, the factfinder reported that, based on the 2010-2011 audit, the absolute minimum staffing level was 275. At the time, the total available complement was only 187, or 32% less or 88 positions fewer than was “absolutely” needed. According to the Teamsters, the current absolute minimum is 277 and, while the complement of staff has increased somewhat, it is only 224, which is still 20% less or 53 fewer positions than absolutely needed. The Teamsters quote Governor Sununu from his February 9, 2017 Budget Address:

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, and that's exactly what we have today.

In addition to its wage proposal, the Teamsters also propose the following changes to overtime provisions:

Article VII Overtime

7.1.a Authorized work in excess of eighty (80) hours in a fourteen (14) consecutive day period. Shall be considered overtime. No employee shall be forced to work more than sixteen (16) hours of “overtime” in a seven (7) consecutive day period.

7.2.b.1 Unit employees shall be entitled to two times the regular rate of compensation for any overtime in excess of sixteen (16) hours in any given work week. This premium pay shall stay in effect until the criterion referenced in Article 7.3.a and 7.3.b have been met.

The first proposed change would restrict how many hours a correctional officer may be forced to work in a seven day period. According to the Teamsters, this proposal will allow the administration to force an officer for an additional two shifts per week. After an employee has been forced to work 16 hours, they may volunteer to work more overtime but they may not be forced to work more overtime.

The second proposed change requires that any officer who works more than 16 hours of overtime will be paid at two times their regular hourly rate of pay. The Teamsters hope this will

incentivize officers to volunteer for overtime while simultaneously motivating the state to actively recruit new officers so that overtime will be reduced. This proposal will also help retain the more senior officers who are eligible to retire.

The Teamsters argue that the Department of Corrections administration relies on forcing officers to work overtime to maintain their established critical minimum which is far below what was suggested in the audit report. At times, the prison is run below minimum staffing because there are no more eligible officers to force into overtime. Some officers, especially newer officers with less seniority, are forced to work 8-hour overtime shifts 3 to 5 times a week. This has resulted in new officers quitting because they cannot endure the stress and strain such a schedule puts on them and their families.

State Response to Teamsters' Wage and Overtime Proposals:

Prior to the hearing, the State's team toured the prison facility and acknowledged the difficult working conditions. The State contends the problems are complicated by external factors beyond either party's control and these factors will not be affected by simply paying more money. The unemployment rate is low and it is hard to fill vacancies generally and even more so for a position as challenging as a corrections officer. Compounding the low unemployment rate, even federal and other state prisons are facing the same shortage of corrections officers and all are in competition for those who are interested in a corrections job.

The State does not dispute data about the excessive number of overtime hours or the impact on the employees and their families. Simply raising the rate of pay to match law enforcement or to pay more for overtime, however, will not solve the shortage problem. The State notes that the 9.1% increase and added step in the last round of bargaining did not solve the problem. The State agrees with the Teamsters about the problem, but they do not agree about an

appropriate solution. The State argued that its financial projections show that significant increases are neither wise nor sustainable.

The State argues that its flat dollar payment in the first year is necessary due to the budget situation and its proposal for a 1% increase in the second year is necessary in order to be fiscally responsible given the uncertainty of economic projections. Based on calculations for the average employee, the State estimated that the total of COLA's granted from 2007-2019 increased salary by 28.1% (not compounded).² For the same period of time, the State estimated the same average employee also received a total of 42.4 % (not compounded) in step increases.

The State rejects the Union assertion that steps should not be considered as wage increases. The State's position is that step increases represent a combination of satisfactory performance, retention, longevity as well as a raise. The State also points out that the new Step 9 was added to the salary grid (January 4, 2019), providing significant advancement for employees. If an employee wishes to further advance their career, nothing prevents the employee from applying for advancement opportunities. Also, the State's aging workforce provides additional opportunities for upward mobility with vacancies due to current retirement trends as well as anticipated retirements.

The State argues that revenues are currently "flat" and cites the following:

FY2018

- General and Education Trust Funds ended the year \$127.9 million ahead of plan;
- Approximately \$100 million of that total is due to one-time, non-recurring revenue.

FY2019

- General and Education Trust Funds ended the year \$198.0 million ahead of plan;
- Approximately \$120 million of that total is due to one-time, non-recurring revenue.

² Calculation does not include the 9.1% increase to Teamsters.

FY2020

- General and Education Trust Funds ended the year \$42.9 million *less* than FY2019 revenues;
- When one-time non-recurring revenues are removed from FY2019 and FY2020, the resulting increase in base revenues is \$18.2m or 0.07%

FY2021

- General and Education Trust Funds are estimated to be 2.7m *less* than FY2020 revenues;
- When one-time non-recurring revenues are removed from FY2020 and FY2021, the resulting increase in base revenues is \$32.9m or 1.3%

Based on this data, the State argues that wage increases above the projected revenue base for FY2020 and FY2021 (.7% and 1.3%, respectively) will require a reduction in another area of spending. In addition to flat revenues, the State argues it is absorbing (conservatively) an increase of \$14.2 million in healthcare costs. The State insists its estimate regarding the cost of a 1% increase was not misstated or misrepresented. The total cost to the State of a 1% increase for one year is \$8.5 million, and \$3.75 million of that total represents the general funds portion of the State budget.

In response to Union assertions that the economy is strong, the State counters that while there have been some economic surpluses, in reality, the economic outlook is uncertain. The State offered a number of articles about the likelihood of a recession within the next two years. According to the State, economic forecasts may be difficult, but these articles are examples of what experts are predicting:

*More than 70% of economists think a US recession will strike by the end of 2021.
NABE Outlook Panel Foresees Favorable Short-Term Outlook
But Recession Fears Surge amid Rising Trade Protectionism*

Awarding pay raises that are based on one-time revenues will put the state budget into a deficit in future years. In fact, per RSA 9:3, I (c), the Governor cannot recommend a budget in which expenditures exceeds revenue estimates plus amounts available in the treasury. Also,

pursuant to RSA 9:8-b, the legislature may not adopt an operating budget which exceeds the state's total estimated revenue.

Factfinder's Analysis and Recommendation(s):

In the prior factfinding report Factfinder Cooper recommended a 9.1% increase for the Teamsters. Cooper opined "It is unclear to me that even with this wage increase, the Department of Corrections will be able to recruit, train and assign sufficient numbers of corrections officers..." It appears he was correct. Since the 9.1% increase and the addition of a new step, the total staff numbers increased by only 37 employees³ and the total complement remains 20% below the "absolute minimum" needed to assure security and safety.

The State opposes the Teamsters' wage and overtime proposals arguing that the prior wage increases have not solved the problem and granting significant wage increases again is not feasible and will not solve the problems caused by external factors beyond the parties' control. The State points out that the Teamsters received a 9.1% increase in the last round of bargaining in addition to the new Step 9 and the Department still has many vacant positions. It must be noted, however, that the total number of corrections officers, in fact, did increase by a decent amount (20%) since the last round of bargaining, which must have been due (at least in part) to the wage adjustments.

The State argues that increasing compensation will not solve the problems in corrections due to factors beyond the parties' control. Wage adjustments may not solve the entire problem, but the recent evidence that staffing did improve somewhat after the last wage adjustment suggests that increasing compensation will affect the ability to recruit new employees. The State has not

³ Testimony indicated the 37 additional employees represents the "net" increase in employees since the last fact finding. The data do not show the number of new hires versus the number of retirements and resignations, but the "net" increase was 37.

proposed any other measure that might reduce the critical staffing shortage or reduce the excessive amount of overtime needed to maintain minimum staffing levels. Given the dire circumstances in the Department, the critical shortage of corrections officers, the absence of any other proposed solution, and recent evidence that compensation increases do have a positive effect on staffing numbers, adjustments will be recommended. The wage increases recommended for other bargaining units are not appropriate since the recommended increases are intended only to maintain the real value of employee wages based on the cost of living. The evidence clearly establishes that maintaining the existing value of correction officers' wages is insufficient to affect the recruitment and retention that is absolutely necessary.

The chronic and severe staffing shortage may be aggravated by external factors (regional or national shortages, for example) but recent experience indicates that wage adjustments do have a positive effect on recruitment. The critical staffing shortage in the Corrections Department poses significant risks for the employees and the inmates. In a state where the economy is one of the most robust in the country and there is a compelling need, there is no reason not to increase compensation enough to impact the critical shortage. The Teamsters proposed an increase of 15% over two years. This may well solve the shortage problem but a more modest increase in compensation might also help reduce the staffing shortage with less burden on the State's finances. For this reason, wage increases of 4% in each year will be recommended.

The State has not argued that it has an inability to pay, but argues that wage increases above the projected revenue for FY2020 and FY2021 (.7% and 1.3%, respectively) will require a reduction in another area of spending. This may be true but this is not a basis for rejecting

modest increases that will reduce the critical shortage and the serious risks that accompany such a shortage. As Arbitrator William Fallon wrote,

Funding limitations must be shared fully to the extent possible, by the providers of public services....the ability-to-pay criterion does not require public employees to bear a disproportionate share of governmental belt-tightening.

National Academy of Arbitrators 34th Annual Meeting, 248, 267 (1981)

The Teamsters and the State generally agree that corrections officers have to work a lot of overtime. The Department operates 3 shifts per day on a 24/7 schedule. If the Department had the minimum number of CO's it needed, the Department would have 277 employees and each would be assigned to work 8 hours a day, 5 days a week (average 21.67 shifts per month), for a total of 6002.6 shifts. (Data regarding the number of shifts needing coverage due to annual, sick or personal leave is not available.) The Department only has 224 employees, however, and by assigning each to work 8 hours per day, 5 days a week, the Department can only cover 4853 shifts at straight time. This leaves at least 1149.6 shifts that have to be covered by an employee working overtime.⁴ In fact, for the period July 2018 through June 2019, the Department had to assign employees to work overtime for an average of 1769 shifts each month.

Month	Total OT Hours
July 2018	15485.5
August 2018	16006.25
September 2018	14339.5
October 2018	15854.5
November 2018	14638
December 2018	13155.5
January 2018	12741.5
February 2018	13205.75
March 2018	14443
April 2018	13719.25
May 2018	13077.75
June 2018	13184.5
12-mo total hours	169851

⁴ This number is lower than it would be if data about annual, sick and personal leave were factored in.

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12-mo total shifts	21231.4
Monthly Avg. hours	14154.25
Monthly Avg. shifts	1769

Teamsters Presentation Tab 2

Over the course of a year, the number of shifts worked on overtime is equivalent to about 81 full-time positions. Assuming the employees working these overtime shifts earned a mid-range salary of \$37,000 (or \$17.79/hour)⁵, the overtime rate for each hour would be \$26.68.

OT HOURS	\$26.68/hour	\$17.79/hour	Premium Costs
169851/year	\$4,531,624.	\$3,021, 649.	\$1,509,975

While the Department is paying a significant premium in overtime, the arrangement costs the State less than the annual salary costs of the 53 full-time employees needed to meet the “absolute minimum number” for safety and security. While it is noted the annual salary does not represent all costs associated with hiring a full-time employee, the ongoing arrangement may inadvertently ease the urgency of hiring new employees.

Hires	Average Salary	Salary Cost
53	\$37,000	1,961,000

One of the most negative impacts of the shortage of correctional officers on current employees is the excessive amount of overtime that must be worked to meet the minimum staffing requirements. The ability to require current employees to work overtime in order to meet minimum manning requirements may be a necessary stop-gap measure but it should not be relied upon as a long-term solution. The Teamsters proposed two changes related to overtime to address this issue. The first proposal is to cap the number of overtime hours an employee can be

⁵ According to a job posting for the position, the salary range is \$34,424 - 40,000/year. Hourly rate assumes 2080 hours/year.

forced to work. I am concerned that an absolute limit on mandatory overtime may not be feasible while the Department continues to experience a shortage of corrections officers and the requirement to maintain a minimum number of officers on duty. The second proposal requires that any overtime hours worked in excess of 16 be paid at the double time rate. This proposal would provide an additional benefit for employees who work large amounts of overtime and, simultaneously, this proposal might discourage the State from forcing employees to work more than 16 hours of overtime in a week.

Factfinder's Recommendations:

- **Increase the general wages by 4.0% for FY2020 effective the first full pay period following execution of a successor Agreement, but no later than the first full pay period following January 1, 2020.**
- **Increase the general wages by 4.0% for FY2021 effective the first full pay period of Fiscal Year 2021.**
- **The Teamsters' proposal regarding Article VII Overtime (Force Restriction) is not recommended.**
- **The Teamsters' proposal regarding Article VII Overtime in Excess of 16 hours is recommended.**

Teamsters' Proposal Regarding Article XVIII Longevity:

18.10 Any Unit employee who has completed ten years of continuous service shall be paid, in addition to his/her normal salary, the sum of ~~\$300~~ **\$400** annually and an additional ~~\$300~~ **\$400** for each additional five years of continuous service. **Any Unit Employee who has completed twenty years of continuous service shall be paid, in addition to his/her normal salary, the additional sum of \$2000.00, for each year thereafter.**

The Teamsters argue that its longevity proposal is intended to retain the senior officers still employed with the Department. The proposal increases the existing longevity increments by \$100 and adds a new longevity increment of \$2000 for employees after 20 years of service. The Teamsters contend this is necessary because 40% of its current officers will be eligible to retire over the course of the next five years. If they do retire, staffing at the Department will be beyond critical.

State Response to Teamsters' Regarding Article XVIII Longevity:

The State did not specifically address the Teamsters' longevity proposal. It is noted, however, that the State and other bargaining units agreed to increase their longevity increments by \$50 for the term of this agreement.

Factfinder's Analysis and Recommendation(s) Regarding Article XVIII Longevity:

An increase in longevity that is comparable to the increases agreed to in other units is reasonable. The proposal to create a new longevity increment at a significantly higher amount is more appropriately achieved through collective bargaining.

Factfinder's Recommendations:

The Teamsters' proposal regarding Article XVIII Longevity is recommended as follows:

18.10 Any Unit employee who has completed ten years of continuous service shall be paid, in addition to his/her normal salary, the sum of ~~\$300~~ **\$350** annually and an additional ~~\$300~~ **\$350** for each additional five years of continuous service.

The Teamsters' proposal for a new longevity increment after 20 years of service is not recommended.

Teamsters' Proposal Regarding Article XVII Shift Differentials:

18.12.2. Second shift: ...at/after 2:00 p.m. or before 7:00 p.m. - increase of ~~sixty (\$0.60)~~ **one dollar and twenty (\$1.20)** cents/hour over base pay.

18.12.3. Third shift...at/or after 7:00 p.m. or before 3:00 a.m. - increase of ~~seventy-five (\$0.75)~~ **one dollar and fifty (\$1.50)** cents/hour over base pay.

18.12.4. Institutional Weekend Differential: ...from 11:00:00 pm Friday night to 10:59:59 pm Sunday night shall receive a weekend differential of ~~one dollar (\$1.00)~~ **two dollars (\$2.00)** per hour for all hours actually worked on that shift.

The Teamsters contend this proposal acknowledges the added stress placed upon officers when working these shifts at a time when the majority of the population is with their family. In addition, it is an effort to incentivize new recruits to join the ranks and to encourage senior officers to stay.

State Response to Teamsters' Proposal Regarding Article XVII Shift Differentials:

The State did not specifically address the Teamsters' shift differential proposal but generally argued that simply adding more money to employees' compensation will not address problems of recruitment and hiring that involve factors beyond the parties' control.

Factfinder's Analysis and Recommendation(s) Regarding Article XVII Shift Differentials:

The Teamsters' rationale for increasing shift differentials is similar to the arguments for their proposed wage increases and changes to the overtime provisions. The facts regarding the severe staffing shortage and the amounts of overtime being worked are compelling and have been addressed with recommendations that focus on significant adjustments to wages and overtime. It is not necessary to also adjust shift differentials at this time.

Factfinder's Recommendations:

The Teamsters' proposal regarding Article XVII Shift Differentials is not recommended.

Teamsters' Proposal Regarding Article XXI Hazardous Duty Pay:

21.1. All Unit Employees of the prisons and Secure Psychiatric Unit who qualify shall receive hazardous duty pay as ~~prescribed by statute (\$25/week)~~ of an extra **\$3.93 per hour**

The Teamsters seeks to increase the statutory rate for hazardous duty pay and to convert it from a weekly stipend to an hourly amount. The Teamsters' rationale for increasing hazardous duty pay and converting to an hourly rate is similar to the arguments for the proposed wage increases and changes to the overtime provisions.

State Response to Teamsters' Proposal Regarding Article XXI Hazardous Duty Pay:

The State did not specifically address the Teamsters' hazardous duty pay proposal. It is noted, however, that a number of other bargaining unit members who receive the \$25/week statutory hazardous duty pay will have the stipend increased by \$5/week.

Factfinder's Analysis and Recommendation(s) Regarding Article XXI Hazardous Duty Pay:

The Teamsters' proposal to change the method of calculating hazardous duty pay from a flat, weekly stipend to an hourly rate is a structural change to a long-established method of calculating the benefit is more appropriately changed through collective bargaining, not through factfinding. That said, it is reasonable and fair to increase the weekly stipend in the same manner as other bargaining unit members who receive the same statutory hazardous duty pay.

Factfinder's Recommendations:

The Teamsters' proposal regarding Article XVI Hazardous Duty Pay is recommended as follows:

21.1. All Unit Employees of the prisons and Secure Psychiatric Unit who qualify shall receive hazardous duty pay as prescribed by statute of \$30.00/week.

State Proposal Regarding "Time Worked":

The State proposed the following changes to Article 7.1.2 and Article 8.3:

Article 7.1.2. Time and One-Half Rate....

c. ~~All hours that an employee is on pay status,~~ **Only hours actually worked** except unscheduled sick leave, will constitute "time work" for the purpose of determining the work week required to establish eligibility for overtime compensation.

8.3. **"Time worked" Defined:** The following provision constitutes the understanding of the Parties with respect to defining time work for the purpose of determining the number of hours required for overtime compensation eligibility.

~~"Time Worked" for law enforcement employees and fire protection employees shall include all hours actually worked and all hours on approved paid leave status except unscheduled sick leave, bona fide meal periods, bona fide rest periods, bona fide commuting time and anytime worked for which specific compensation provisions have been established elsewhere in the Agreement. Rest periods are defined by Article VI, Section 6.2....~~

The State has a couple reasons for its "time worked" proposal. First, the State seeks to align the overtime provisions more closely with the FSLA rules, which do not count paid leave

when determining whether overtime rates apply. (The proposal would not change the parties' prior agreement regarding unscheduled sick leave). Second, the State contends its ability to make wage adjustments depends on an offset or cost savings in overtime spending. According to the State, its "time worked" proposal could save up to \$2.8 million a year in overtime costs.

Teamsters Response to Proposal Regarding "Time Worked":

The Teamsters' arguments echo those made by the SEA, which rejects the State's "time worked" proposal for several reasons. Due to staffing shortages, high employee turnover, and increased demand for State services, employees are asked -- or mandated -- to work a lot of overtime. In 2018, a majority of the 9,199 state employees earned more than \$1000 in overtime pay. It is clear that the State cannot function without its employees working overtime. During the 2015 negotiations, the Union agreed to a State proposal that eliminated unscheduled sick leave as "time worked" when calculating overtime. The impact of that change had a broader negative impact on employees than anticipated. The current proposal amounts to an unfair wage reduction at the expense of employees who are doing more for less and who are already stressed. The proposal impacts only those employees who must work overtime and establishes a standard of unequal treatment. The State has other means of addressing the problem of costly overtime through adequate staffing and increased wage incentives.

Factfinder's Analysis and Recommendation(s):

The State proposes to change the definition of "time worked" so that it is more aligned with FLSA rules and to offset the cost of wage increases. The goal of being more aligned with the FLSA rules appears to run counter to the parties' long and established collective bargaining relationship. A common reason for entering into a collective bargaining relationship is to negotiate terms and conditions of employment beyond those minimally required by law. I find

the State's goal of aligning state overtime rules with those of FLSA to be unpersuasive. The State's goal of aligning contract provisions with existing minimum wage laws is a reasonable basis for changing collectively bargained overtime provisions at factfinding.

On the other hand, there can be no question that the change could reduce overtime costs. According to the State, the savings could mean wage increases for all employees. The problem is that reducing overtime costs by changing the definition of "time worked" simultaneously reduces the wages paid to the employees who work overtime. Some evidence and data from the parties regarding the "time worked" proposal follow:

- \$2.8 million estimated savings if proposal is adopted; and
- 55% (5048 of 9199) of FT employees earned \$1000 or more in overtime in 2018⁶;
- Average salary is \$55,582/year.

Based on these data and the State's "time worked" proposal, employees who work overtime could see an average wage reduction of \$554/year, or about 1% of an average annual salary. If the \$2.8 million in savings is paid as an across-the-board wage increase, employees could see an average wage increase of \$304/year or about .5% of the average annual salary. It is clear that the savings paid as an across-the-board wage increase to all employees will not offset the wage reduction the change would impose on the majority of employees.

Collective bargaining, rather than factfinding, is the most appropriate process for making significant structural changes to long-standing and agreed-upon provisions for the method of calculating and paying overtime. The State proposed similar changes to overtime in 2015 and was successful in reaching agreement with the Union that unscheduled sick leave would no longer count as "time worked" for overtime purposes. This was a significant structural change made by the parties themselves through the process of collective bargaining.

⁶ Note: this does not represent *all* employees who earn work and overtime

In summary, the State's argument that its "time worked" proposal should be adopted for the purpose of aligning with FLSA is not persuasive; the evidence does not support the State's assertion that the savings could have a significant impact on its ability to pay wage increases; and, finally, collective bargaining, not factfinding, is the appropriate process for changing long-standing and agreed-upon provisions for the method and payment of overtime.

Factfinder's Recommendation

The State's proposal regarding "Time Worked" is not recommended.

State FMLI Proposal:

The State proposed the following new provision:

11.8.2. Family Medical Leave Insurance: Effective TBD, after the exhaustion of all authorized paid leave available to an employee under this Agreement the State shall provide employer paid Family Medical Leave Insurance to full-time employees, employed for at least twelve (12) months, that provides 60% of base annual salary for up to six (6) weeks non-intermittent per year for the following Family Medical Leave Act (FMLA) defined qualifying events: care for a spouse, son, daughter or parent who has a serious health condition; bonding with a newborn or newly placed son or daughter; exigency arising out of the fact that a spouse, son, daughter or parent is a military member on covered active or called to covered active duty status.

The State described this proposal as a "gift" to employees with no request for anything in exchange. Family Medical Leave Insurance will provide some pay for employees where none is available now and at no cost to the employee.

Teamsters Response to FMLI Proposal:

The Teamsters' arguments echo those made by the SEA, which rejects the FMLI proposal because it claims the State has not provided details to support the claim that the benefit will have no cost to employees. The Union points out that one of the State's most common explanations for rejecting Union wage proposals is the added cost of employee benefits. The Union cannot agree to implement a benefit plan without knowing the impact of its cost.

The Union also argues that the State has not provided requested information about the benefit. The original plan was a bi-state arrangement (with Vermont) to require private employers to provide FMLI for their employees, with the risk pool anchored by state employees. The Union notes that news accounts indicate the original plan (the bi-state agreement with Vermont) has not materialized and, to date, the Governor has only engaged in “preliminary discussions with multiple insurance carriers.” The Union also notes that the NH General Court was considering several bills to establish an FMLI program. The Senate Majority leader commented on the Governor’s plan saying, “There’s no policy behind this, there’s no legislative planning behind this, there’s no actuarial studies, there’s no stakeholder support....” The Union does not believe the State’s proposal is financially feasible and suggests the money is better spent on employee wages.

Factfinder’s Analysis and Recommendation(s) Regarding FMLI Proposal:

The State’s proposal for Family Medical Leave Insurance would provide a new monetary benefit the employees do not have at this time. While the State proposal does not require employees to pay a premium or ask the Union for anything in exchange, the Union correctly argues that the program must have *some* cost. It may be that most program costs for state employees would be covered by private employer contributions but the State provided no evidence about program costs or how it would be funded. The Union provided evidence that the program is not yet developed and its future remains uncertain. The State did not refute the Union’s evidence and has not demonstrated that its proposal for FMLI will not create a financial burden that, down the road, might require limits on other benefits or employee wages.

Factfinder’s Recommendation

The State’s FMLI proposal is not recommended.

State Proposal for Step Therapies:

The State proposed the following change to Health Insurance:

19.8 Health Insurance

Prescription Drugs

h. 5. Traditional Generic Step Therapy Therapies

The State proposes a change from the current “traditional generic step therapy” approach to prescription management to a “step therapy” approach. According to the State, the change only means that employees will now have access to a brand name medication or a generic medication in the first instance (for the lowest copay). Under the current “traditional generic step therapy,” prescriptions must be filled with a generic medication in the first instance. The State has proposed the change because evidence indicates that generics may not always be the most cost effective medication. Rather than mandating a prescription be filled with a generic in the first instance, the proposed step therapy approach will require prescriptions be filled with the cheapest but effective medication, whether it is a generic or a brand name. The State rejects the Union’s assertion that its “Step Therapy” proposal is actually a “fail first” approach to prescription coverage. The State counters that the Union is overlooking the fact that a “step therapy” approach for prescription coverage has been in the collective bargaining agreement since 2011 at Article 19.8.1.h:

19.8.1.h. Prescription Drugs – The prescription drug plan shall include the following:

4. Exclusive Specialty Pharmacy
5. **Traditional Generic Step Therapy**

Retired Insurance Director Michael Wilkey testified for the State and explained that the proposed change simply allows employees to receive a brand name medication in the first instance if the brand name medication is cheaper. The traditional generic step therapy requires a generic medication be given in the first instance regardless of cost. The State contends it is looking to

provide a *greater* benefit to employees by not limiting the current step therapy approach to generics and to include the option of brand name medications in the first instance.

Teamsters Response to Proposal for Step Therapies:

The Teamsters' arguments echo those made by the SEA, which opposes the step therapy proposal. The Union agrees the current contract refers to "step therapy" but it is a limited step therapy approach and is for generic medications only. The State's proposed change would allow the prescription plan to force employees to try lower cost medications before allowing them the medication prescribed by their doctor. During bargaining, the Union asked what the "specialty and brand" step therapy would mean for employees, the State offered explanations about perceived savings with few details. The Union supports the idea of potential cost savings but not if the approach jeopardizes the health and well-being of employees.

The Union points out that step therapy approaches have created problems for patients accessing the medications they need. In response to these problems there are now 25 states that regulate the use of "step therapy," citing an article about a recent bill passed in Wisconsin. The Union opposes the proposed change because the current prescription plan has been performing well (with only a .9% increase between 2017 and 2018) and in there is no evidence that employee's medical care will not be compromised and there is no evidence the change will result in savings.

Factfinder's Analysis and Recommendation(s) Regarding Step Therapies:

At hearing, Retired Insurance Director Michael Wilkey testified about the proposal to change from a "traditional generic step therapy." Representatives for the State stressed that its proposal only changes the current rule that prescriptions must be filled with generic medications

in the first instance. The State argues that this proposal provides a *greater* benefit by allowing brand name medications or generics in the first instance.

A document from Express Scripts with general questions about “step therapy” was submitted into evidence. Based on Express Scripts’ general description of a general “step therapy” program, the Union’s skepticism about the State’s proposal is understandable. The Express Scripts handout, however, is not the State’s proposal. The proposal being considered and the one before me is the State’s proposal for a single, limited change to the current health insurance provisions that would allow prescriptions to be filled with either a generic or a brand name medication in the first instance (for the lowest copay).

Under the current collective bargaining agreement, generic medications are mandated in the first instance unless the prescriber has specified a brand name:

1. Mandatory Generic Substitution with DAW 2 (i.e., the only exception is physician ordered “Dispense as Written”)

Based on the Express Scripts handout, the Union is concerned that medications prescribed by their members’ doctors will not be approved. However, the State proposes to make a very limited change. The State does not propose changes to any other health insurance provision. For example, the State’s proposal will not change the current provision that employees will not be required to accept a cheaper medication first or prove that they tried a cheaper medication first before getting access to the medication their doctor prescribed even if it is more expensive.

When presenting its proposal, the State repeatedly emphasized that the only change would be that prescriptions could be filled with a generic OR a brand name medication in the first instance. The Union is skeptical because the handout from Express Scripts describes “step therapy” very differently but the handout it is not the proposal before me. According to the State, it proposes to change the words, “traditional generic step therapies” to, “step therapy” for only

one reason: to allow prescriptions to be filled with the cheapest medication in the first instance, whether it is a generic or a brand name. If this is the only change and employees' contractual prescription benefit remains otherwise unchanged, the State's proposal will not reduce employees' current benefit. The State has not proposed to change any other aspect of the employees' contractual prescription benefit and so no other change to the Health Insurance provisions will be recommended. The factfinder's recommendation will be clear: the State's proposal is recommended so long as the only change being made is the ability to fill a prescription with a generic or a brand name in the first instance and the employees' contractual prescription benefit remains otherwise unchanged.

Factfinder's Recommendation

The State's proposal to change "Traditional Generic Step Therapies" to "Step Therapy" is recommended provided the only change to employees' existing contractual prescription benefits is that prescriptions can be filled with a generic or a brand name medication in the first instance. (for the lowest copay).

SUMMARY OF FACTFINDER RECOMMENDATIONS

TEAMSTERS PROPOSALS

Wages

Increase the general wages by 4.0% for FY2020 effective the first full pay period following execution of a successor Agreement, but no later than the first full pay period following January 1, 2020.

Increase the general wages by 4.0% for FY2021 effective the first full pay period of Fiscal Year 2021.

Article VII Overtime (Force Restriction)

The Teamsters' proposal regarding Article VII Overtime (Force Restriction) is not recommended.

Article VII Overtime in Excess of 16 Hours

The Teamsters' proposal regarding Article VII Overtime in Excess of 16 hours is recommended.

Article XVIII Longevity

The Teamsters' proposal regarding Article XVIII Longevity is recommended as follows:

18.10 Any Unit employee who has completed ten years of continuous service shall be paid, in addition to his/her normal salary, the sum of ~~\$300~~ \$350 annually and an additional ~~\$300~~ \$350 for each additional five years of continuous service.

The Teamsters' proposal for a new longevity increment after 20 years of service is not recommended.

Article XVII Shift Differentials

The Teamsters' proposal regarding Article XVII Shift Differentials is not recommended.

Article XXI Hazardous Duty Pay

The Teamsters' proposal regarding Article XVI Hazardous Duty Pay is recommended as follows:

21.1. All Unit Employees of the prisons and Secure Psychiatric Unit who qualify shall receive hazardous duty pay as prescribed by statute of \$30.00/week.

STATE PROPOSALS

7.1.2 and 8.3 Time Worked

The State's proposal regarding "Time Worked" is not recommended.

11.8.2 Family Medical Leave Insurance

The State's FMLI proposal is not recommended.

19.8 Health Insurance: Step Therapy

The State's proposal to change "Traditional Generic Step Therapies" to "Step Therapy" is recommended provided the only change to employees' existing contractual prescription benefits is that prescriptions can be filled with a generic or a brand name medication in the first instance.



Mary Ellen Shea
Factfinder