



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF :
POLICE OFFICERS, LOCAL 580, :
for ROCHESTER POLICE OFFICERS: :
Complainant : CASE NO. P-0749:13
v. : DECISION NO. 97-085
ROCHESTER POLICE COMMISSION :
Respondent :
:

APPEARANCES

Representing IBPO Local 580:

Peter C. Phillips, Esq., Counsel

Representing Rochester Police Commission:

Gary W. Wulf, Chief Negotiator

Also appearing:

Daniel Auger, Rochester Police Department
Doug Donlon, Rochester Police Department
David G. Dubois, Rochester Police Department
Ray Porelle, Jr., Rochester Police Department
Donovan E. Funk, II, Rochester Police Department
Ray Porelle, Sr.

BACKGROUND

The International Brotherhood of Police Officers (IBPO), Local 580, on behalf of Rochester Police Officers (Union) filed unfair labor practice (ULP) charges against the Rochester Police Commission (Commission) on March 14, 1997 alleging violations of RSA 273-A:5 I (a), (c), (e) and (g) resulting from restraining and coercing bargaining unit employees, deprivation of Weingarten [42 US 251, (1975)] rights, and threatening to suspend employees who had been

cleared by outside State Police inquiry. The Commission filed its answer on March 25, 1997. After being scheduled for hearing along with another case involving the same parties on June 3, 1997 and being continued, the PELRB heard this matter on July 17, 1997. Briefs were received from the parties on August 5, 1997 at which time the record was closed.

FINDINGS OF FACT

1. The Rochester 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 (IBPO), Local 580, by affiliation, is the duly certified bargaining agent for full-time police officers through the rank of sergeant employed by the City of Rochester/Rochester Police Commission.
3. The Commission and the Union are parties to a collective bargaining agreement (CBA) for the period July 1, 1995 to June 30, 1996. It continues in effect under the *status quo* doctrine as the parties are still in the process of bargaining for a successor agreement.
4. Raymond Porelle, Jr., has been employed by the City of Rochester Police Department for 13 1/2 years during which time he has also been a union officer, including Secretary-Treasurer. In the summer of 1996, he was approached by, and later received a memo dated August 14, 1996 (Un. Ex. No. 1) from, Officer Michael McQuade concerning McQuade's complaints about operation of the evidence locker and his being assigned to it. Porelle then drafted a letter outlining those concerns to the Commission signed by local president Anne Brideau and dated August 21, 1996 (Un. Ex. No. 2). Chief Daniel Auger submitted a rebuttal memo to the Commission on August 22, 1996 (Un. Ex. No. 3).
5. The Commission decided to devote a portion of its September 18, 1996 meeting to the issues raised in the August 21st letter. Accordingly, at some time on September 17, 1996, Capt. David Dubois directed McQuade to turn over to him the

paperwork and memoranda he had prepared relating to the operation and deficiencies of the evidence locker. This amounted to 174 pages. (Un. Ex. No. 4 and 7). Sometime between August 21, 1996 and September 17, 1996, McQuade had given this paperwork, which he believed to be a personal or union work product, to Porelle who retained it as union documents. When Dubois could not find the file in the evidence locker where McQuade worked, he asked McQuade where it might be found. When Dubois learned Porelle had the file, he escorted Porelle and McQuade to Porelle's home to retrieve the file. Porelle testified that he thought the Department had been maintaining its own independent copy of the same file and documents.

6. On September 18, 1996, at 4:12 a.m. (Un. Ex. No. 5, McQuade Rights Statement), McQuade was questioned by Dubois and Capt. Douglas Donlon relating to possible unauthorized removal of department records. Porelle reported to work at 8:00 a.m. and thereafter was advised by Donlon that an internal investigation was being conducted relating to unauthorized removal of departmental property. Porelle was required to sign a rights statement at 10:50 a.m. (Un. Ex. No. 5). Porelle inquired if this was an administrative or criminal investigation and testified that Donlon said it was not criminal. Porelle then asked for the presence of Peter Phillips, Union Representative, who also happens to be union counsel in New Hampshire. Donlon told Porelle he was not entitled to use Phillips as a union representative because he is an attorney and attorneys are excluded under the rights statement. (See Donlon's investigative report, Un. Ex. No. 5, page 9). Porelle then asked for Donovan "Don" Funk, local vice president and a ten year employee of the department, as his union representative during the inquiry. Donlon and Dubois escorted Porelle and Funk to a waiting area where they could hear Auger berate Porelle to Lt. Allen by saying that Porelle had caused lots of problems. Allen also submitted a one page statement dated 9/18/96 as part of Un. Ex. No. 5. Thereafter, Porelle was interviewed by Donlon and Dubois in the presence of Funk, commencing at 11:33 a.m., according to the transcription included

in Un. Ex. No. 5.

7. When Porelle reported to work on September 19, 1996, he and McQuade were put on administrative leave with pay but without overtime or detail opportunities, pending a criminal investigation conducted by the Strafford County Attorney and by the New Hampshire State Police Major Crimes Unit. Auger requested that investigation. State Police Sgt. David Kelley conducted and closed the investigation on November 12, 1996 after providing a copy to the Strafford County Attorney, Lincoln Soldati. Soldati declined any further action by letter of November 20, 1996 to Dubois. (Un. Ex. Nos. 5 and 6). Kelley's report (Un. Ex. No. 6, page 6) concluded that "the circumstances of...the removal and possession [of the file by McQuade and Porelle] was most likely related to Union activity rather than criminal activity." Porelle and McQuade were returned to duty late in November of 1996 after approximately nine weeks of administrative leave.
8. When Porelle was put on administrative leave on September 19, 1996, he was in possession of numerous documents relating to both the union and to the Rochester Police Benevolent Association, both of which were kept in the personal, versus business, areas of his desk and file cabinet. Both Donlon and Dubois would not permit Porelle to leave the building unless they reviewed these documents. They would not permit Porelle to relinquish the documents to Funk to preserve the Union's chain of custody. On September 17, 1996, before being placed on leave, Porelle requested, by letter (Un. Ex. No. 4), the return of all erroneous Union paperwork and copies of any pages kept by Dubois. By memo of November 20, 1996, to Porelle, Donlon denied that request, after the conclusion of the criminal investigation. (Un. Ex. No. 7.) By similar memo of December 2, 1996, Donlon identified a report marked "Grievance" from McQuade to Porelle and returned it to Porelle. (Un. Ex. No. 8.)
9. On December 3, 1996, Auger sent Porelle a memo citing violations of General Duties, §§ B (1) and N (6) as well as SOPs 45, page 9, § 3 (g) and 53, page 3, § 2 (c) with the intention of

imposing both a 15 day suspension without pay and a two year probation on him. (Un. Ex. Nos. 5 and 10.) Auger recommended a similar penalty for McQuade (Un. Ex. No. 11). The Commission rescinded the recommended sanctions against both officers after conducting public hearings in February, March and April of 1997 by its directives of May 5, 1997 (Un. Ex. Nos. 10 and 11).

10. Departmental Standard Operating Procedure No. 47, most recently reissued January 10, 1996, provides at Section 3 (c) that "all allegations made against the appointing authority shall be investigated by an independent law enforcement agency, due to the obvious conflicts." The investigation following the Union's concerns about the evidence locker was not conducted in this manner; it was conducted as an internal investigation.

DECISION AND ORDER

It is obvious to us that these parties are not co-existing in a workable labor-management relationship, let alone an effective one. We urge both the Union and the public employer to strive actively, not passively, to improve this lack of an effective working relationship, albeit from different perspectives. Our observation has caused us several concerns for which we find unfair labor practice violations and direct remedies.

This Board has recognized the right of a union officer to be present with bargaining unit members when they attempt to adjust grievances with management for over fifteen years. Laconia Education Association, Decision No. 79-20 (August 23, 1979), later followed by Nashua Police Commission, Decision No. 85-074 (September 9, 1989). By 1992, we specifically addressed "Weingarten rights" in International Brotherhood of Police Officers, Local 394 v. City of Manchester, Decision No. 92-73 (May 4, 1992). In that decision (page 5), we distinguished non-urgent administrative inquiries, such as was the case here (Finding No. 6, above), from criminal investigations which may be accompanied by a "degree of urgency or need for spontaneous reaction." We also rejected the notion of entitlement to a specific union representative for the concepts of competency and reasonableness as they may apply to an available union representative. In Manchester, supra, page 6, we cited Gulf Oil Corp., NLRB Case No. 8-CA-11646 (1978) wherein "an employee's right of prior consultation with his union representative to insure knowledgeable and effective representation... arises only after a request...." (Emphasis added.)

Such a request was made here by Porelle who, incidentally, was offered no option about signing a "rights statement" or waiving his right to counsel by doing so. Also in Manchester, we cited both Oates Brothers, Inc., 135 N.L.R.B. 1295, 1297 (1962) and National Can Corp., 200 N.L.R.B. 1116, 1123 (1972) for the proposition that "it is well established that, in the absence of special circumstances, an employer does not have a right of choice[,] either affirmative or negative[,] as to who is to represent employees for any of the purposes of collective bargaining." Contract interpretation, imposition of discipline and grievance adjustment are characteristic of such purposes and should be protected by access to appropriate and competent union representation. It appears that such representation was denied here, both because Porelle was not permitted to attempt to reach Mr. Phillips and because, Mr. Phillips, who happens to be an attorney, should not be excluded from representing union members merely because he has that additional qualification.

We closed our assessment of the Manchester case, *supra*, page 7, by saying, "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, with 'reasonably available' meaning that the representative is 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 this case, no opportunity was offered to see if the representative of the employee's choice was reasonably available and there was no showing by the Commission that time taken for such an inquiry would have impaired its ability to operate its police department. The Commission had already delayed the Administrative inquiry from 8:00 a.m. when Porelle reported to work until 10:50 a.m. when he was given administrative proceedings rights. Time does not seem to have been of the essence yet Donlon denied Porelle the use of the telephone to call Phillips. We find Porelle to have been unduly and inappropriately deprived of "Weingarten rights" under RSA 273-A:5 I (a) and (g) as defined and discussed in our decisions numbered 92-073, 94-074, 95-002 and 97-017.

Next, we find the series of events pertaining to union documents to be extraordinary. The public employer refused to permit Porelle to surrender Union and Police Benefit Association documents to another Union officer in order to preserve the Union's chain of custody. On September 17, 1996, the Union turned over 174 pages of documents which were in its possession. Simultaneously, it requested their return and/or photo copies of retained documents of which it did not have a copy. Union Exhibit No. 4. While there may have been a reason to review these 174 pages of material to insure that no official departmental documents were purposefully or inadvertently maintained in the possession of the Union, we are puzzled by the Commission's

inability to comply with the Union's request for an internal departmental review of the documents, return of non-relevant documents and copies of others. We are even more puzzled why all but one document pertaining to a grievance (Union Exhibit No. 8) were retained by the Commission or its agents until December 2, 1996, after the investigations in question were concluded. For that matter, as late as November 26, 1996, the Commission, through its agents, denied return of all of the 174 pages of documents. Union Exhibit No. 7. This occurred two weeks after the State Police announced the conclusion of their investigation.

When we consider the conduct of the prior paragraph and the testimony of both Funk and Porelle, we believe the public employer's conduct has exhibited a clear case of anti-union animus.¹ It has constrained, and had the intent to constrain, the exercise of rights conferred on Porelle and McQuade under RSA 273-A and, as such, is violative of RSA 273-A:5 I (a), in their individual capacities, and of RSA 273-A:5 II (b) as to the retention and duration of the refusal to return union documents.

Finally, and because, in part, of our prior findings, we are concerned about the manner and duration of the administrative leave which began on September 19, 1996 and ended on November 22, 1996 for McQuade and on November 25, 1996 for Porelle. While both were on administrative leave in pay status, that is not to say that they were not deprived of income or earnings opportunities in the form of lost extra details and lost overtime. This is violative of the "just cause" standard of Article VIII of the CBA and, thus, is also a violation of RSA 273-A:5 I (h). Because of our finding of animus and the excess duration of the administrative leave, both Porelle and McQuade must be made whole for overtime and extra detail opportunities lost during that time.

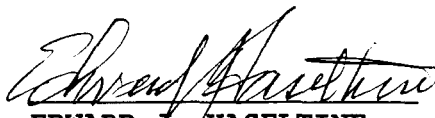
By way of remedy, we direct that (1) the public employer shall CEASE and DESIST from denying employee access to Weingarten rights as described herein; (2) the public employer return to the Union forthwith any documents or pages of documents remaining in its possession after taking custody of some 174 pages thereof on September 17, 1996 and refusing to return all but those documents identified in Union Exhibit No. 8; (3) the public employer CEASE and DESIST from retaining documents dealing solely with Union business or that the Police Benefits Association; (4) that the public employer CEASE and DESIST from actions depriving Porelle or any bargaining unit member of

¹ Porelle testified that, while he was waiting in a conference room next to the Chief's office, he heard Anger tell Lt. Allen, "I do not trust Ray Porelle. He has caused lots of problems." Funk, who was with Porelle at the time testified he heard Anger tell Allen, "I don't trust Ray. How are [we] doing to put pressure on Ray?"

rights conferred under RSA 273-A; (5) the public employer CEASE and DESIST from actions which interfere with the administration of Union business under RSA 273-A:5 I (b), and (6) that the public employer make whole Porelle and McQuade for overtime and extra detail assignments lost during the terms of their respective administrative leaves.

So ordered.

Signed this 24th day of October, 1997.


EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members E. Vincent Hall and Frances LeFavour present and voting.