



things, telling him that he (Roach) was aware that the Complainant was no longer a member of the patrolman's union, that the Union was not going to represent him, that the interview was going to happen on that date whether the Complainant liked it or not, and that the Complainant had fifteen minutes to find a representative. When the Complainant returned with Officer Christopher Gibbons, the Complainant states that Roach then questioned Gibbons as to whether he was "in the Union" and told Gibbons that it was his (Roach's) understanding that the Complainant was not in the Union and that the Union was not going to represent him. The Complainant alleges that Roach then directed Gibbons to call the Union's president. After speaking with the Union's president, Gibbons told the Complainant that he would go into the interview only as a friend. The Complainant contends that he was not afforded any time to consult with Gibbons and that the ensuing interview, conducted by Roach and Captain Marc Lussier of the Department, directly led to his being disciplined and was carried out in violation of RSA 273-A:5, I (a) and (g).

As to the events of October 31, 2003, the Complainant states that pursuant to a directive by Lussier on October 30, 2003, he reported to the police department at 1:00 PM for a polygraph exam. Shortly after his arrival, the Complainant told Lussier that he wanted a representative with him during the exam. The Complainant alleges that the Department violated RSA 273-A:5, I (a) and (g) based upon Lussier's response that the Complainant was not entitled to a representative during the exam because of the "sensitivity" of the polygraph machine. The Complainant thereafter met with the polygraph examiner, Sergeant Peter Favreau, and informed him as well that he wanted a representative present for the exam. He alleges that the Department committed another violation of RSA 273-A:5, I (a) and (g) by Favreau's response that the "sensitivity" of the polygraph prohibited the Complainant from having a representative. The Complainant asserts that Favreau thereafter questioned him for half an hour without being attached to the polygraph machine, and that as a result of said interview he was disciplined. Based upon Lussier's and Favreau's refusal to allow a representative to accompany the Complainant during the October 31<sup>st</sup> interview, the Complainant contends that the Department again violated RSA 273-A:5 I (a) and (g).

As remedies, the Complainant requests that the PELRB, among other things, order the Department to cease and desist from preventing employees from obtaining the representation of their choice during investigative interviews, order the Department not to use the information gained in the two interviews for any purpose, and award the Complainant his costs and reasonable attorney's fees incurred in this matter.

The Department filed its answer denying the Complainant's charges on January 13, 2004 and also filed a Motion to Dismiss. Although the Department acknowledges that Department officials did meet with the Complainant on October 30 and 31, 2003 as part of an internal investigation, it asserts that the Complainant's rights under RSA 273-A were not violated. As to the October 30, 2003 interview, the Department contends that the Complainant was afforded his right to representation, namely Gibbons. In point of fact, it states that before the interrogation began, the Complainant was asked if Gibbons was acceptable as his representative and he answered in the affirmative. Relative to the October 31, 2003 interview, the Department admits that Favreau did tell the Complainant that he could not have a representative in the room while he was being polygraphed. However, it states that Favreau also told the Complainant that he

could have a representative outside of the room or he could use a telephone, and the interview could be stopped in order for him to make these arrangements.

In its Motion to Dismiss, the Department claims, *inter alia*, that since the Complainant has filed a grievance asserting that his termination is without just cause, the PELRB does not have jurisdiction at this time. Indeed, the Department states that the issue of *just cause*, including the propriety of the disciplinary interviews, is for an arbitrator to decide, not the PELRB. The Department also contends that complaint must be dismissed as a matter of law, since it is not alleged that the Complainant was ever denied "a Union representative." It also states that the Complainant's request for attorney's fees must be dismissed, as a matter of law, since the PELRB is without authority to award such relief. The Department requests that the PELRB grant its Motion to Dismiss, and grant such other and further relief as may be just.

The Complainant filed a Motion in Opposition to the Department's Motion to Dismiss and a Motion to Consolidate with the PELRB on January 28, 2004.

On January 28, 2004, the Complainant also filed an improper practice charge against the Manchester Police Patrolman's Association (hereinafter "the Union") alleging that it violated RSA 273-A:5 II (a), (c), (d), (f) and (g) by virtue of various conduct generally related to a failure to fairly represent him. More specifically, the Complainant states that in a meeting with Union President Todd Boucher on October 27, 2003, he attempted to join the Union. When Boucher asked him why he wanted to join, the Complainant stated that he believed that the Department would soon be contacting him regarding an internal affairs investigation and that if he had the assistance of the Union the Department would give him less grief. The Complainant briefly discussed the case with Boucher. The Complainant alleges that his rights under RSA 273-A were violated when Boucher then told him that he was not a dues paying member and that the Union was not going to represent him. On October 29, 2003, after submitting an application to join the Union, the Complainant alleges that Boucher told him that the application was being held until the potential investigation involving the Complainant was concluded. On October 30, 2003, prior to the internal affairs interrogation, the Complainant again asked Boucher for Union representation. The Complainant alleges his rights under RSA 273-A were violated when Boucher not only refused to provide him representation, stating, once again, that he was not a dues paying member, but also when Boucher discussed with Lieutenant Roach the Union's unwillingness to provide representation. The Complainant also claims that by virtue of comments made to Officer Gibbons by Boucher on October 30, 2003, Gibbons indicated to the Complainant that he would go into the interview only as friend, thereby further interfering with the Complainant's rights under the law.

On November 10, 2003, the Complainant was ordered to appear before the Chief of Police for a disciplinary hearing. The Complainant alleges that the Union refused to represent him at the hearing and, as a result, he hired Attorney Vincent Wenners to attend the hearing as his representative. The hearing concluded with the Complainant's termination. When he subsequently asked Boucher to file a grievance on his behalf, the Complainant states that Boucher again told him that he was not a dues paying member, that he was on his own and would have to file his own grievance, thereby constituting a further violation of RSA 273-A:5 II (a), (c), (d), (f) and (g). The Complainant asserts that the Union has continued to violate the law

based upon its failure to investigate the charges against the Complainant and otherwise process his grievance through the steps of the contractual grievance procedure.

As remedies against the Union, the Complainant asks, inter alia, that the PELRB sustain the charge, order the Union to provide representation to all members of the bargaining unit, order the reinstatement of the Complainant with all rights, benefits and back pay restored or, in the alternative, order the City not to use the information obtained in the interviews for any purpose, and any other relief deemed just and necessary by the PELRB.

A pre-hearing conference was conducted at the PELRB on February 5, 2004 for which the parties' representatives were present. In light of the common set of facts, the parties' stipulated to the consolidation of the instant matters. The Department reserved its right to dispute the PELRB's jurisdiction in this matter, as raised in its Motion to Dismiss. The Union was present and participated in the pre-hearing conference, while it was noted that the Union's answer to the Complainant's charge was not actually due until a later date.

The Union denied the Complainant's improper practice charge during the course of the pre-hearing conference, as well as in its answer filed with the PELRB on February 12, 2004. While it does not dispute much of the factual background, the Union asserts, among other things, that it is not required, as a matter of law, to accept the Complainant as a member, nor take on his case and the expenses associated with it. The Union asks that the PELRB dismiss the complaint and deny the requested relief.

The Complainant filed a Motion for Interim Order Enjoining Pre-Arbitration Meeting on February 11, 2004. The issue raised by the Motion was resolved during the course of a teleconference conducted on the same date between the parties' representatives and the Hearings Officer. The Complainant subsequently filed a Motion for Interim Order Enjoining Arbitration with the PELRB on February 13, 2004. A hearing is presently scheduled for February 24, 2004 at 9:30 AM, at PELRB offices, relative to the Complainant's motion.

#### PARTICIPATING REPRESENTATIVES

For the Complainant: Edward J. Kelley, Esq.

For the City: David A. Hodgen, Chief Negotiator

For the Union: James W. Donchess, Esq.

#### ISSUES FOR DETERMINATION BY THE BOARD

1. In reference to the Complainant's improper practice charge against the Department, does the PELRB have jurisdiction in this matter or may it appropriately be deferred to arbitration?
2. In applying the *Weingarten* doctrine [see *International Brotherhood of Police Officers, Local 395 v. City of Manchester*, PELRB Decision No. 92-73 (May 4,

1992)] to the instant case, must the Complainant's improper practice charge against the Department be dismissed, as a matter of law, in that it is not alleged that the Complainant was denied "a *union* representative?"

3. Did the City violate RSA 273-A:5 I (a) and/or (g) by interfering with or otherwise denying the Complainant his right to representation during interviews conducted on October 30 or 31, 2003?
4. Did the Union violate RSA 273-A:5 II (a),(c),(d),(f) and/or (g) by refusing to allow the Complainant to join the Union, refusing to provide him a representative during interviews held on October 30 and 31, 2004, discussing its position of not representing the Complainant with the Department investigator, interfering with the Complainant's representative on October 30, 2003, and/or refusing to file a grievance on behalf of the Complainant?

#### WITNESSES

For the Complainant:

1. Marc Desilets, Complainant
2. Officer Christopher Gibbons
3. Officer Richard Brennan
4. Officer Greg Murphy
5. Officer Jim Curran

For the Union:

1. Officer Todd Boucher, Pres., MPPA
2. Officer Dave Connare

For the City:

1. Lieutenant Fred Roach
2. Captain Marc Lussier
3. Sergeant Peter Favreau

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. It is understood that each party may rely on the representations of the other party that witnesses appearing on their respective list will be available at the hearing.

#### EXHIBITS

Joint Exhibits:

1. Parties' collective bargaining agreement, July 1, 2002 to June 30, 2004.
2. Desilets Grievance documents

For the Complainant:

1. Desilets "Reversed Garrity" form, dated 10/30/03
2. Desilets "Reversed Garrity" form, dated 10/31/03
3. Manchester Police Dept. roster, dated 10/30/03
4. Transcripts and/or tapes of MPD radio transmissions for 10/30/03 & 10/31/03
5. Transcripts and/or tapes of Desilets MPD interviews of 10/30/03 & 10/31/03
6. Desilets' Application for Union Membership form, dated 10/27/03
7. Letter dated January 22, 2004 from Attorney Donchess to David Hodgen

For the City:

1. None other than those marked as "Joint."

For the Union:

1. None other than those marked as "Joint."

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. Copies of all exhibits are to be submitted to the presiding officer in accordance with Pub 203.02. It is understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

#### LENGTH OF HEARING

The time set aside for this hearing will be one (1) day. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least twenty (20) days prior to the date of the evidentiary hearing.

#### DECISION AND ORDER

1. The parties' representatives shall meet, or otherwise confer, on or before **March 4, 2004** in order to compose a mutual statement of agreed facts. The parties' representatives shall memorialize those facts upon which they can so stipulate and file that document with the PELRB at least five (5) days prior to the date of the hearing.
2. The party representatives shall forward any amendments to, or deletions from, their Witness and Exhibit lists, as detailed above, to the opposing representative or counsel, and to the PELRB, at least five (5) days prior to the scheduled hearing date. The party representatives shall meet, or otherwise arrange, to pre-mark any exhibits, for

identification, prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.

3. The parties shall file any additional preliminary, procedural or dispositive motions, including a Motion to Dismiss, no later than twenty (20) calendar days prior to the scheduled hearing date.

4. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an evidentiary hearing between the parties will be held on

**March 18, 2004 @ 9:30 AM**

at the offices of the Public Employee Labor Relations Board, Concord, New Hampshire.

So ordered.

Signed this 20<sup>th</sup> day of February, 2004.



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Peter C. Phillips, Esq.  
Hearings Officer

Distribution:  
Edward J. Kelley, Esq.  
David A. Hodgen, Chief Negotiator  
James W. Donchess, Esq.