STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

State Employees' Association of NH, SEIU Local 1984

v.

Town of Salem et al.

Case No. G-0080-2
Decision No. 2011-140

Appearances:

John S. Krupski, Esq., Molan, Milner & Krupski, PLLC, Concord, NH for the Complainant

Nancy Oliver, Esq., Jackson Lewis LLP, Portsmouth, NH for the Respondent

Background:

The State Employees' Association of NH, SEIU Local 1984 (SEA) filed an unfair labor practice complaint against the Town of Salem on June 7, 2010. The SEA claims that the Town's treatment of a bargaining unit employee violated the parties' collective bargaining agreement (CBA) and that the Town's interactions with an SEA representative restrained, coerced and otherwise interfered with the employees' exercise of their contractual rights and with the administration of the employee organization in violation of RSA 273-A:5, I (a), (b), (g), and (h). As relief, the SEA requests that the PELRB order the Town to make the SEA and the bargaining unit employees whole; to cease and desist from engaging in actions designed to restrain, coerce and/or interfere with employees in the exercise of their contractual rights, from interfering with the administration of the employee organization, and from breaching the CBA; and to comply with the provisions of RSA 273-A.

The Town denies that it violated any provision of RSA 273-A and asserts, among other things, that the SEA failed to state a claim upon which relief can be granted; that the Town acted in good faith; and that the SEA's claims are barred because the decisions about which the SEA complains were based on legitimate work-related reasons. The Town filed a motion to dismiss on the grounds that the SEA's pleadings were insufficient and that the dispute is subject to the grievance procedure which concludes with final and binding arbitration. The SEA objected to the motion arguing, among other things, that it raised claims of substantive violations of RSA 273-A:5, I which are independent of its contract claims.

The hearing in this case was originally scheduled for July 22, 2010, but at the parties' requests was rescheduled four times and was ultimately conducted on February 1, 2011 at the Public Employee Labor Relations Board (PELRB) offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. At the close of the SEA's presentation, the SEA's motion to amend its complaint as necessary to conform to the evidence and to add a demand for reinstatement to its request for relief was granted.[1] The parties filed post-hearing briefs and the decision is as follows.

Findings of Fact

1. The Town of Salem is a public employer within the meaning of RSA 273-A:1, IX.

2. The SEA is an employee organization certified under RSA 273-A:8 and representing certain employees of the Town.

3. The SEA and the Town are parties to a collective bargaining agreement (CBA) effective from April 1, 2010 through March 31, 2011.

[1]The Town objected to adding a demand for reinstatement on the ground that the subject employee was not fired by the Town but instead resigned. Pub 201.04 (c) provides in relevant part that the board "shall allow requests for an amendment . . . including requests filed at the conclusion of the hearing to amend the complaint . . . as necessary to conform to the evidence, unless the amendment shall result in unnecessary delay of the proceeding or unfair prejudice to another party in the proceeding." As both parties submitted evidence (joint exhibits and testimony) regarding the events which occurred after, as well as before, the filing of the complaint, the undersigned hearing officer found no unfair prejudice to the Town in this case. The Town did not argue that the amendment would result in unnecessary delay.

4. Article 6 of the parties' CBA sets forth the following 4-step grievance procedure: Step I – immediate supervisor; Step II – Department Head; Step III - Town Managers; and Step IV - final and binding arbitration. Article 6.1 defines grievance as "an alleged violation, misinterpretation or misapplication of any provision of this Contract." See Joint Exhibit 1.[2]

5. Article 6.4 of the parties' CBA, entitled Grievance Procedure, provides that "[n]o reprisals of any kind will be taken by the Town or Union against any party in interest or other participant in the grievance procedure." See Joint Exhibit 1.

6. Article 19 of the parties' CBA is entitled Disciplinary Actions and provides that discipline will be initiated in a progressive manner according to the following steps: Verbal Warning, Written Warning, Suspension, and Termination. See Joint Exhibit 1.

7. Article 19.2.2 of the parties' CBA, entitled Verbal Warning, provides as follows:

> The immediate supervisor shall issue a verbal warning as soon as possible. The supervisor shall notify the employee of the nature of the infraction and will offer remedial suggestions. No formal record will be made of verbal warnings.

See Joint Exhibit 1.

8. Article 19.4 of the CBA provides as follows: "Disciplinary actions shall be undertaken in a polite, open, honest and private environment so as not to involve unconcerned individuals directly or indirectly." See Joint Exhibit 1.

9. Christopher Long is the SEA's field representative assigned to county and municipal bargaining units. His responsibilities include negotiating contracts and handling grievances. He is responsible for several bargaining units, including the Salem administrative and technical employees bargaining unit. He is also the chief negotiator for this bargaining unit.

10. Roxanne Colella was hired by the Town as a part-time clerk in August, 2008 and after successfully completing probationary period, was working as a part-time Clerk II in the

[2]All exhibits referenced herein are incorporated in full into the Findings of Fact.

Salem Town Hall-Department of Collections (collections), a position included in the administrative and technical employees bargaining unit represented by the SEA. During 10 years prior to August of 2008, Ms. Colella was employed by the Salem Police Department.

11. Town Clerk Susan Wall and Tax Collector Cheryl-Ann Bolouk, both elected officials, were Ms. Colella's direct supervisors. Ms. Wall and Ms. Colella were acquainted prior to Ms. Colella's employment with collections and Ms. Colella learned about the opening for a clerk position from Ms. Wall who suggested that Ms. Colella should apply for the position. Ms. Wall and Ms. Bolouk participated in hiring of Ms. Colella. As any employee in collections, Ms. Colella received on-the-job training and began working independently with the public as soon as she felt ready.

12. Ms. Colella's duties in collections included registration of motor vehicles, processing applications for dog licenses, landfill and other permits, and receipt and processing of various fees, taxes, and payments from the public.

13. During her employment as a collections clerk prior to Spring of 2010, Ms. Colella had not received a warning or any other form of discipline nor was she recommended for remedial training. Her performance was satisfactory and she received good evaluations. During her 10 years with the Police Department, Ms. Colella received satisfactory annual evaluations and had never been disciplined.

14. According to Ms. Wall and Ms. Bolouk for over a year and a half Ms. Colella's work performance was good, she had always been punctual, courteous with customers, and asked questions to improve her performance. Ms. Wall also testified that Ms. Colella has frequently inquired as to the quality of her performance.

15. On May 3, 2010 Ms. Wall and Ms. Bolouk issued a verbal warning to Ms. Colella, which was reduced to writing pursuant to an advice from Director of Human Resources (HR) Lynn Rapa and the substance of which is reflected in Joint Exhibit 2. The warning concerned the

manner in which Ms. Colella processed a landfill permit and a related cash-receipt discrepancy of $10. See Joint Exhibit 2.

16. Mr. Long and Ms. Colella submitted a Step I grievance concerning the May 3, 2010 warning to Ms. Wall and Ms. Bolouk at a late afternoon meeting in Ms. Wall's office late afternoon on May 17, 2010. The grievance alleged that the discipline was issued without just cause, was untimely, did not offer remedial suggestions, and was formally recorded in violation of the CBA Articles 19.1 and 19.2.2. See Joint Exhibit 2. At the start of the meeting, Mr. Long asked who had access to Ms. Colella's computer. When Ms. Wall and Ms. Bolouk said that no one, apart from Ms. Colella, had access, Mr. Long asked whether either Ms. Wall or Ms. Bolouk had access, and they admitted that they did. When Mr. Long pointed out the discrepancy between their previous answer to computer access question with their admission that they also had access, Ms. Wall and Ms. Bolouk abruptly terminated the meeting and demanded that Ms. Colella and Mr. Long leave the office.

17. According to Ms. Wall and Ms. Bolouk, they understood that Mr. Long was accusing them of improper conduct and they terminated the meeting because they were defending themselves from his accusations of tampering with Ms. Colella's computer. According to Mr. Long, the tone of the meeting changed to hostile and aggressive as soon as he mentioned computer access, but he did not accuse either Ms. Wall or Ms. Bolouk of taking $10 or tampering with Ms. Colella's computer.

18. On May 19, 2010 Ms. Colella received a second verbal warning from the Ms. Wall, but this time Ms. Wall did not make any formal record of the warning.

19. On May 26, 2010 Mr. Long filed a Step II grievance concerning the May 3, 2010 warning with Acting Town Manager Henry LaBranche, in which he alleged the violations of CBA Articles 19.1 and 19.2.2 and advised Mr. LaBranche that he was representing Ms. Colella and that Ms. Wall and Ms. Bolouk had not responded to the Step I grievance. See Joint Exhibit 2.

20. On May 26, 2011 Mr. Long filed with Ms. Wall two Step I grievances concerning the May 19, 2010 verbal warning. The first Step I Grievance alleged violations of the CBA Articles 19.1 (lack of just cause), 6.4 (issued in reprisal), and 19.2.2 (lack of remedial suggestions) and provided in part:

> . . . When the grievance was filed with the Tax Collector and you on May 17, 2010, you were each visibly upset, became indignant, were verbally aggressive with me, the SEA field representative, and acted in an intimidating manner toward Ms. Colella and me.

See Joint Exhibit 10.

21. The second Step I Grievance concerning May 19, 2010 warning alleged the violations of the CBA Articles 6.4, 19.2.2, and 19.4 and provided in part:

> On or about May 19, 2010 Roxanne Colella was issued a verbal warning by you concerning a matter that has been previously addressed with her by the Deputy Town Clerk. Since that date, you have been openly discussing the discipline that you issued to her with other employees who work in the Town Clerk/Tax Collector area. . . [S]uch conduct violates the provisions of CBA Article 19.4, which requires that discipline 'be undertaken in a polite, open, honest and private environment so as not to involve unconcerned individuals directly or indirectly.'
> Additionally, such conduct has created a hostile work environment for Ms. Colella and is a form of reprisal that is prohibited under CBA Article 6.4.

See Joint Exhibit 3. The first and second May 19, 2010 grievances advised Ms. Wall that Mr. Long was Ms. Colella's union representative. A meeting concerning both grievances was held on June 1, 2010 between Ms. Wall, Ms. Colella, and Mr. Long.

22. Ms. Wall denied the first Step I grievance on May 19, 2010 warning stating in part:

> There is just cause to issue a verbal warning . . . to Ms. Colella because her performance resulted in the loss of four months of revenue to the town. Whereas I had not previously addressed the matter with Ms. Colella and whereas I am her supervisor, I have the authority to issue her a verbal warning. Ms. Fleury simply answered Colella's question when she asked if she was the person who made the error. Ms. Colella has been trained and retrained regarding the appropriate procedures she needs to follow. Further remedial suggestions would be redundant.
> Regarding me becoming verbally aggressive and intimidating towards you and Ms. Colella, in my opinion, my response was warranted due to your

unprofessional behavior when you alleged that the Tax Collector and me tampered with Ms. Colella's drawer.

See Joint Exhibit 10.

23. Ms. Wall denied the second Step I Grievance concerning the May 19, 2010 warning. Her response is set forth in Joint Exhibit 3.

24. Some time after Mr. Long filed grievances on behalf of Ms. Colella, during an accidental encounter, Mr. LaBranche asked Mr. Long: "Are you going to keep filing all these grievances?" Mr. Long accused Mr. LaBranche of trying to intimidate him and prevent him from representing the employees. At a later meeting between Mr. LaBranche and Mr. Long, scheduled to resolve pending grievances, Mr. LaBranche told Mr. Long that he had little control over Ms. Wall and Ms. Bolouk because they were elected officials.

25. On June 2, 2010 Ms. Wall issued a written warning to Ms. Colella. As set forth in Joint Exhibit 4, in this warning Ms. Wall was critical of how Ms. Colella processed a motor vehicle registration and a dog license transaction and provided Ms. Colella with remedial suggestions.

26. On June 4, 2010 Mr. Long filed with Ms. Wall a Step I Grievance concerning the June 2, 2010 written warning. As set forth in Joint Exhibit 4, the grievance alleged a violation of CBA Articles 19.1, 6.4, and 19.4. See Findings of Fact at 20.

27. On June 7, 2010 the SEA filed the subject unfair labor practice complaint with the PELRB.

28. On June 10, 2010 Mr. Long proceeded to Step III on the second grievance concerning the May 19, 2010 warning. In the Step III grievance letter, filed with Mr. LaBranche, Ms. Long restated the claims set forth in the Step I grievance and noted that he skipped Step II because in this case the immediate supervisor (Step I) and the department head (Step II) was the same person who had already denied the grievance at Step I. See Joint Exhibit 3.

29. On June 25, 2010 Ms. Colella and Mr. Long attended a meeting with Mr. LaBranche to discuss a remedial training program and agreed to an employee improvement plan. Pursuant to the parties' agreement, during the implementation of the plan, from June 28 to August 12, 2010, all grievances would be held in abeyance and Ms. Colella would not be disciplined further. The employee improvement plan provided as follows:

> 1. Sue Wall, Town Clerk, Town of Salem, NH, will serve as the primary mentor. Cheryl Bolouk, Salem Tax Collector, will also provide mentoring support for all matters related to the collection of taxes.
> 2. Training: The Town Clerk, with the assistance of the Tax Collector, will prepare and provide a retraining program, assisted by the retired Town Clerk, Barbara Lessard. The retraining will focus on critical responsibilities, as well as related activities and procedures customarily associated with a clerk's position and in keeping with the position description (see attached).
> 3. A document outlining the critical duties of the position and related procedures for discharging those duties, will be prepared by the Town Clerk and Tax Collector. Said document will provide guidance to the employee and to be used as a resource for completing all assigned tasks (see attached).
> 4. Communication Protocol:
>
> (a) All inquiries and questions related to job responsibilities will be directed to the Town Clerk.
>
> (b) In the absence or unavailability of the Town Clerk, the employee will contact the Deputy Town Clerk or Tax Collector depending upon the nature of the inquiry.
>
> 5. Concerns/Issues with Supervisor:
>
> (a) All concerns and issues will be directed to Michael DiBartolomeo, President, SEA Local 1894 (sic).
>
> (b) Unresolved matters will then be addressed to the Acting Town Manager.
>
> 6. Benchmark Activities and Dates:
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> (a) Re-training Session – June 28, 2010
> (b) First Review – July 2, 2010
> (c) Second Review – July 16, 2010
> (d) Third Review – July 23, 2010
> (e) Fourth Review – July 30, 2010
> (f) Summative Review – August 12, 2010
>
> 7. Other Considerations:
>
> (a) Without prejudice to either party, all outstanding grievances filed on behalf of Roxanne Colella are stayed until the improvement process has been completed.
>
> (b) The Unfair Labor charge filed with PELRB is not impacted by this agreement.

The agreement did not address Mr. Long's status or future involvement in Ms. Colella's employment situation, and it did not relieve Mr. Long of his responsibilities as Ms. Colella's union representative. See Joint Exhibit 5.

30. Pursuant to the employee improvement plan, a training manual for Ms. Colella was jointly prepared by Ms. Wall and Ms. Bolouk. Ms. Colella kept the training manual on her work desk and used it as necessary. Although the June 25 agreement designated Ms. Wall as a primary mentor and instructed Ms. Colella to direct all questions regarding job responsibilities to Ms. Wall, former Town Clerk Barbara Lessard, who usually worked part-time, was assigned the responsibility of retraining Ms. Colella. Ms. Lessard provided on-the-job training for one week, from August 2 to August 6, 2010, during which both Ms. Colella and Ms. Lessard worked full time shifts. See Joint Exhibit 7. During that time Ms. Lessard was available to answer Ms. Colella's questions between serving customers. Ms. Colella was provided with 1 ½ hour of direct training. Ms. Lessard did not go over the training manual with Ms. Colella, nor was Ms. Colella tested on her knowledge of the training manual. There was no further training provided between scheduled evaluations.

31. On July 21, 2010 Ms. Bolouk sent the following email message to Ms. Colella:

> ... Your next 2 reviews are scheduled as follows: Friday July 30th at 2:30 and Thursday[,] August 12th at 2:30. The conference room has been booked for these meetings. Chris Long is not invited to attend these meetings because he is not your supervisor. Mark DiBartolomeo is your union representative.

Ms. Colella wrote in response: "I will have to talk to Chris Long." See SEA Exhibit 1.

32. The performance report/evaluation under the employee improvement plan, entitled Summation Review, was completed on August 12, 2010 by Ms. Bolouk and Ms. Wall. According to the report, an employee is scored between 1 and 5 where 1 means "does not meet expectations", 2 means "meets some expectations"; 3 means "meets expectations"; 4 means "exceeds most expectations"; and 5 means "consistently exceeds expectations." Ms. Colella was

evaluated for, and received the following scores, accuracy (1.5), alertness (1.5), attendance (4), punctuality (4), courtesy (2.5), dependability (2.5), drive (2), neatness (2), commitment toward the job (2), job knowledge (2), personal appearance (3), physical performance (3), quantity of work (2), stability (2.5), teamwork (3), attention to safety (3), customer service (2). The overall evaluation was scored at 2, i.e. "substandard; requires timely improvement". Objectives/Future Goals section of the evaluation provided: "Our future goals and objectives are to continue the learning process for Town Clerk and Tax Collector functions. Also to continue to provide efficient and courteous service to the public." See Joint Exhibit 7.

33. The Summation Review also contained a report criticizing Ms. Colella for not following a chain of command, for making errors while renewing and transferring motor vehicle registrations, titling vehicles, and processing an LLC registration, for failing to balance her cash receipts properly, and for asking questions regarding these transactions. The report provided in part:

> ... Roxanne will not follow the chain of command when she has a question even though this has been explained to her in writing as well as verbally by three different people.
> The week of August 2nd -6th retired Town Clerk Barbara Lessard worked the same hours as Roxanne's (they both worked full time that week) so that she would be available for any questions...
> On August 5, 2010, you asked what you should do with an out of state new registration that did not have a title or a lien holder. This information is included in the re-training manual ...
> You did a lease transfer of a vehicle. You know how to do that part but asked Barbara if it was PS, AP or EX... This has been explained to you numerous times and you should have known the answer...
> In summary, Roxanne is making the same mistakes with motor vehicle registrations. She is not paying attention to detail and not following the instructions given to her. The Re-Training Manual given to Roxanne on June 25, 2010, contains the information she needs so she will not make the mistakes she has made during this re-training period... Roxanne did not follow Item #1 (Primary Mentor) and Item #4 (Communications Protocols) contained in the Employee Improvement Plan Agreement. Roxanne asks the Deputy Town Clerk questions even when Susan is in the office...

See Joint Exhibit 7.

34. Mr. Long, who did not attend prior review meetings, came to the August 12, 2010 Summation Review meeting. Ms. Colella, Ms. Bolouk, Ms. Wall, and Donna Dilgata were also present. Ms. Wall told Mr. Long that he cannot attend the meeting because Ms. Dilgata was Ms. Colella's union representative. Mr. Long refused to leave stating that he was Ms. Colella's representative to which Ms. Wall responded that if he stayed, she would leave, subsequent to which Ms. Wall and Ms. Bolouk left the room. There was no other meeting to go over the Summation Review.

35. On September 14, 2010 Ms. Wall and Ms. Bolouk issued a second written warning to Ms. Colella in which they were critical of how Ms. Colella processed a title application and dog license transactions, including a failure to apply a senior citizen's discount, and provided remedial suggestions. The warning concluded with the following statement:

> ... we are taking this opportunity to inform you that any further infractions or violations of policy and procedures related to job responsibilities will result in a recommendation of termination to the Town Manager.

See Joint Exhibit 8.

36. On September 19, 2010 Ms. Colella submitted a letter of resignation to Mr. LaBranche. The letter provided in part:

> It is with reluctance that I'm submitting this letter. Although my time with the Town of Salem has been, on the whole, satisfying and productive, for quite a while now I have become less and less satisfied with the current work situation. Due to irreconcilable differences between my immediate supervisors and myself, it has become increasingly difficult for me to continue contributing sufficiently to a level of expectation that has been valued over the past twelve years. The tension between us recently has had a significant impact on my health and well being. With no foreseeable resolve in sight and faced with no alternative, it is with great regret that I must ask you to accept this as my resignation from the Salem Town Offices effective October 1, 2010.

Mr. LaBranche formally accepted Ms. Colella's resignation on September 21, 2010. See Joint Exhibit 9.

37. Ms. Colella was not asked to resign.

38. According to Ms. Wall, she has never issued 3 disciplinary actions within a 2-months period during her tenure as a Town Clerk.

39. At all relevant times Ms. Colella believed that Mr. Long was her representative and she told the Town management that she wanted Mr. Long to represent her.

Decision and Order

Decision Summary:

As the parties' CBA provides for final and binding arbitration and the SEA's contract claims are subject to contractual grievance procedure, the PELRB has no jurisdiction over the contract claims and they are, therefore, dismissed. The Town has committed an unfair labor practice in violation of RSA 273-A:5, I (a), (b), and (g) when it refused the SEA's representative access to the disciplinary meeting and when it interfered with Ms. Colella's exercise of the rights conferred by RSA 273-A.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6. However, the PELRB has no jurisdiction over the SEA's contract claims for the reasons set forth in this decision.

Discussion:

The SEA claims, among other things, that the Town breached the parties' CBA and the implied covenant of good faith and fair dealing when it created a formal record of a verbal warning in violation of CBA Article 19.2.2 and when it discussed the discipline imposed on Ms. Colella with other employees in violation of Article 19.4. The Town moves to dismiss the SEA's complaint on the ground that the SEA failed to exhaust remedies under the parties' CBA which provides for final and binding arbitration.

"[W]hen a grievance initiated under a CBA and a ULP complaint allege substantively identical claims, authority rests with the PELRB to determine the threshold matter of arbitrability

of the claim." *Appeal of the City of Manchester*, 153 N.H. 289, 294 (2006). The PELRB "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." *Id.* at 293 (citations omitted). Under the Supreme Court's "positive assurance" standard, "when a CBA contains an arbitration clause, a presumption of arbitrability exists, and in the absence of any express provision excluding a particular grievance from arbitration, ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Appeal of Lincoln-Woodstock Coop. Sch. Dist.*, 143 N.H. 598, 600 (1999). A particular claim is not arbitrable if the PELRB concludes with "positive assurance that the CBA is not susceptible of an interpretation that covers the dispute." See *id.* at 601.

In this case, the CBA provides for a final and binding arbitration as a last step of the grievance procedure. As there is no evidence that the parties agreed to submit the question of arbitrability to the arbitrator, the PELRB has authority to determine as a threshold matter whether the breach of contract claims fall within the scope of the CBA and to interpret the CBA to the extent necessary to determine whether this dispute is arbitrable. Here, there is no positive assurance that the CBA is not susceptible of an interpretation that covers the SEA's contract claims as the contract claims involve alleged violations of the CBA Articles 19.2.2, 19.4, and 6.4. The SEA filed several grievances alleging the same violations of the same CBA Articles. See Findings of Fact at 16, 19-21, 26, and 28. The parties' CBA defines grievance as "an alleged violation, misinterpretation or misapplication of any provision of this Contract." See Findings of Fact at 4. For the foregoing reasons, the SEA's contract claims are subject to the parties' contractual grievance procedure which concludes with final and binding arbitration.

Accordingly, the PELRB has no jurisdiction to decide the SEA's contract claims and these claims are therefore dismissed.

The remaining claims are properly before the PELRB as they involve violations of RSA 273-A:5, I which are independent of the contractual disputes and the Town's motion to dismiss these claims is denied.[3]

The SEA claims that the Town violated RSA 273-A:5, I (a) and (b) when, among other things, it abruptly ended the May 17, 2010 grievance meeting demanding the SEA representative to leave, refused to allow the SEA representative to attend a disciplinary Summation Review meeting on August 12, 2010 and cancelled the meeting when the representative refused to leave, and instructed Ms. Colella as to who she can or cannot have as her union representative.

Under RSA 273-A:5, I (a) and (b) it is a prohibited practice for any public employer to restrain, coerce, or otherwise interfere with its employees in the exercise of the rights conferred by this chapter and/or to dominate or interfere in the formation or administration of any employee organization. In this case, the Town's conduct has run afoul of these provisions and the Town has committed unfair labor practices in violation of RSA 273-A:5, I (a) and (b). In particular, the Town's conduct constitutes a coercion and interference with Ms. Colella in the exercise of the rights conferred by RSA 273-A and a domination and interference in the administration of the SEA, the employee organization, which has been duly certified as the bargaining unit's exclusive representative.

The union's and bargaining unit employee's rights protected under the statute and at issue in this case are an integral part of the right of public employees to organize and the right of the

[3]The Town's claim that the complaint should be dismissed for violation of Pub 201.02 (b) (6) is interpreted as claim of violation of Pub 201.02 (b) (5) (as Pub 201.02 (b) (6) does not exist) and is also denied. Pub 201.02 (b) (5) applies only to claims under subsections (c) and (d) of RSA 273-A:5, I, neither of which is at issue in this case. Moreover, Pub 201.02 (h) provides that "if a complaint is alleged to be deficient for lack of one or more of the criterion of (b)," the complaint may be amended to correct such deficiency. See Pub 201.02 (h). Pub 201.02 does not provide for dismissal of a complaint on the merits in case of such alleged deficiency.

unions to represent employees in collective bargaining negotiations and in the settlement of grievances. See RSA 273-A:11 (a). See also *AFSCME, Council 93, Local 3657/Milford Police Employees v. Town of Milford*, PELRB Decision No. 2011-084. They include the right of the union to conduct its internal affairs and administer and conduct union business and operations without intrusions by the public employer designed to influence and change how such affairs are conducted. See *id.* In a case such as this, it means that a public employer does not get to choose an employee's union representative. In addition, the PELRB has previously recognized the right of public employees like Ms. Colella to union representation during a disciplinary meeting or interview generally known in labor relations as *Weingarten* rights.[4] See *Manchester Police Patrolman's Association v. City of Manchester Police Department*, PELRB Decision No. 2011-093. See also *New Hampshire Troopers Association v. New Hampshire Department of Safety, Division of State Police*, PELRB Decision No. 95-02. The PELRB identified RSA 273-A:11, I (a) and (b) as two statutory provisions that are violated by a deprivation of such representation. *Id.*

In this case, the Town interfered with Ms. Colella's right to have a union representative of her choice present at the grievance meeting on May 17, 2010 and at the disciplinary Summation Review meeting on August 12, 2010 and also denied the SEA's right to act as Ms. Colella's exclusive representative. The Town Clerk's and Tax Collector's assertions that they terminated the May 17, 2010 meeting and told Mr. Long to leave because they were offended by, and were defending themselves from, Mr. Long's alleged accusations justify neither the abrupt termination of the grievance meeting nor their later refusal to conduct a Summation Review meeting with Mr. Long present. The exchange about which Ms. Colella's supervisors

[4] See *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 95 S. Ct. 959 (1975). Under *Weingarten*, a union employee has the right to union representation at an investigatory interview he or she reasonably believes will result in discipline." *Appeal of Exeter Police Association*,154 N.H. 61, 62-63 (2006) (citations omitted). The Supreme Court expressed no opinion as to whether the New Hampshire law affords *Weingarten* protection. See *id.*, at 64. See also *Appeal of City of Manchester*, 149 N.H. 283, 289, 821 A.2d 1019 (2003).

complained is nothing more than the usual "give and take" incidental to such meetings, and Mr. Long's questions and overall behavior are within the parameters of acceptable union representation. Feeling personally offended by a union representative's behavior does not justify the Town's actions in depriving an employee of the statutory rights or depriving the union of its right to represent an employee in the settlement of grievances.

Despite being informed by Ms. Colella that Mr. Long was her union representative and despite being repeatedly notified by Mr. Long that he represented Ms. Colella, the Town insisted on deciding who should represent Ms. Colella. In her email message regarding the scheduled improvement plan meetings, Ms. Bolouk wrote to Ms. Colella: "Chris Long is not invited to attend these meetings because he is not your supervisor. Mark DiBartolomeo is your union representative." See Findings of Fact at 31. This statement represents an impermissible interference with Ms. Colella's statutory right to be represented by the union, with her *Weingarten* rights as well as with the SEA's right to decide how to run its business and who to assign to represent employees in settlement of grievances. Although the improvement plan agreement does refer to Mr. DiBartolomeo, it does not prove that Ms. Colella waived her right to Mr. Long's representation. Neither did the agreement deprive the SEA and Mr. Long of the right to represent Ms. Colella at disciplinary meetings or in settlement of grievances. The Town's refusal to conduct the Summation Review meeting on August 12, 2010 unless Mr. Long left the meeting further proves a violation of the employee's and the union's statutory rights. Because Ms. Colella wanted Mr. Long to represent her at the August 12, 2010 meeting and because Mr. Long refused to leave, the Town Clerk and the Tax Collector cancelled the meeting, thereby depriving Ms. Colella of an opportunity to discuss an important Summation Review, which could lead to a discipline or even termination, as demonstrated by a second written warning in which Ms. Colella was informed that unless she stopped making mistakes, the supervisors would recommend termination. See Findings of Fact at 35.

The Town's argument that there was no impermissible interference because the verbal warning and the Summation Review meetings were not disciplinary in nature is without merit. The verbal warning is a first step in a progressive disciplinary process and is followed by a written warning, suspension, and, finally, termination. See Findings of Fact at 6. The Summation Review was a part of an improvement plan agreement which was entered into because of the discipline, including 2 verbal warnings and 1 written warning, administered to Ms. Colella by the Town. The parties agreed to stay the grievances regarding the discipline imposed on Ms. Colella pending the outcome of the improvement plan. The failure to successfully complete the improvement plan could result in further discipline and even termination, as reflected by the Town Clerk's and the Tax Collector's statement in the written warning issued to Ms. Colella on September 14, 2010 that "any further infractions or violations of policy and procedures related to job responsibilities will result in a recommendation of termination to the Town Manager." Findings of Fact at 35.

The SEA also claims that the Town interfered with Ms. Colella's statutory rights in violation of RSA 273-A:5, I (a) because it issued verbal and written warnings in retaliation for filing grievances. In cases involving alleged retaliation, the Supreme Court held that a complainant must prove illegal motivation at least to some degree. See *Appeal of Sullivan County*, 141 N.H. 82, 84 (1996). See also *AFSCME Council, Local 863/Rochester Public Works Dept., Buildings and Grounds v. City of Rochester, Dept. of Public Works and Buildings and Grounds*, Decision No. 2009-131. "[T]he union bears the burden to prove some minimal degree of proscribed motivation in order to establish an unfair labor practice under RSA 273-A:5." *Appeal of Sullivan County*, supra, 141 N.H. at 85. Furthermore, the employer can meet the union's evidence of retaliatory motivation with its own evidence; and if the PELRB finds by a preponderance of the evidence that the employer was unlawfully motivated to some degree, an employer can still avoid being adjudicated a violator by proving by a preponderance of the

evidence that regardless of the unlawful motivation, the employer would have taken the same action for wholly permissible reasons. See *Appeal of Professional Firefighters of East Derry*, 138 N.H. 142, 144-45 (1994). See also *Hampton Firefighters Local 2664, IAFF, AFL-CIO, CLC v. Town of Hampton*, Decision No. 2008-068.

In this case, the SEA satisfied its burden to prove a sufficient degree of proscribed motivation to support a retaliation claim. The retaliatory motivation can be reasonably inferred from a history of interactions between the Town, Ms. Colella and Mr. Long during the time period from May to September of 2010 and, specifically, from the temporal proximity between the grievances filed and the discipline administered to Ms. Colella. Although she was employed by the Town for over 10 years in the Police Department and a year and a half in the collections without being disciplined once and had previously received good evaluations, Ms. Colella was issued 2 verbal warnings and 2 written warnings between May and September of 2010. This temporal proximity between the grievances filed and warnings issued almost immediately thereafter, along with the evidence of hostility exhibited toward Ms. Colella's union representative and the evidence demonstrating that prior to May, 2010 the Town found Ms. Colella's performance satisfactory, proves the existence of retaliatory motivation.

Once a union has satisfied its burden to prove some minimal degree of retaliatory motivation, the burden shifts to the employer to prove by a preponderance of the evidence that regardless of the unlawful motivation, the employer would have taken the same action for wholly permissible reasons. *Appeal of Sullivan County*, supra, 141 N.H. at 85. All the evidence offered to show that the Town acted for wholly permissible reasons stems from the retaliatory warnings themselves and comes from the supervisors who issued these retaliatory warnings and demonstrated hostility toward Ms. Colella's union representative.[5] In this case, the Town's

[5]Although the Town Exhibit 3 was admitted as a full exhibit over the SEA's objection that the Town made the SEA aware of this exhibit only one day before the hearing, this exhibit has not been assigned significant weight. The Town Exhibit 3 is a purported report regarding the retraining of Ms. Colella prepared by Ms. Lessard on July 1,

evidence is insufficient to prove that, absent retaliatory motivation, Ms. Colella would be issued 4 warnings.

Finally, the SEA claims that the Town's actions violated RSA 273-A:5, I (g). RSA 273-A:5, I (g) provides that "[i]t shall be a prohibited practice for any public employer ... [t]o fail to comply with this chapter or any rule adopted under this chapter." As the Town violated RSA 273-A:5, I (a) and (b), it failed to comply with RSA 273-A and, thereby, violated RSA 273-A:5, I (g).

The SEA requests that Ms. Colella be reinstated in the Clerk II position in collections. The SEA argues that, although Ms. Colella resigned and was not asked by the Town to leave her employment, the Town has created a hostile work environment which forced Ms. Colella to resign. As in this case, the employee was not terminated but instead resigned, the SEA must prove the existence of a constructive discharge. "The law of constructive discharge is part of New Hampshire's common law wrongful termination jurisprudence." *Hillsboro-Deering Support Staff AFT-NH, Local 6219, AFL-CIO v. Hillsboro-Deering Sch. Dist.*, PELRB Decision No. 2007-091.

> [T]o succeed on such a claim, a plaintiff must prove: (1) [that] the termination of employment was motivated by bad faith, retaliation or malice; and (2) that she was terminated for performing an act that public policy would encourage or for refusing to do something that public policy would condemn. The termination element of the claim may be satisfied by proof of a constructive discharge, which occurs when an employer renders an employee's working conditions so difficult and intolerable that a reasonable person would feel forced to resign. Constructive discharge is not established by showing relatively minor abuse of an employee ... rather, the adverse working conditions must generally be ongoing, repetitive, pervasive, and severe.

Id. (citing *Lacasse v. Spaulding Youth Ctr.*, 154 N.H. 246, 248-49 (2006)). The PELRB has previously recognized that "there are legally significant distinctions between constructive

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2010, i.e., two days after Ms. Colella's retraining period (June 28 to August 12, 2010) was supposed to commence under the improvement plan and a month before the actual week of retraining (August 2 to August 6, 2010) did commence. See Findings of Fact at 29 and 33.

discharge and hostile work environment claims on the one hand and unfair labor practice claims adjudicated by this agency on the other ..." See *Hillsboro-Deering Support Staff AFT-NH, Local 6219, AFL-CIO v. Hillsboro-Deering Sch. Dist.*, supra. Generally, the PELRB "does not have jurisdiction over claims derived from the common law"; see *id.*; and in this case proving that the Town violated RSA 273-A:5, I (a), (b), and (g) is not the same as proving a common law constructive discharge claim. Assuming that a constructive discharge claim can be maintained in this case, the SEA's evidence is insufficient to prove that Ms. Colella resigned because of the Town's violation of her rights under RSA 273-A. Based on the foregoing, the SEA's request for Ms. Colella's reinstatement is denied.

The Town has committed unfair labor practices in violation of RSA 273-A:5, I (a), (b), and (g). The Town shall cease and desist from all such coercion, domination, and interference with the employees' and union's rights and administration of the union. The SEA's claims based upon alleged violations of RSA 273-A:5, I (h) and a breach of the implied covenant of good faith and fair dealing are dismissed. Ms. Colella's personnel record shall be expunged of any references to verbal and/or written warnings issued after May 3, 2010 and of information concerning improvement plan/retraining nor shall these warnings and improvement plan be mentioned if and when another employer will request information regarding Ms. Colella's employment history and/or performance. This decision shall be posted for thirty days in an area(s) in the workplace where it can be viewed by bargaining unit employees and the attached certificate of posting shall be completed and filed with the PELRB.

So ordered.

May 16, 2011

Karina A. Mozgovaya, Esq.
Staff Counsel/Hearing Officer

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