

34D



**STATE OF NEW HAMPSHIRE
OFFICE OF THE GOVERNOR**

CHRISTOPHER T. SUNUNU
Governor

January 7, 2021

The Honorable Council
State House
Concord, New Hampshire 03301

REQUESTED ACTION

Pursuant to an order of the Public Employee Labor Relations Board (PELRB), which is currently on appeal before the New Hampshire Supreme Court, the fact finder report for New Hampshire Department of Safety, Marine Patrol, State Employees Association of New Hampshire, Service Employees International Union, Local 1984, is being submitted for your review and input on whether such recommendations should be accepted or rejected.

EXPLANATION

On June 25, 2021, the parties of The State of New Hampshire and The State Employees Association of New Hampshire (SEIU Local 1984) finalized and signed the master agreement terms for the 11,200 covered state employees to go into effect July 1, 2021.

Per determination of the PELRB and according to RSA 273-A:9(I), individual subunits can bargain unique cost items separate from the master agreement terms.

While the parties have already negotiated a master agreement, which included bargaining over statewide contract issues as well as bargaining over issues specific to the sub-unit agreements, four of the 29 sub-units did not agree to terms.

The sub-unit representing the Department of Safety, Marine Patrol, consisting of approximately 735 employees reached an impasse over the SEA sub-unit proposal over issues that apply to seven (7) full-time patrol employees.

As required by law, the State and the Union have followed the impasse process set forth in RSA chapter 273-A and a fact finder has issued a report pertaining to the unit negotiations. After receiving the report, the State's bargaining team pursued further negotiations with this unit, which unfortunately have remained unsuccessful.

Because agreeing to these provisions could cause potential long term unintended consequences that may reach far beyond this specific sub-unit, I have rejected the recommendations of the fact finder report.

Therefore, per order of the Public Employee Labor Relations Board (PELRB), this item is being submitted to the New Hampshire Executive Council for review and input on whether such recommendations should be accepted or rejected.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Chris T. Sununu". The signature is written in a cursive, flowing style.

Christopher T. Sununu
Governor
State of New Hampshire

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

In the factfinding matter between: *
NH DEPARTMENT OF SAFETY, MARINE PATROL, *
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 Marine Patrol, 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 Safety, Marine Patrol 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 State Employees Association, SEIU, Local 1984, was represented by Randy

Hunneyman, Executive Branch Negotiator. The Union's team also included Captain Timothy Dunleavy.

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 Department of Safety, Marine Patrol has multiple divisions with a total of about 735 employees performing various law enforcement and administrative functions. The unresolved issues apply to seven (7) full-time patrol employees.

THE ISSUES

The issues that remain unresolved are the following proposals by the SEA:

- | | |
|------------------|--------------------------------------|
| 1. Article 42.X | Time Worked Exemption for Sick Leave |
| 2. Article 42.X | S416 Law Enforcement Wage Scale |
| 3. Article 42 | Diversity of Duty Pay |
| 4. Article 42.2 | Annual Leave Accruals |
| 5. Article 42.XX | Sick Leave Accruals |

PROPOSALS AND RECOMMENDATIONS

SEA Item 1: Exemption to Article 8.3 "Time Worked relating to the use of Sick Leave"
42.X. Notwithstanding the provisions of Article 8.3, all hours that full time sworn law enforcement employees of the Division of State Police-Marine Patrol Unit are on pay status shall constitute "time worked" for the purpose of determining the workweek required to establish eligibility for overtime compensation

SEA Proposal regarding Time Worked Exemption for Sick Leave

The SEA proposes that the use of earned sick leave be considered "time worked" when calculating overtime. The SEA points out that, like the State Troopers, Marine Patrol employees work a 28-day schedule. When a Marine Patrol employee takes sick leave without advance notice, their sick leave hours do not count as "time worked" when calculating overtime during their 28-day pay period. Most state employees work a 7-day schedule, however, and taking unscheduled sick leave only impacts one week's pay, not four. The SEA points out that the State Troopers and the Trooper Supervisors also work a 28-day schedule and, in their contracts, the State agreed to the exemption proposed here. Because the Marine Patrol unit is a law

enforcement unit like the State Police and because it is a small unit, the SEA urges the proposal be recommended.

State of NH Response to SEA Proposal regarding Time Worked Exemption for Sick Leave

The State opposes all five SEA proposals for Marine Patrol employees in which the Union argues for parity with State Troopers. The State contends the terms and conditions of the Troopers' contracts were negotiated in different contexts and with different considerations than the Marine Patrol unit and there are valid reasons for the differences. The State is opposed to "parity" arguments generally, saying they should not be used to short-circuit the deliberative/determinative agency of the bargaining process. The fact that another group has a different contract provision reflects that group's specific bargaining history and process and should not be a reason for extending the same provision to others in the future. Allowing parity arguments to prevail can result in whipsawing to the point of unreasonableness.

Regarding the "hours worked" proposal, the State also argues the employer has been consistent in its efforts to get contract language to more closely reflect FLSA requirements. For the purpose of calculating overtime, the FLSA reference to "time worked" actually means time when the employee was at work. The State contends it cannot make progress toward this goal if the SEA proposal is recommended. The State urges this and all of the SEA proposals for parity with the State Troopers be rejected.

Factfinder's Analysis of SEA Proposal regarding Time Worked Exemption for Sick Leave

The SEA argument for exempting Marine Patrol employees from the "time worked" provision is persuasive. Like the State Troopers, Marine Patrol employees work a 28-day schedule, but unlike the State Troopers, the master agreement "time worked" provision which applies to all other state employees, also applies to Marine Patrol employees. The impact of that

“time worked” language on Marine Employees’ overtime is different than the impact of the same language on the majority of state employees whose overtime is calculated on a 7-day schedule. For example, if an employee on a 7-day schedule and a Marine Patrol officer both work 4 hours overtime every week for 4 weeks and each one calls out sick once for an 8-hour shift during the same 4 weeks, the Marine Patrol employee will be paid for fewer overtime hours. The employee on a 7-day schedule will receive more overtime pay because the 8 hours of sick leave only affects the calculation of overtime during one of the four weeks. The Marine Patrol employee, however, will be paid less overtime even though they had the same amount of unscheduled sick leave and worked the same amount of overtime. There is no reasonable justification for applying a master agreement provision in a manner that produces such disparate outcomes. The State’s argument that it has a goal of moving closer to the requirements of the FLSA must fail because the FLSA requirements for calculating overtime are based on a fixed and recurring 7-day workweek.

Factfinder’s Recommendation:

The SEA proposal regarding time worked exemption for sick leave is recommended.

SEA Item 2: S416 Law Enforcement Wage Scale

42.X All full time sworn members of the Division of State Police-Marine Patrol Unit shall be moved to the S416 wage scale.

42.X.X All full time sworn members of the Division of State Police-Marine Patrol Unit that are moved to the S416 wages scale shall also be placed at the labor grades listed herein on the first full pay period following July 1, 2021. All unit employees that are subject to wage scale adjustments under article 42.X.X shall maintain their original accrual dates.

***Marine Patrol Captain shall be placed in the new pay scale at labor grade 29.
Marine Patrol Lieutenant shall be placed in the new pay scale at labor grade 27.
Marine Patrol Sergeant shall be placed in the new pay scale at labor grade 24.
Marine Patrol Officer II shall be placed in the new pay scale at labor grade 21.***

SEA Proposal regarding S416 Law Enforcement Wage Scale

The SEA propose that Marine Patrol employees are law enforcement officers and should receive wages comparable to fellow law enforcement personnel (State Troopers), who are paid on the S416 wage schedule. Marine Patrol employees are required to perform the same law enforcement duties, are required to complete the same training and certifications, and are subject to similar risks and dangers as State Troopers, who are paid at a substantially higher rate. For example, a state trooper earns about 6% more than a Marine Officer; a sergeant earns about 11% more than a Marine Patrol sergeant; and a lieutenant or captain earns about 20% more than the same rank in the Marine Patrol. Due to low staffing levels, there are occasions when State Troopers are assigned to work with the Marine Patrol. When State Troopers are assigned to assist, the troopers are paid at higher rates for the same work being performed by Marine Patrol employees. During bargaining, the State offered little rebuttal to the SEA proposal, despite the negligible fiscal footprint. The Marine Patrol is a self-funded unit and these wage adjustments do not require budgetary appropriation or legislative action to implement for the 7 affected employees.

State of NH Response to SEA Proposal regarding S416 Law Enforcement Wage Scale

The State reiterates its opposition to the argument that the Marine Patrol should have parity with State Troopers because the terms and conditions of the Troopers' contracts were negotiated in different contexts and with different considerations than the Marine Patrol unit. The State points out there has never been wage parity between State Troopers and Marine Patrol for varied reasons over many years. The State argues the proposed wage adjustments should be rejected.

Factfinder's Analysis of SEA Proposal regarding S416 Law Enforcement Wage Scale

The SEA proposal that Marine Patrol employees be paid on the S416 wage scale is not persuasive. The SEA established that Marine Patrol employees are law enforcement officers who face certain risks and dangers and have challenging, necessary, and essential jobs. The fact that both groups are "law enforcement officers," however, is not sufficient evidence that a Marine Patrol officer's work is comparable to the State Trooper's and is insufficient to establish that Marine Patrol officers should be paid comparable wages and benefits.

Specifically, the SEA has not established that the nature of the Marine Patrol officer's job is comparable to the nature of the State Troopers' job. For example, both officers have the authority to arrest citizens, which can be a stressful and sometimes dangerous part of the job. There is no evidence, however, to establish how this aspect of the Marine Patrol officers' job compares to the State Troopers'. Similarly, while both officers conduct law enforcement patrols, Marine officers perform this duty differently and under different conditions and there is no evidence to establish how this part of their job compares to the State Troopers'. The SEA evidence does not persuade me that the work performed by Marine Patrol officers work is comparable to the work performed by State Troopers or that their wages and benefits should be the same as those negotiated by the State with the State Troopers.

Factfinder's Recommendation:

The SEA proposal regarding S416 law enforcement wage scale is not recommended.

SEA Item 3: Diversity of Duty Pay

42.xx Notwithstanding any other provisions of this Agreement, full time sworn members of the Division of State Police-Marine Patrol Unit shall, in recognition of the diverse nature of their job duties, shall receive the following payments above base wages:

Lieutenants and Captains: sixty (\$60) dollars per week.

Marine Patrol Officer IIs and Sergeants: twenty-five (\$25) dollars per week.

SEA Proposal regarding Diversity Pay

The SEA proposes that Marine Patrol employees be paid a weekly stipend as “diversity pay” which is comparable to the “diversity pay” State Troopers receive in recognition of the diverse nature of their job. The SEA argues the very nature of Marine Patrol is diverse in nature and is the primary law enforcement presence on State’s coasts, rivers and waterways. The job description states that employees must be able to coordinate “a combination of diverse job functions.” As with the other Marine Patrol proposals, the State has not offered a substantive rebuttal. The SEA argues this is an issue of equity and fairness and urges the proposal be recommended.

State Response to SEA Proposal regarding Diversity Pay

The State reiterates its opposition to the argument for parity with State Troopers because the terms and conditions of the Troopers’ contracts were negotiated in different contexts and with different considerations than the Marine Patrol unit. The State points out that “diversity pay” for State Troopers is paid pursuant to a state law, which did not apply to Marine Patrol, and is a significant difference. The State argues the proposal for diversity pay should be rejected.

Factfinder’s Analysis of SEA Proposal regarding Diversity Pay

The SEA proposal that Marine Patrol employees receive a stipend comparable to the “diversity” stipend paid to State Troopers is not persuasive. The reasoning and analysis above, applies here we well. The SEA established that Marine Patrol employees are law enforcement officers whose job is “diverse” because it entails a wide range of duties. The SEA evidence does not establish, however, whether the “diverse” work performed by Marine Patrol officers work is comparable to the work performed by State Troopers. More significantly, it is not clear what duties or working conditions the original “diversity” stipend was meant to compensate.

Factfinder's Recommendation:

The SEA proposal for diversity pay is not recommended.

SEA Item 4: Annual Leave Accruals

42.20 c. Accrue leave at the following rates in lieu of the rates provided by Article X, Section 10.1:

Years Service	Hours per Month	Hrs per Yr/Maximum
0-1	0 1	12 days
2-5	10 1 1/2	120 144/256
6-10	12 1 1/4	144 168/304
11-15	14 2	168 192/352
15+ 16-20	16 2 1/4	192 216/400
21+	2 1/2	240/448

*1 day = 8 hours; 1 1/4 days = 10 hours; 1 1/2 days = 12 hours
1 3/4 days = 14 hours; 2 days = 16 hours; 2 1/4 days = 18 hours; 2 1/2 days = 20 hours
* No payment for accrued but unused annual leave will be made upon separation from employment within the first twelve (12) months of employment*

SEA Proposal regarding Annual Leave Accruals

The SEA proposes to increase the amount of annual leave Marine Patrol employees earn to match the rate earned by State Troopers. The SEA points out that only 7 employees would be eligible for the revised benefit in an agency that is self-funded. Since the annual leave provision for Marine Patrol employees has been in place, the State Troopers' annual leave rates have increased. The different treatment of the State Troopers and the Marine Patrol sends a negative message about the roles they play in protecting NH citizens and the risks they take for them. The

SEA argues the proposal has a negligible impact and will address this disparate treatment. The SEA urges the proposal be recommended.

State of NH Response to SEA Proposal regarding Annual Leave Accruals

The State reiterates its opposition to the argument for parity with State Troopers because the terms and conditions of the Troopers' contracts were negotiated in different contexts and with different considerations than the Marine Patrol unit. The State points out that, under the current annual leave provision, the average accrual of current Marine Patrol employees is 335 hours or about 8+weeks of accrued annual leave. The State asserts this is an indication that the existing annual leave provision is sufficient and expanding it is not necessary. The State urges the proposal be rejected.

Factfinder's Analysis of SEA Proposal regarding Annual Leave Accruals

The SEA proposal that Marine Patrol employees should earn annual leave at the same rate as State Troopers is not persuasive. The SEA established that Marine Patrol employees are law enforcement officers but, as discussed previously, the evidence is not sufficient to conclude that the two law enforcement groups are so similar that they should earn annual leave at comparable rates. Both units have had long-standing bargaining relationships with the State, and each has had an opportunity to negotiate over wages and benefits over multiple contracts.

Factfinder's Recommendation:

The SEA proposal regarding annual leave accruals is not recommended.

SEA Item 5: Sick Leave Accruals

42.20 d. ~~Not be entitled to accrue any bonus leave,
notwithstanding Article XI, Section 11.1.1.~~

Accrual: Full time sworn law enforcement employees of the Division of State Police-Marine Patrol Unit shall accrue sick leave at the following rates in lieu of the rates provided by Article XI, Section 11.1.

<i>Continuous Years Worked</i>	<i>Accrued/ Month</i>	<i>Years/Max.</i>
<i>0 thru 8</i>	<i>1 1/2 days</i>	<i>18/90</i>
<i>9 thru 15</i>	<i>1 1/2 days</i>	<i>18/105</i>
<i>16 thru 20</i>	<i>1 1/2 days</i>	<i>18/120</i>
<i>21 plus</i>	<i>1 1/2 days</i>	<i>18/135</i>

1 ½ days = 12 hours

For all other employees, 1 1/4 days equals 10 hours.

Employees in their first six (6) months of service accrue sick leave and may use accrued sick leave as soon as it is accrued.

For purpose of utilization, sick leave shall be converted to hours. Sick leave deductions shall be made hour for hour.

42.20 e Payment: Notwithstanding the provisions of Article 11.1., Full time sworn law enforcement employees of the Division of State Police-Marine Patrol Unit, upon retirement under the provision of RSA 100-A:5 and RSA 100-A:6 only, or upon eligibility under RSA 100-A:5 but electing to receive a lump sum payment in lieu of an annuity, an employee shall receive payment in a sum equal to 50% of the number of sick leave days remaining to the employees credit. However, the total number of days eligible for payment shall not exceed sixty-two (62) days.

42.20 f Notwithstanding the provisions of Article 11.1., Full time sworn law enforcement employees of the Division of State Police-Marine Patrol Unit who are terminated as a result of a reduction in force shall receive payment in a sum equal to 50% the number of sick leave days remaining to the employees credit. However, the number of days eligible for payment shall not exceed sixty-two (62) days.

SEA Proposal regarding Sick Leave Accruals

The SEA proposes to increase the amount of sick leave Marine Patrol employees earn to match the rate earned by State Troopers. The SEA makes the same argument here that was made regarding annual leave. Only 7 employees would be eligible for the revised benefit in an agency that is self-funded. Marine Patrol employees are part of the Division of State Police and due to the nature of their jobs, they should receive the same leave benefits as the State Troopers. The SEA argues this proposal has a negligible impact and will be a step toward eliminating the disparate treatment between the two groups. The SEA urges the proposal be recommended.

State of NH Response to SEA Proposal regarding Sick Leave Accruals

The State reiterates its opposition to the argument for parity with State Troopers because the terms and conditions of the Troopers' contracts were negotiated in different contexts and with different considerations than the Marine Patrol unit. The State points out that, under the current sick leave provision, the average accrual of current Marine Patrol employees is 493 hours or about 12 weeks of accrued sick leave. The State asserts this is an indication that the existing sick leave provision is sufficient and expanding it is not necessary. The State urges the proposal be rejected.

Factfinder's Analysis of SEA Proposal regarding Sick Leave Accruals

The SEA proposal that Marine Patrol employees should earn sick leave at the same rate as State Troopers is not persuasive. As discussed above, the SEA established that Marine Patrol employees are law enforcement officers but there is insufficient evidence to conclude that the nature of their jobs is comparable or that they should earn sick leave at comparable rates.

Factfinder's Recommendation:

The SEA proposal regarding sick leave accruals is not recommended.

SUMMARY OF FACT FINDER RECOMMENDATIONS

- Item 1: Article 42.X Time Worked Exemption for Sick Leave
The SEA proposal regarding time worked exemption for sick leave is recommended.
- Item 2: Article 42.X S416 Law Enforcement Wage Scale
The SEA proposal regarding S416 law enforcement wage scale is not recommended.
- Item 3: Article 42 Diversity of Duty Pay
The SEA proposal for diversity pay is not recommended.
- Item 4: Article 42.2 Annual Leave Accruals
The SEA proposal regarding annual leave accruals is not recommended.
- Item 5: Article 42.XX Sick Leave Accruals
The SEA proposal regarding sick leave accruals is not recommended.



Mary Ellen Shea, Factfinder

Issued: October 15, 2021