State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

PORTSMOUTH POLICE OFFICERS, I.B.P.O., LOCAL 402 Complainant v. CITY OF PORTSMOUTH, POLICE COMMISSION Respondent	CASE NO. P-0709:16 (Formerly Case No. P-0752:4) DECISION NO. 97-017

APPEARANCES

Representing Police Officers, IBPO, LOCAL 402:

Peter C. Phillips, Esq.

Representing City of Portsmouth, Police Commission:

Thomas E. Cayten, City Negotiator

Also appearing:

Len DiSesa, I.B.P.O., Local 441
Brad Russ, Portsmouth Police Department
William A. Irving, I.B.P.O., Local 441
Fred Rubino, Portsmouth Police Department
Phil Miler, Portsmouth Police Department
William Burke, Portsmouth Police Department
Al Kane, I.B.P.O., Local 402, President
Rich Brabazon, I.B.P.O., Local 402, Steward
Fred Hoysradt, Portsmouth Police Department
Mark Newport, Portsmouth Police Department
Thomas E. Hart, Portsmouth Police Department

BACKGROUND

The Portsmouth Police Officers, I.B.P.O., Local 402 (Union) filed unfair labor practice (ULP) charges against the City of Portsmouth Police Commission (Commission) on October 22, 1996 alleging violations of RSA 273-A:5 I (a) and (g) for (Count I) denial of a union representative when two officers reasonably believed certain orders given to them could result in discipline and (Count II) for rebuking and/or retaliating against a bargaining unit member for pursuing a safety grievance. The Commission filed its answer on November 5, 1996. These matters were then heard by the PELRB on January 8, 1997. Count II was resolved prior to the conclusion of the hearing on that date, as represented by PELRB Decision No. 97-003 dated January 23, 1997. The remainder of this decision addresses only Count I.

FINDINGS OF FACT

1. The City of Portsmouth, by and through its Police Commission, is a "public employer" of police officers and other personnel within the meaning of RSA 273-A:1 X.

2. The International Brotherhood of Police Officers, Local 402 is the duly certified bargaining agent for police officers employed by the City of Portsmouth Police Commission.

3. The City and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 1992 through June 30, 1995, and continuing at all pertinent times thereafter under the "status quo" doctrine. Article V thereof provides that "no permanent employees shall be disciplined except for just cause" and that disciplinary actions are subject to the grievance procedure.

4. This case involves whether two police officers who were/are members of the bargaining unit were entitled to union representation under the doctrine of N.L.R.B. v. Weingarten, 420 US 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975), or otherwise, after having been ordered by superior authority to render a report of certain of their activities while on duty during the early morning hours of July 21, 1996.

5. Officers Hoysradt and Newport were assigned to a

two-officer detail known as the "trouble car" on the night of July 20-21, 1996. At approximately 2:20 to 2:30 a.m., they were "waived down" by two females who were known to them and were asked for a ride home because they were "apprehensive about driving." According to a post-transport statement given by the officers (Attachment #2 to Commission's answer), during the transport two attempts were made by Hoysradt to notify headquarters but were unsuccessful due to "continuous radio traffic," inclusive of a felony traffic stop by other officers during the same time. They claimed the transport was completed within five minutes.

6. Detective Sergeant William Irving was responsible for the shift when the two named officers made the transport. At approximately 2:45 a.m. he received a telephone complaint that there were two noisy officers and two noisy women at the site of the transport. Thereafter, he inquired of Hoysradt if he and Newport had made the transport. When Hoyradt answered affirmatively, Irving asked both officers to come to his office and explain the incident to him.

7. Hoysradt and Newport testified that they explained the circumstances of the transport to Irving. Hoysradt said Irving appeared to accept the explanation. After both officers told Irving about the transport, he asked them for a written statement, previously identified as Attachment No. 2. Upon hearing the request for a written statement, Hoysradt and Newport asked if what they submitted could lead to discipline. After receiving an affirmative response from Irving, the officers asked for a union representative. Irving denied that request and told them to complete their written report before leaving. There was no union steward on duty at the time of the foregoing request. One may or may not have been available by phone. There is no evidence that an attempt was made to reach a union steward/representative by phone. It is as a result of the foregoing circumstances that the last sentence of the statement given by Hoysradt and Newport reads, "This statement is being submitted after an order to do so by Sgt. Irving after a request for Union representation prior to said statement was denied."

8. Irving testified that he had no intention to discipline the officers when he asked for the statement but wanted to avoid relying on his memory when he responded to the noise complainant. He did, however, intend to counsel them and ultimately did so, in the context of telling them not to conduct future transports without radio contact with the station. He acknowledged responding to the officers' question of "Could this be disciplinary?" by saying, "I guess it could be."

9. In the course of his inquiry, Irving received the officers' statement (Attachment No. 2) and created his own notes (Joint Exhibit No. 2). After discussing his findings with the noise complainant and being satisfied that the matter was closed, Irving destroyed his copy of the officers' statement (Attachment No. 2) because, at that time, he viewed that document as "notes" between him and them. He testified that the incident resulted in no entries to the personnel files of Hoysradt and Newport but that he had retained the notes he had made. (Joint Exhibit No. 2). He said that those notes could be referred to in the future if either of the officers should again violate procedures for passenger transports and could be the basis for future discipline or increased severity of discipline imposed.

DECISION AND ORDER

The Commission has asked us to dismiss Count I because neither an "administrative interview" nor "investigative interview" was conducted nor was discipline imposed. We deny that motion and find for the Union for the reasons stated below.

This Board early on grappled with the issue of public employee representation at preliminary investigations which may result in discipline. Laconia Education Association v. Laconia School Board, Decision No. 79-20 (August 23, 1979). It was in International Brotherhood of Police Officers Local 464 v. Nashua Police Commission Decision No. 85-74 (September 26, 1985) that the PELRB wrote that refusal of a chief of police to allow an officer "to have a representative of his choice accompany him in a disciplinary hearing is a violation of RSA 273-A:11 I (a) and therefore is an unfair labor practice . . . ." As such, the right in question is an incident of exclusive representation accorded to the Association as well as a protected condition of employment under RSA 273-A:5 I.

The PELRB has subscribed to the principle of "Weingarten Rights," from the case of the same name, *supra*, since it decided International Brotherhood of Police Officers, Local 394 v. City of Manchester, Decision No. 93-73, on May 4, 1992. We said that a "reasonable attempt must be made to contact and have available a union representative of the employee's choice if that representative is reasonably available,...[i.e.,] capable of presenting himself without unreasonably delaying the employer's administrative interview and without impeding the employer's ability to fulfill its mandated governmental function, namely, the operation of a police department."

In New Hampshire Troopers Association v. New Hampshire Department of Public Safety, Decision No. 95-02 (March 20, 1995), we said that the denial of a trooper's "request for union representation on two occasions when discipline was reasonably anticipated constitutes an unfair labor practice under RSA 273-A:5 1 (a)" and (g), had it been pled.

"Weingarten rights" have been summarized as the rights of "employees [to] have the right to union representation at an investigatory interview if they reasonably believe the investigation will result in disciplinary action." Roberts' Dictionary of Industrial Relations, Fourth Edition, p. 840, Bureau of National Affairs (1994). The Commission would have us dismiss because Irving said he "terminated" the "interview" once Hoysradt inquired about discipline or the complaint being a "union matter." Irving later concluded, as did the Commission when it claimed that no discipline was imposed, that he imposed no "discipline." We disagree on both counts.

First, Irving's conduct, as well as his terminology, suggests that an "interview" was at least commenced. This alone is cause for us to deny the Commission's Motion to Dismiss. There had to have been an interview if Irving subsequently discontinued it!

Second, "discipline" was imposed, at least to the extent he counseled Hoysradt and Newport about how to conduct transports in the future (Finding No. 8) and then retained his notes of the incident saying that they could be referred to in the event of similar infractions in the future. (Finding No. 9).

Third, finally and most convincing, both officers asked Irving if discipline could result from their written statement. Irving testified that he answered something akin to "I guess it could be." In addition to this, both Hoysradt and Newport

testified that they understood themselves to be subject to discipline, depending on what their written report to Irving said. This triggers both the "when discipline is reasonably anticipated" test under Troopers Association *supra*, and the "reasonably believe" test of Weingarten.

Under the circumstances of this case, we conclude that Irving's conduct in denying a union representative under conditions which admittedly could lead to discipline constituted an unfair labor practice in violation of RSA 273-A:5 I (a) and (g). The Commission is directed to CEASE and DESIST from denying union representation in such circumstances. The commission and/or its agents and employees may not use the notes retained by Sgt. Irving in any future disciplinary proceedings.

So ordered.

Signed this 14th day of February, 1997.

Jack Buckley

JACK BUCKLEY
Alternate Chairman

By unanimous decision. Alternate Chairman Jack Buckley presiding. Members E. Vincent Hall and William Kidder present and voting.