



State of New Hampshire  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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City of Dover	*	
	*	
Complainant	*	
	*	Case No: M-0608-4
v.	*	
	*	Decision No. 2006-040
Dover Municipal Employees Association	*	
	*	
Respondent	*	
	*	

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PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

The City of Dover (hereinafter "the City") filed an unfair labor practice complaint on December 22, 2005 alleging that the Dover Municipal Employees Association (hereinafter "the Association") committed an unfair labor practice in violation of RSA 273-A:3, RSA 273-A:11, and RSA 273-A:5 II (d), (f), and (g) by delegating or assigning its rights as the certified representative. More specifically, the City states that the Association, despite having informed former bargaining unit members whose jobs had been eliminated that there was nothing that the Association could do for them, agreed that the former employees' attorney, Brian Stern, could be delegated or appointed as special counsel for the limited purpose of going forward with an action on behalf of the three former members. In this regard, the City references a letter dated September 19, 2005 from Association Counsel, Emmanuel Krasner, to Attorney Stern. According to the City, this purported delegation or appointment of Attorney Stern as special counsel to the Union was subject to severe limitations, including that all expenses would be borne by the three former employees, the former employees would hold the Association harmless from any claim for or from themselves, and that if the City brought an unfair labor practice against the Association, the former employees would have to cover the cost of defending the complaint borne by the Association.

Based upon this purported "delegation or appointment," the City states that Attorney Stern has filed demands for arbitration and as a result the City has incurred legal expenses and costs in this improper effort to initiate arbitration proceedings. The City contends, among other things, that the rights extended to the certified bargaining representative under RSA 273-A:11 are not delegable or assignable, and therefore the

aforementioned actions of the Association are unlawful. As remedies, the City requests that the PELRB (1) find that the Association has violated RSA 273-A:3, RSA 273-A:11, and RSA 273-A:5 II (d), (f), and (g); (2) issue a cease and desist order directing the Association to withdraw its purported "delegation or assignment" of authority to Attorney Stern; (3) award the City its costs and attorney's fees incurred as a result of the filing of this unfair labor practice and from its obligation to respond to the demands for arbitration filed on behalf of the three former employees; and (4) award such other relief as justice may require.

The Association filed its answer denying the City's charge on January 6, 2006. The Association admits that a grievance has been filed on behalf of the three former employees by Attorney Stern, who has been authorized to proceed in such fashion by the Association. By way of further answer, the Association states that it is free to choose whatever counsel or agent it wishes, for any purpose, specific, general, or otherwise. Moreover, it states, *inter alia*, that the Association is not acting in bad faith when it allows a member (or members) of the bargaining unit to attempt to vindicate rights under the collective bargaining agreement based upon representations of their own counsel that there is a good probability of success. On March 6, 2006, the Association filed a "Motion to Exclude Testimony and Evidence," specifically in reference to the letter dated September 19, 2005, contending that said letter constitutes a privileged communication and therefore it should be excluded from the record in this case. Accordingly, the Union requests that the PELRB (1) dismiss the instant unfair labor practice charge; or in the alternative, (2) defer the matter to arbitration, and (3) order such other further relief as may be just.

On January 4, 2006, Attorney Stern filed an answer on behalf of Parker Blaney, Kenneth Whelan, and Anne Parsons to the City's unfair labor practice complaint. On January 30, 2006, the City filed a Motion for Entry of Interim Cease and Desist Order, seeking an order from the Board staying the arbitration proceedings that had been initiated by Attorney Stern on behalf of Blaney, Whelan, and Parsons. On February 6, 2006 the City filed a motion to strike the answer of Blaney, Whelan, and Parsons, stating, among other things, that they are not parties to this matter and have failed to properly intervene. The City withdrew its Motion for Entry of Interim Cease and Desist Order on February 10, 2006.

A pre-hearing conference before the undersigned-hearing officer was conducted on March 6, 2006 at PELRB offices, Concord, New Hampshire.

#### PARTICIPATING REPRESENTATIVES

For the City: Mark T. Broth, Esq.

For the Association: Emmanuel Krasner, Esq.

ISSUES PRESENTED FOR BOARD REVIEW

- (1) Whether the September 19, 2005 letter from Attorney Emmanuel Krasner to Attorney Brian Stern shall be excluded from the record or whether the Association has waived any such confidentiality or privilege by voluntarily furnishing the letter to the City.
- (2) Did the Association improperly delegate its functions as the exclusive representative, in violation of RSA 273-A, by authorizing the three grievants and Attorney Stern to utilize the parties' grievance procedure?

WITNESSES

For the City:

1. J. Michael Joyal, City Manager
2. William Fenniman, Chief of Police

For the Association:

1. Christopher Parker, Association President
2. Tom Clark
3. Emmanuel Krasner, Esq.\*

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. (\*In the event that Attorney Krasner is called to testify, please note that the Board does not generally allow narrative testimony from a witness. The Association shall therefore identify for the Board and the City the person who will conduct direct examination of Attorney Krasner no later five (5) days prior to the scheduled hearing date.)

EXHIBITS

Joint Exhibits:

1. Collective Bargaining Agreement
2. DMEA Certification

For the City:

1. Letter From Atty. Krasner dated 9/19/05
2. Correspondence from Atty. Brian Stern
3. Correspondence from Atty. Krasner to Atty. Stern.

4. Demand for Arbitration.
5. Correspondence between Atty. Stern & American Arbitration Association.

For the Association:

None other than those marked above 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 two (2) hours. 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 adjudicative hearing.

#### DECISION

1. The City's "Motion to Strike Answer of Parker Blaney, Kenneth Whelan, and Anne Parsons to Unfair Labor Practice Complaint Filed by the City of Dover" is granted without prejudice based upon the fact that neither Parker Blaney, Kenneth Whelan or Anne Parson are parties to the instant case at this time.
2. In reference to the Association's Motion to Exclude Testimony and Evidence, filed with the Board on March 6, 2006, the City shall file its response to said motion, and any accompanying legal arguments, no later than **March 21, 2006**. The Association shall also file any supplemental legal arguments in support of said motion no later than **March 21, 2006**, if the parties' representatives are able to reach sufficient factual stipulations in order to submit this issue for Board decision solely through written pleadings and without the need for formal testimony. Upon receipt of these documents, the record shall be deemed closed and a decision shall be issued on the motion based solely upon the file documents, stipulated facts and the parties' memoranda, unless it is determined that a hearing is necessary prior to a decision on the motion.
3. The parties' representatives shall meet, or otherwise confer, on or before **March 21, 2006** in attempt to reach a stipulation on presenting the instant case by written submission, or, in the alternative, without the need for formal testimony. In the event that agreement is reached to submit the

case by written submission, the parties shall forthwith file a joint statement indicating such agreement. As stipulated during the pre-hearing conference, the adjudicative hearing would accordingly be cancelled and parties' written submissions would be due to be filed with the Board no later than **April 20, 2006**. Upon receipt of these documents, the record shall be deemed closed and a decision shall be issued based solely upon the file documents, stipulated facts and the parties' memoranda, unless it is determined that a hearing is necessary prior to a final decision on the merits.

4. If the matter is to proceed to a hearing before the Board, the parties' representatives shall meet, or otherwise confer, on or before **March 21, 2006** 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 no later than **April 6, 2006**.
5. 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.
6. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an adjudicative hearing between the parties will be held on:

**April 20, 2006 @ 9:30 AM**

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

So ordered.

Signed this 7<sup>th</sup> day of March, 2006.



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Peter C. Phillips, Esq.  
Hearing Officer

Distribution:  
Emmanuel Krasner, Esq.  
Mark T. Broth, Esq.  
Brian T. Stern, Esq.