



STATE OF NEW HAMPSHIRE  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Portsmouth NH Police Patrolmen's Union,  
NEPBA Local 11  
(Successor In Interest to IBPO Local 402)

Complainant

v.

Portsmouth Police Commission

Respondent

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Case No: P-0709-24

Decision No. 2006-109

APPEARANCES

Representing NH Police Patrolmen's Union, NEPBA Local 11

Peter J. Perroni, Esq.  
Nolan Perroni LLP

Representing Portsmouth Police Commission

Thomas J. Flygare, Esq.  
Flygare, Schwarz & Closson

BACKGROUND

The Portsmouth NH Police Patrolmen's Union, NEPBA Local 11, successor to International Brotherhood of Police Officers (IBPO) Local 402, (hereinafter the "Union") filed an unfair labor practice complaint on November 4, 2005 against the Portsmouth Police Commission (hereinafter the "Commission").

The Union claims that the Commission violated RSA 273-A:5 I (a), (b), (c), (d), (g), and (h) when, on August 24, 2005, Captain DiSesa and Captain John Yerardi questioned Officer Richard Webb, Jr. "regarding an internal investigation involving Officer Timothy Cashman." Previously, on July 7, 2005, Officer Webb appeared as Union Steward to represent Officer

Cashman in a meeting with Deputy Chief David Young regarding Officer Cashman's involvement in a disciplinary matter.

The Union requests that the PELRB: (1) issue a cease and desist order against the Commission pursuant to RSA 273-A:6 III; (2) order the Commission to cease and desist in its violation of employees' rights under RSA 273-A; and (3) order any other remedy deemed just and appropriate under the circumstances.

The Commission timely filed its' response to the Union's charge and denies any violation of RSA 273-A:5. The Commission asserts that the Union fails to allege facts which show that the Commission "retaliated" or "discriminated" against Officer Webb or which show any specific interference by the Commission with Officer Webb's "protected union activity." The Commission also claims that the Union's complaint should be dismissed because the complaint sets forth arbitrable claims under the CBA and the Union's pleadings do not otherwise meet the specificity requirements of Board Rules.

The Commission requests that the PELRB: (a) dismiss the Union's charge with prejudice; (b) order the Union to reimburse the City for it's fees, expenses and lost time in responding to the charge; and (c) grant such other relief as may be appropriate under the circumstances.

A pre-hearing conference was conducted via telephone on January 23, 2006. The parties have agreed to submit this case upon an agreed statement of facts, the parties' July 1, 2003 to June 30, 2006 CBA, and legal memorandum. Deadlines for all submissions have now passed and the record is closed. The parties' stipulated facts appear below as Findings of Fact 1-12.

#### FINDINGS OF FACT

1. The Portsmouth Police Commissioner (hereinafter "the Commission") is a "public employer" within the meaning of RSA-A:1.X.
2. The International Brotherhood of Police Officers, Local 402 (hereinafter "the Union") is an employee organization that represents police officers of the Portsmouth Police Department for the purposes of collective bargaining pursuant to RSA 273-A.
3. Richard Webb, Jr. is employed by the Portsmouth Police Department and is presently a steward of IBPO Local 402 assigned to represent the police officers of Local 402 of the Portsmouth Police Department.
4. On or about July 7, 2005 at approximately 3:00 p.m. Officer Webb was present for a meeting between Portsmouth Police Officer Timothy Cashman and Deputy Chief David Young. Officer Webb was present in his capacity as Union Steward to represent Officer Cashman regarding his involvement in a disciplinary matter.

5. On or about August 8, 2005, Officer Webb received an e-mail from Captain Len DiSesa stating that his presence was required for an interview as a witness regarding an internal investigation involving Officer Timothy Cashman.
6. In the e-mail, Captain DiSesa advised Officer Webb that the internal investigation stemmed from the results of Officer Cashman's meeting with Deputy Chief Young on July 7, 2005 in which Officer Webb was present as Officer Cashman's Union representative.
7. Captain DiSesa advised Officer Webb that he was not the subject of discipline at this interview, but would be questioned as a witness.
8. On or about August 24, 2005, at approximately 1:00 p.m. Officer Webb met with Captain DiSesa and Captain John Yerardi for the interview regarding the internal investigation involving Officer Cashman. Officer Richard Brabazon, President of IBPO Local 402, was also in attendance at this interview.
9. At the start of this interview Captain DiSesa advised Officer Webb that the the (sic) was being ordered to answer the questions posed during the interview, and that failure to do so could result in disciplinary action against him.
10. Before the questioning began Officer Brabazon objected to the interview based on the fact that Officer Webb was acting as Officer Cashman's Union representative during the July 7, 2005 meeting.
11. Captain DiSesa noted the objection and then once again advised Officer Webb that he was ordered to answer the questions asked of him during the interview, which Officer Webb subsequently answered.
12. Following the interview with Officer Webb, the Police Department dropped the disciplinary charges against Officer Cashman.

### DECISION AND ORDER

#### JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. RSA 273-A:6 I. PELRB jurisdiction is proper in this case (subject to ruling on the Commission's motion to dismiss) as the Union has alleged violations of different provisions of RSA 273-A:5.

## DISCUSSION

### The Commission's Motion to Dismiss (Arbitration):

The Commission argues that the Union was required to bring the instant complaint as a grievance utilizing the final and binding arbitration procedure under Article 46 of the parties' CBA. The framework in which to analyze the arbitrability of this case and the PELRB's role in the analysis is discussed in Appeal of the City of Manchester, \_\_\_ N.H. \_\_\_ (Slip Op. 2006-016); Appeal of Police Comm'n of City of Rochester, 149 N.H. 528 (2003); Appeal of State, 147 N.H. 106 (2001); and Appeal of Town of Bedford, 142 N.H. 637 (1998).

While the PELRB has primary jurisdiction of all ULP claims alleging violations of RSA 273-A:5, see RSA 273-A:6, I, it does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration. Absent specific language to the contrary in the CBA, however, the PELRB is empowered to determine as a threshold matter whether a specific dispute falls within the scope of the CBA. Thus, as a threshold matter, the PELRB is empowered to interpret the CBA to the extent necessary to determine whether a dispute is arbitrable.

Appeal of the City of Manchester at 3 (quotations and citations omitted).

The CBA in this case does provide for final binding arbitration in Article 46. It does not, however, specifically state that the arbitrator is to determine the arbitrability of claims or that the PELRB should not perform this task. Accordingly, the PELRB must decide the arbitrability of claims in this case and review and interpret the CBA for this purpose.

"The extent of the parties' agreement to arbitrate determines the arbitrator's jurisdiction, and the overriding concern is whether the contracting parties have agreed to arbitrate a particular dispute." Appeal of the City of Manchester at 2 (quotations and citations omitted). Additionally:

A presumption of arbitrability exists if the CBA contains an arbitration clause, but the court may conclude that the arbitration clause does not include a particular grievance if it determines with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute. Furthermore, the principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties.

Appeal of Town of Bedford, 142 N.H. at 640 (quotations and citations omitted).

In this case, the Union contends, in general, that the Commission improperly subjected Officer Webb, a Union Steward, to questioning. The Commission contends that the Union complaint should have been prosecuted as a grievance and ultimately to final and binding arbitration. Article 46 of the CBA sets forth the grievance process, and states that "[t]he term "GRIEVANCE" shall include any dispute concerning the application or interpretation of any of the provisions of this Agreement." The Union did not file a grievance in this case, nor does the Union claim in its ULP complaint that the Commission violated any provision of the CBA. These circumstances do not determine, however, whether the Union could or should have proceeded with a grievance, and in particular whether the Union could or should have claimed a violation of a particular provision of the CBA.

There are CBA provisions which address the Commission's discrimination against employees because of Union related activities. In particular, Article 5 provides:

The Commission and the Police Department agree not to discriminate against any employee covered by this Agreement in conditions of employment in order to discourage or encourage membership in the Union, or to discriminate against any employee because he or she has given testimony, or taken part in a grievance procedure, or proceedings of the Union. It is agreed that the employee shall not be transferred or reassigned unjustly or unreasonably and that no permanent employee shall be disciplined except for just cause, and that any and all disciplinary actions taken against any member of the Portsmouth Police Department covered by this Agreement will be subject to the grievance procedure."

Because the Union is not relying on the provisions of Article 5 of the CBA but instead cites provisions of RSA 273-A:5, the provisions of Article 5 must be compared with the provisions of RSA 273-A cited and relied upon by the Union.

The Union specifically claims the Commission violated RSA 273-A:5 I (a),(b),(c),(d), and (g), which provide:

- I. It shall be a prohibited practice for any public employer:
  - a. To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;
  - b. To dominate or to interfere in the formation or administration of any employee organization;
  - c. To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization;
  - d. To discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under this chapter;

- g. To fail to comply with this chapter or any rule adopted under this chapter;
- h. To breach a collective bargaining agreement.

While there are similarities between some of the statutory provisions cited and relied upon by the Union in its complaint and the type of employer behavior described and prohibited under Article 5 of the CBA, they are not identical. In particular, the statute describes and prohibits forms of conduct which are not addressed in Article 5 or elsewhere in the CBA. For example, sub-sections (a) and (b) state that it is a prohibited practice for public employers to restrain, coerce or otherwise interfere with its employees in the exercise of rights conferred by this chapter or to dominate or to interfere in the formation or administration of any employee organization. These particular prohibitions do not appear in the CBA.

The Union claims that when Officer Webb was interviewed in the manner described, the Commission not only discriminated against Officer Webb in violation of the provisions of RSA 273-A:5 I (c) and (d) but also restrained, coerced or otherwise interfered with its employees in the exercise of the rights conferred by this chapter and dominated or interfered in the formation or administration of an employee organization, all per RSA 273-A:I (a) and (b). As noted, these prohibitions do not appear in the CBA, nor does the CBA incorporate these statutory provisions by reference. Accordingly, the Union cannot bring these types of claims as a grievance under the CBA. The Union is entitled to proceed at the PELRB because the parties did not agree in the CBA to submit such claims to the Article 46 grievance and arbitration process, and because the Union did not agree to waive, relinquish, or otherwise forgo these distinct and discrete statutory claims in the CBA. To find otherwise would deprive the Union of the opportunity to fully adjudicate its statutory claims, in particular the restraint, coercion, interference or domination claims.

#### The Union's Case Against the City:

The Union's case turns on Officer Webb's status as Union Steward representing Officer Cashman at the July 7, 2005 meeting with Deputy Chief David Young and the fact that subsequently, on August 24, 2005, he was obligated to answer questions from Captain DiSesa and Captain John Yerardi, despite objections from Officer Richard Brabazon, the Union's President.

According to the stipulated facts, Captain DiSesa told Officer Webb by email on or about August 8, 2005 that his presence was required for an interview as a witness regarding an internal investigation involving Officer Timothy Cashman. Captain DiSesa advised Officer Webb that he was not the subject of discipline at this interview, but would be questioned as a witness. He also told Officer Webb that the internal investigation stemmed from the results of the July 7, 2005 meeting.

At the start of the interview on August 24, 2005 Captain DiSesa advised Officer Webb that he was being ordered to answer the questions posed during the interview, and that failure to do so could result in disciplinary action against him. After Officer Brabazon objected to the

interview based on the fact that Officer Webb was acting as Officer Cashman's Union representative during the July 7, 2005 meeting, Captain DiSesa noted the objection and then once again advised Webb that he was ordered to answer the questions asked of him during the interview, which Officer Webb subsequently answered. Following this interview with Officer Webb, the Police Department dropped the disciplinary charges against Officer Cashman.

The stipulated facts do not disclose the content of the questions asked nor the answers given at the August 24, 2005 interview. The stipulated facts do not disclose whether Captain DiSesa or Captain Yerardi asked Officer Webb questions about any communications he had with Officer Cashman before, during, or after the July 7, 2005 meeting.

It is important in this case for the Commission to be mindful of Officer Webb's status as Union Steward. However, RSA 273-A is not intended to completely prevent a public employer like the Commission from communicating, interviewing, or otherwise having dealings with an employee who is a Union Steward (like Officer Webb) in the course of an internal investigation as happened here. On the record submitted in this case, there is insufficient evidence to find that the Commission violated RSA 273-A:5 I (a),(b),(c),(d)(g) or (h) by summoning Officer Webb, the Union Steward for Officer Cashman at the July 7, 2005 meeting, to a subsequent meeting and compelling him to answer questions that related in some way to the internal investigation of Officer Cashman. Accordingly, the Union's complaint and requests for relief are denied. The Commission's requests for relief are denied consistent with the rulings in this order.

So ordered.

Signed this 20th day of July, 2006.

  
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Douglas L. Ingersoll, Esq.  
Hearing Officer

Distribution:

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