

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Raymond Porelle, Jr.

v.

NEPBA, Inc.

Case No. P-0749-34
Decision No. 2010-095

Appearances:

Raymond Porelle, Jr. of Rochester, New Hampshire appeared pro se.

Diane Byrnes of Chelmsford, Massachusetts appeared for NEPBA, Inc.

Background:

Raymond Porelle is a former employee of the Rochester Police Department. He filed an unfair labor practice complaint on May 29, 2008 alleging that the New England Police Benevolent Association, Inc. ("NEPBA") breached its obligations under a November 19, 2007 Settlement Agreement and Release which resolved a prior unfair labor practice complaint in *Raymond Porelle, Jr. v. NEPBA Local 23, Rochester Police Union*, PELRB Case No. P-0749-32. The NEPBA has denied Mr. Porelle's claim and raised a number of affirmative defenses, such as the statute of limitations and failure to exhaust administrative remedies.

After Mr. Porelle requested and received four hearing continuances a hearing was held on his complaint on December 9, 2009¹ at the offices of the PELRB in Concord at which time the parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The record was held open until January 29, 2010 in order to allow the parties to file post-hearing briefs. This decision is based upon the evidence submitted into the record at the December 9, 2009 hearing, including Porelle Exhibit 83, submitted after the hearing and allowed into the record as a full exhibit. This decision is also issued after consideration of the parties' post hearing briefs, and any evidence discussed or referenced in the briefs that was not already submitted into the record at the December 9, 2009 hearing has been disregarded.

Findings of Fact

1. The Rochester NH Police Union, NEPBA Local 23, ("NEPBA") is the certified exclusive representative of certain employees of the Rochester Police department pursuant to PELRB Decision No. 2006-118, issued August 9, 2006. The NEPBA obtained this status after prevailing in a representation election involving the NEPBA and the incumbent certified representative, IBPO Local 580.

2. According to a letter he wrote in March, 2007, Mr. Porelle "left the Rochester Police Department in October, 1998" and filed a workers' compensation claim. *See* Porelle Exhibit 32.

3. Mr. Porelle subsequently received workers' compensation benefits, including two checks totaling \$47,499.01. A dispute developed between Mr. Porelle and the City over the amount of pay Mr. Porelle was entitled to receive in exchange for his tender of his workers' compensation benefit checks to the City. *See* Porelle Exhibits 7 and 8.

¹ This case was originally scheduled for hearing on August 14, 2008 but was rescheduled at Mr. Porelle's request. Three subsequent hearing dates (December 17, 2008; March 12, 2009; and June 9, 2009) were also rescheduled at Mr. Porelle's request.

4. On November 1, 2001 Mr. Porelle filed a grievance with the Rochester Police Chief. In this letter he stated he was returning the City's check in the amount of \$1,463.53, contending that he was owed additional funds. *See* Porelle Exhibit 8. In his letter Mr. Porelle stated that:

I am returning the above mentioned check because I do not want to leave you with the impression that any agreement under accord and satisfaction has been reached. I believe that I am owed my full pay during the entire length of my absence. I believe that I am entitled to my customary level of overtime that you denied me. I believe that my benefits that were involuntarily liquidated should be restored as well as those that I would have accumulated had I not been wrongfully terminated. I believe that I should be reimbursed for the COBRA payments that I made in order to maintain health insurance for my family. I believe that I am entitled to reimbursement for the medical expenses incurred which resulted from the change in employment status. I believe that I am entitled to recover the interest lost in my retirement account due to your due process contractual violations.

5. On May 9, 2002 counsel for IBPO Local 580 utilized a process the PELRB provides to facilitate the selection of a neutral to serve in arbitration proceedings and filed a request with the PELRB for the appointment of an arbitrator. The PELRB assigned Case No. P-0749-27 to the request. *See* Porelle Exhibit 15. The IBPO Local 580 request lists November 1, 2001 as the date of the grievance, and claimed that Article 14 of the parties' collective bargaining agreement had been violated. According to the IBPO Local 580 request, the subject matter of the grievance is that Mr. Porelle "was denied injury leave benefits in violation of Article 14 of the parties' contract."

6. Attorney John Van N. Dorr, III served as the arbitrator at a March, 2003 arbitration hearing. However, Attorney Dorr never issued a decision and in April, 2005 he informed the PELRB that he had retired from arbitration practice and did not anticipate that he would be able to complete the remaining work on the matter. *See* Porelle Exhibit 27. The PELRB notified representatives for the parties of Attorney Dorr's decision by letter dated April 19, 2005. *See* Porelle Exhibit 28.

7. Attorney Peter C. Phillips served as union counsel at the March, 2003 arbitration hearing. He sent Mr. Porelle a letter dated August 28, 2003 which concluded his representation of Mr. Porelle. *See* Porelle Exhibit 21.

8. In 2004 Mr. Porelle received a schedule of benefits from the New Hampshire Retirement System (“NHRS”). He questioned the retirement date the NHRS used to calculate his benefits and by letters to the NHRS dated March 10 and April 7, 2004 he appealed the NHRS determinations. *See* Porelle Exhibit 23 and 24.

9. Mr. Porelle subsequently retained, at his own expense, attorney James E. Ritzo to represent him in the NHRS proceedings beginning in approximately April of 2007. According to Mr. Porelle’s chronology, Porelle Exhibit 82, attorney Ritzo submitted a letter to the NHRS on or about April 11, 2007 described as an “Appeal of Determination.” Attorney Ritzo’s undated invoice for services, Porelle Exhibit 83, submitted post-hearing and accepted into the record, states the following:

Professional fees and services regarding manual (sic) to New Hampshire Retirement Systems includes conferences with client review of extensive materials, 2 Hearings before New Hampshire Retirement System, Preparation (sic) for hearing assembly extensive documents and exhibits 39.2 hrs. Nine Thousand Eight Hundred Dollars (\$9800.00)

10. In 2005, 2006 and in the first half of 2007 Mr. Porelle contacted the NEPBA about the unresolved grievance arbitration heard by Attorney Dorr in March of 2003 and about issues involving the NHRS. *See* Porelle Exhibits 29-32 and 36. Because he was not satisfied with the NEPBA’s response, Mr. Porelle filed an unfair labor practice complaint against the NEPBA on June 18, 2007, captioned as *Raymond Porelle, Jr. v. NEPBA Local 23, Rochester Police Union*, PELRB Case No. P-0749-32. The NHRS proceedings were pending at the time Mr. Porelle filed this complaint.

11. Mr. Porelle withdrew his unfair labor practice in PELRB Case No. P-0749-32 when he and the NEPBA entered into a November 19, 2007 Settlement Agreement and Release (the "Settlement Agreement").

12. The Settlement Agreement includes the following provisions:

The NEPBA agrees to represent Porelle in a grievance arbitration matter previously captioned IBPO Local 580 & Rochester Police Commission – Case No. P-0749-27 ("the arbitration"). The NEPBA will represent Porelle consistent with its duty of fair representation.

In consideration of this agreement and other valuable and sufficient consideration, Porelle hereby releases, remises and forever discharges the NEPBA, its officers, employees, agents, attorneys and affiliates (the "Releasees") from all debts, demands, actions, unfair labor practice claims, duty of fair representation claims or the like, claims, causes of action, suits, dues, sums, accounts, covenants, contracts, controversies, agreements, promises, omissions, damages, and any and all other claims of every kind, nature and description whatsoever, both in LAW and EQUITY, which against the Releasees, Porelle now has, ever had, or ever will have on account of any loss, cost, expense, damages, fees, suffering, illnesses, emotional distress or injuries allegedly sustained or incurred, or which yet to be sustained or incurred, by Porelle by reason of or as a result of any events, incidents, acts or omissions that allegedly occurred at any time form (sic) the beginning of the world to the present.

Porelle acknowledges that because of previous events, including but not limited to, the passing of time since the last action in the arbitration, it may not be possible to obtain a favorable result (or any result) on his behalf in the arbitration. Porelle understands that it may now not be possible to obtain relevant documentary and testimonial evidence. Porelle further acknowledges that the NEPBA is not responsible for the consequences previous events (sic) including, but not limited to, any delay or failure to act. Nevertheless, the NEPBA agrees to use its best efforts, consistent with its duty of fair representation, to obtain a favorable result in the arbitration on behalf of Porelle.

13. Subsequent to November 19, 2007 Mr. Porelle demanded that the NEPBA provide him with representation in connection with the pending proceedings before the NHRS involving his retirement benefits.

14. Thereafter the parties agreed to an arbitration date in March, 2009. *See* Porelle Exhibit 77. Prior to the arbitration the parties discussed settlement and an agreement was

reached, but no finding is made as to whether the agreement was final, binding, and enforceable.

Decision and Order

Decision Summary:

Mr. Porelle's unfair labor practice complaint is dismissed. The terms of the November 19, 2007 Settlement Agreement do not obligate the NEBPA to provide Mr. Porelle with representation in the NHRS proceedings. Further, any claim that the NEBPA was otherwise obligated to provide such representation based upon events and circumstances prior to the November 19, 2007 Settlement Agreement was extinguished by the Settlement Agreement and is otherwise barred by the six month limitations period set forth in RSA 273-A:6, VII.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. *See* RSA 273-A:6.

Discussion:

The issues for consideration are whether the NEBPA is obligated to provide Mr. Porelle with representation in the NHRS proceedings under the provisions of the November 19, 2007 Settlement Agreement or otherwise. Mr. Porelle's claims are dismissed for the reasons that follow.

As to the November 19, 2007 Settlement Agreement, the NEBPA only agreed and obligated itself to represent Mr. Porelle in the grievance arbitration matter. The Settlement Agreement specifically identifies this undertaking, and further provides that the NEBPA will represent Mr. Porelle "consistent with its duty of fair representation." In subsequent provisions there is language that is sufficient to extinguish any other representation obligations:

Porelle hereby releases, remises and forever discharges the NEPBA, its officers, employees, agents, attorneys and affiliates (the "Releasees") from all debts, demands, actions, unfair labor practice claims, duty of fair representation claims or the like, claims, causes of action, suits, dues, sums, accounts, covenants, contracts, controversies, agreements, promises, omissions, damages, and any and all other claims of every kind, nature and description whatsoever, both in LAW and EQUITY, which against the Releasees, Porelle now has, ever had, or ever will have on account of any loss, cost, expense, damages, fees, suffering, illnesses, emotional distress or injuries allegedly sustained or incurred, or which yet to be sustained or incurred, by Porelle by reason of or as a result of any events, incidents, acts or omissions that allegedly occurred at any time form (sic) the beginning of the world to the present.

The "consistent with its duty of fair representation" phrase, which describes how the NEPBA will provide representation in the grievance arbitration matter, does not equate to a NEPBA undertaking to provide representation in the NHRS matter. NEPBA representation in the NHRS cannot, on the basis of the record submitted in this case, be considered to be a necessary incident, aspect or component of fair representation in the grievance arbitration matter. In other words, Mr. Porelle has not established that the NEPBA cannot fulfill its duty of fair representation in the grievance arbitration matter unless the NEPBA also provides him with representation in the NHRS proceedings.

Any claim that the NEPBA had an obligation to provide Mr. Porelle with representation in the NHRS proceedings independent of the Settlement Agreement is also dismissed. First, to the extent any such obligation existed, it arose prior to the Settlement Agreement, and the Settlement Agreement effectively extinguished any such obligation. Further, any such claim is otherwise barred by the RSA 273-A:6, VII six month limitation period.

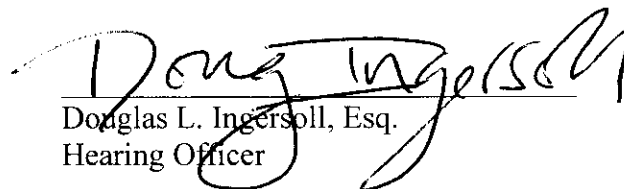
The record reflects that Mr. Porelle's right to challenge determinations by the NHRS had accrued, at the latest, by April of 2007, and likely may have accrued as early as April of 2004. *See* Finding of Fact 8 and 9. If Mr. Porelle had wanted the assistance of the bargaining unit's certified exclusive representative with the NHRS matter he should have made a request for

representation as early as April of 2004 and no later than April of 2007. If dissatisfied with the exclusive representative's response he should have pursued any possible remedies available in PELRB proceedings well before May 29, 2008, the date this complaint was filed. This is true even if Mr. Porelle is allowed up to six months after April of 2007 to demand and receive a response from the NEPBA about representation before the six month limitation period begins to run.

Accordingly, Mr. Porelle's unfair labor practice complaint against the NEPBA, Inc. is dismissed.

So ordered.

May 11, 2010



Douglas L. Ingersoll, Esq.
Hearing Officer

Distribution:
Mr. Raymond Porelle, Jr.
Diane Byrnes, Esq.
Peter Perroni, Esq.