



and threats to discharge pro-union employees. The Town of Atkinson filed an answer on October 21, 1999 after which this matter was heard by the PELRB on October 28, 1999.

FINDINGS OF FACT

1. The Town of Atkinson employs personnel in the operation of its police department and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.
2. The I.B.P.O. is an employee organization which seeks to represent police officers and related categories of law enforcement personnel for purposes of collective bargaining. It has been involved in an organizational campaign among police officers in Atkinson since July of 1999 and sent a notice to that effect to the Chairman of the Atkinson Board of Selectmen on July 28, 1999. (Appendix B to ULP.) The Union then filed a certification petition on September 22, 1999 in accordance with RSA 273-A:10.
3. Michael Rivera was hired as a regular part-time police officer by the Atkinson police department on September 14, 1998, to work three or four shifts a week. Due to personnel shortages he worked full forty hour weeks from December, 1998 to April 1999. According to his testimony, he was among a group of Atkinson police officers who considered a union and who contacted the IBPO in the first part of July, 1999. Prior to July 28, 1999, Rivera had no counseling or disciplinary encounters with the Chief of the department, Philip Consentino. On July 28-29, Consentino wrote a memo to Rivera (Appendix C to ULP) complaining that he was not making motor vehicle stops when he was working the midnight to 8:00 a.m. shift. Elsewhere in the same document, Consentino asked that Rivera respond to him by August 1, 1999 which Rivera failed to do because he claims not to have received the memo until August 1, 1999. By memo of August 2, 1999 (Appendix D to ULP). Consentino then cited Rivera for refusal to comply with a direct order to respond to the July 28-29 memo and turned the matter over to Captain Yatsevich who was to discuss it with Rivera the following week. On August 12, 1999, Consentino wrote another memo to Rivera complaining that the bathrooms at Pope Field were not locked during his shift on August 10, 1999. (Appendix E to ULP.) On August 16, 1999, Consentino sent yet another memo to Rivera (Appendix F to ULP) asking for written response to his

previous questions about no motor vehicle stops on the midnight shift and no summonses being issued. He asked for an answer in the "next several days." Rivera testified that his motor vehicle stops were comparable to those of those of other officers and that, to his knowledge, none of them had received complaints or inquires about their small number of stops.

4. Rivera and IBPO counsel Phillips met with town negotiator Wulf, Consentino and Selectmen Turell at 3:00 p.m. on August 25 about forming a union and, in particular, to see if they could agree on a bargaining unit. Later that same day, Yatsevich told Rivera that the Town did not intend to reappoint him at the end of his current probationary period. Yatsevich was told to write a memo directing Rivera to come to a meeting with the chief on August 31, 1999. That meeting occurred as scheduled on August 31, 1999 with Rivera, Consentino, Yatsevich and Sgt. Diane Kinney in attendance. Rivera was told he would not be reappointed for "reasons good and sufficient to the department." Rivera testified he was separated from employment on August 31, 1999. By memo of September 16, 1999, Consentino announced to members of the police department that Rivera was no longer a member of the departments of September 14, 1999. (Union Exhibit No. 4.) During all times pertinent to these proceedings Rivera was a "probationary employee" within the meaning of RSA 273-A:1 IX since he never completed twelve months of employment with the Town.
  
5. Patrick Yatsevich was hired as the only captain in the Atkinson Police Department effective December 2, 1998. He described himself as being second in command and in charge of administrative services within the department since the chief fills a part-time position. The department has four full-time positions with "heavy reliance" on part-time personnel to fill the schedule. Yatsevich rode with Rivera during his first two months on the job. Yatsevich never disciplined or made recommendations for discipline to be imposed on Rivera. He was aware of Consentino's memos to Rivera and testified there was no departmental standard or quota for motor vehicle stops. He attended a meeting in which Consentino blamed the union organizational drive on Rivera. Yatsevich testified that he learned about the union organizing campaign in "mid July." Referring to Union Exhibit No. 5, he said Consentino threatened his employment on July 12, 1999. Since he did not have authority to discipline

(unless the Chief were to have become incapacitated) or to appoint (or non-reappoint), he believed himself eligible for union representation and signed a card on July 15, 1999. Describing personnel turnover problems, Yatsevich said four full-time officers left before he was hired and that the selectmen hired him to fix such problems. He reported "union grumblings" to the selectmen in March and suggested a reassessment of pay and benefits. Yatsevich said Consentino resented his preparing a wage and benefit report for the selectmen and warned him about "going over my head."

6. William Baldwin has been employed by the Town as a police officer 2 1/2 years and currently is a corporal, a full-time position. He described organizational issues as going beyond pay and benefits; there is a need to make things "fair among everybody...reduce the favoritism." Baldwin also said there were no quotas for motor vehicle stops and that no officers, other than Rivera, had been counseled or reprimanded for having an insufficient number of those stops. Despite an historically high turnover rate in the department, he had never seen a "no longer a member of the department" memo issued when other officers left Town employment. Baldwin, as well as others, received a "loyalty memo" in message distribution from Consentino (Attachment G to ULP). He said he considered it an "intimidation factor" and that "people felt intimidated by it." Baldwin said Consentino told residents, selectmen and the press that he did not favor a union. (See Union Exhibit No. 6 and 7 dated September 22, 1999 and October 8, 1999, respectively.)
7. George Lorden has been a part-time officer in Atkinson since 1998. He has been a full-time officer in another community since 1988 and was Rivera's training officer. He said Consentino challenged the "back up" policy he trained Rivera to use by questioning Rivera directly but never discussed it with him as his instructor. Lorden has not received comment or memos when he has not had night time motor vehicle stops. He believes himself to be the only officer not to have received a copy of the "loyalty memo" but has seen it. He said it was intended to be a "detriment to organization."
8. Robert Desjardins has been a part-time officer in Atkinson for 12 years. He testified that conditions within the department involving safety issues, old equipment, and an unfilled shift from midnight to 8:00 a.m. on Friday and Saturday nights were brushed

aside by Consentino and caused him to support the organizational drive. Once the organizational campaign was announced in July of 1999, he said it was "very difficult to work" in that environment. During his 12 years of employment, motor vehicle stops, or the lack thereof, never prompted complaints to officers. Desjardius said that, in his experience, no other officer has been subjected to the level of scrutiny imposed on Rivera. He believes the work environment became threatening when Consentino was quoted in the media as saying the officers were "committing absolute suicide," as found in Union Exhibit No. 7. It was his belief that separation memos (Union Ex. No. 4) were discretionary.

#### DECISION AND ORDER

We dismiss the charges of ULP as they refer to Rivera because, for the duration of time pertinent to these proceedings, he was a probationary employee. In accordance with RSA 273-A:1 IX "probationary employees" are not "public employees" within the meaning of that chapter. According to the PELRB's charter found at Chapter 490:1 of the Laws of 1975, harmonious and cooperative relations between public employers and their employees are fostered by "acknowledging the right of public employees to organize and be represented for the purpose of bargaining collectively..." (Emphasis added.) Rivera never became a "public employee," hence he does not come within the purview of the act. By so holding, we do not intend to infer that Rivera's rights to pursue any other causes of action outside RSA 273-A are impaired hereby.

We also dismiss any portions of the ULP as may apply to a cause of action on behalf of Yatsevich since he testified that he was voluntarily leaving his employment with the Town forthwith as the result of another offer of employment. Any request for relief on his behalf would now be moot.

Finally, we direct our attention to the effect and impact of Consentino's complained of conduct as described by the witnesses and which was unrebutted by the Town. "Under federal law a *prima facie* showing by a labor union is insufficient to shift any burden to the employer in an unfair labor practice hearing....The union must establish by a *preponderance of the evidence* that the discharge or elimination was motivated by a desire to frustrate union activity." (Emphasis in original.) Appeal of Prof. Firefighters of E. Derry, 138 N.H. 142, 144 (1993). It is in this vein that we examine the complained-of conduct in its totality vis-a-vis its impact on potential bargaining unit members.

First, it is undisputed that Rivera suffered an extensive amount of scrutiny relative to the number of his night time motor vehicle stops and that this was known by other police officers. Second, it is undisputed

that criticism of his small number of such stops did not start until approximately the same time the organizational drive started, in July of 1999. This is after he had been employed by the police department for ten months, a good portion of which was full time, during which time he had no record whatsoever of any disciplinary events. Third, it is again undisputed that the intervention and criticism came not from Rivera's immediate supervisors but from the chief himself.

Fourth, un rebutted testimony from Union witness (Yatsevich, Baldwin and Desjardis) and from Rivera established that other officers had not been held to the night time motor vehicle stop requirements which Consentino imposed on Rivera. Fifth, and also un rebutted, was Yatsevich's testimony that Consentino had a meeting with him and Sergeant Kinney in which he discussed the organizational campaign and attributed it to Rivera. Sixth and contemporaneously, Consentino queried Yatsevich about signing a union card and thereafter had him prepare a memo directing Rivera to come to a meeting, on August 31st, at which he was informed that he would not be reappointed. Seventh and also un rebutted, Consentino sent a memo to each officer announcing Rivera's departure from the department as of September 14, 1999, a communication which Desjardins described as not a "standard practice," but one which may or may not be followed. This was dated September 16, 1999, six days before the petition for certification was filed and six weeks after Appendix B dated July 28, 1999.

Eighth and finally, Consentino sent virtually every member of the department a "loyalty memo" on or about September 7, 1999, approximately five weeks after the organizational campaign was announced and two weeks before the petition was filed. Baldwin, a corporal, and Desjardins, with twelve years of seniority, both testified they "felt intimidated by it" and were offended by it. In the case of Desjardins, he took the "committing absolute suicide" comment in Union No. 7 as a threat.

When we take the confluence of these events into account, along with their timing and intended audiences, we cannot ignore their impact on the potential bargaining unit members. The Union has met the "preponderance of the evidence" test based on the fact that the foregoing events were either undisputed or un rebutted. In Appeal of Prof. Firefighters of East Derry, supra, the New Hampshire Supreme Court adopted the federal standard found in N.L.R.B. v. Transportation Mgmt. Corp. 462 U.S. 393 (1980). The Union is obligated to prove, by a preponderance of the evidence, some elements of retaliatory action. We believe the cited events, taken as an entirety, show conduct intended to intimidate and coerce potential union members away from the organizational campaign in violation of RSA 273-A:5 I (a). This is supported by unusual conduct which did not occur until after the campaign commenced and for which, taken collectively, there is no logical explanation other than to influence the campaign. Given the source of the complained of conduct, it constituted an attempt to dominate and interfere under RSA 273-A:5 I (b). Under East Derry, (supra) even if we find, by the requisite preponderance of the evidence, that the employer was unlawfully motivated to some degree, an employer can still avoid being adjudicated as

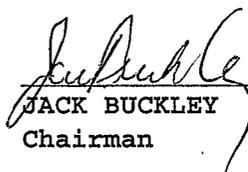
adjudicated as being in violation by proving by a preponderance of the evidence that, regardless of the unlawful motivation, it would have taken the same action for wholly permissible reasons. The record in this case simply fails to show where the Town has either made or attempted to make such a showing.

This case is distinguished from Appeal of Portsmouth Fire Commissioners, 140 N.H. 435 (1995), which involved utterances by a fire commissioner and free speech issues. In this case, the Court relied upon provisions in the NLRA which provide that "the expressing any views, argument or opinion...shall not constitute or be evidence of an unfair labor practice...if such expression contains no threat of reprisal or force or promise of benefit." See 29 U.S.C. §158 (c). The facts of the Atkinson case transcend views, utterances or opinions and are replete with testimony of feeling intimidated, restrained in the exercise of rights under RSA 273-A and, in the case of Yatsevich, with being threatened, or feeling he was being threaten, with loss of employment. It is significant that the feelings of being threatened and intimidated in the workplace were felt not merely by Rivera and Yatsevich but by officers diligently performing their duties as members of the department and who were not seeking reinstatement or redress of any wrongs. They were impacted by what was, or was perceived to be, a tense, uncomfortable and intimidating work environment.

Such fears, interference, domination and coercion must be abated. The Town's conduct, through its agent and employee, is, taken as a whole, violative of RSA 273-A:5 I (a) and (b). The Town shall CEASE and DESIST therefrom forthwith.

So ordered.

Signed this 23rd day of December, 1999.

  
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JACK BUCKLEY  
Chairman

By unanimous decision. Chairman Jack Buckley presiding. Members Seymour Osman and Richard Molan present and voting.