Reverses PELRB Decision No. 2004-168

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THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2005-264

APPEAL OF THE CITY OF MANCHESTER
(New Hampshire Public Employee Labor Relations Board)

Argued: January 11, 2006
Opinion Issued: February 24, 2006

City Solicitor's Office, of Manchester (Daniel D. Muller, Jr. on the brief and orally), for the petitioner.

McKittrick Law Offices, of North Hampton (J. Joseph McKittrick on the brief and orally), for the respondent.

GALWAY, J. The petitioner, the City of Manchester (City), appeals a New Hampshire Public Employee Labor Relations Board (PELRB) ruling that the City committed unfair labor practices (ULPs) in violation of RSA 273-A:5, I(a) and (g) (1999). We reverse.

The record supports the following facts. The respondent-appellee, Marc J. Desilets, was employed by the Manchester Police Department (Department) as a regular full-time police officer from January 10, 1988, until November 10, 2003. The Manchester Police Patrolman's Association (Union) is the exclusive bargaining representative for all regular full-time police officers employed by the City. The City and the Union were parties to a collective bargaining agreement (CBA) in effect from July 1, 2002, to June 30, 2004.

In response to a citizen complaint made against Desilets on or about October 23, 2002, the Department initiated an internal affairs investigation. In the course of that investigation, Desilets was interviewed by investigating officers on October 30 and 31, 2002. Desilets alleges that the Department either interfered with or denied him the opportunity to obtain Union representation during both interviews.

On November 3, 2003, the Department issued a letter of disciplinary intent charging Desilets with two counts of untruthfulness arising from the October interviews, one count of conduct unbecoming an officer, and one count of unlawful conduct. The letter recommended that Desilets' employment be terminated. After a disciplinary hearing on November 10, 2003, Desilets' employment was terminated.

On December 20, 2003, Desilets initiated a grievance pursuant to article 7 of the CBA, alleging he was terminated without just cause in violation of section 3.1 of the CBA. The grievance was processed and the Union filed for arbitration. The arbitration hearing was scheduled for June 25, 2004.

On December 22, 2003, Desilets filed a ULP complaint with the PELRB against the City, alleging that the Department violated RSA 273-A:5, I (a) & (g) by obstructing or interfering with his Union representation during the October investigative interviews. On January 28, 2004, Desilets also filed a ULP complaint against the Union. The City moved to dismiss the complaint against it, asserting that the PELRB lacked jurisdiction because the CBA provides for final and binding arbitration, and Desilets had raised the same issues in his grievance.

The PELRB conducted a hearing in May 2004, at which it considered the City's motion to dismiss and Desilets' ULP complaints against both the City and the Union. By order dated October 22, 2004, the hearing officer denied the City's motion to dismiss, finding that: (1) the PELRB has primary jurisdiction of all violations of RSA 273-A:5, pursuant to RSA 273-A:6, I; and (2) the denial of an employee's Weingarten rights, see NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), or, more specifically, the denial of the right to a union representative during an investigative interview, constitutes a ULP and violates RSA 273-A:5, I (a). While acknowledging that Weingarten rights are often litigated in a just cause grievance arbitration proceeding, the hearing officer concluded that the PELRB has the authority to determine "on a case-by-case basis . . . whether or not a matter is appropriate for arbitration."

Having concluded that it had jurisdiction to consider Desilets' ULP complaint, the hearing officer determined that the City violated Desilets' Weingarten rights during both investigative interviews, and that the Union

violated its duty of fair representation during the October 30 interview. The Union did not appeal the ruling against it.

On November 19, 2004, the City timely requested that the PELRB review the hearing officer's decision, asserting that the decision was: (1) unlawful, unjust, and unreasonable; and (2) based upon factual misrepresentations, and/or omissions. By order dated January 6, 2005, the PELRB sustained the hearing officer's decision. After the PELRB denied the City's motion for rehearing, the instant appeal followed. The arbitration hearing on Desilets' just cause grievance has been postponed, at the City's request pending the outcome of this appeal.

"When reviewing a decision of the PELRB, we defer to its findings of fact, and, absent an erroneous ruling of law, we will not set aside its decision unless the appealing party demonstrates by a clear preponderance of the evidence that the order is unjust or unreasonable." Appeal of Laconia Sch. Dist., 150 N.H. 495, 496 (2004); see RSA 541:13 (1997).

As a preliminary matter, we note that both parties and the PELRB refer to "Weingarten rights" in the context of this appeal. In NLRB v. Weingarten, Inc., the United States Supreme Court held that the language of section 7 of the National Labor Relations Act accords employees the right to union representation during an investigatory interview that the employee reasonably believes might result in disciplinary action. Weingarten, 420 U.S. at 267. The Court held that a denial of union representation during such an interview constitutes an unfair labor practice in violation of section 8(a)(1) of the National Labor Relations Act. Id. at 252. No party argues that Desilets was not entitled to this right. Therefore, for the purposes of this appeal, we will assume, without deciding, that Desilets had a right to union representation during the October investigatory interviews under Weingarten.

On appeal, the City first argues that the PELRB lacked jurisdiction to consider Desilets' ULP complaint because Desilets had already initiated a grievance encompassing the same claims that was subject to final and binding arbitration under the CBA. Desilets counters that the PELRB properly determined that it had jurisdiction to consider the alleged violations of his Weingarten rights because his ULP complaint alleged violations of RSA 273-A:5 and was not based upon provisions in the CBA.

"A CBA is a contract between a public employer and a union over the terms and conditions of employment." Appeal of Hillsboro-Deering School Dist., 144 N.H. 27, 30 (1999) (citations omitted). When parties enter into a CBA, they are obligated to adhere to its terms, which are the product of their collective bargaining. Id. Every CBA must contain a workable grievance procedure. RSA 273-A:4 (Supp. 2005). The extent of the parties' agreement to

arbitrate determines the arbitrator's jurisdiction, and "[t]he overriding concern is whether the contracting parties have agreed to arbitrate a particular dispute." Appeal of Police Comm'n of City of Rochester, 149 N.H. 528, 534 (2003) (quotations and citations omitted). In the context of a just cause grievance, the arbitrator also has the authority to consider the underlying issues and surrounding circumstances necessary to interpret and apply the express provisions of the CBA and reach a final decision. See Paperworkers v. Misco, Inc., 484 U.S. 29, 34 (1987) (identifying seven criteria considered in the context of a just cause grievance).

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. Appeal of State of N.H., 147 N.H. 106, 108 (2001). 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. Appeal of Police Comm'n of City of Rochester, 149 N.H. at 533. 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 State, 147 N.H. at 109.

We first consider whether the just cause grievance and the ULP complaint encompass the same substantive issue. In his demand for arbitration, Desilets alleged that the Department: (1) had terminated his employment without just cause; and (2) had violated his "right to be represented during a disciplinary interview." Similarly, his ULP complaint alleged that the Department denied or interfered with his Union representation during both October 2002 investigative interviews. Thus, both the just cause grievance and the ULP complaint alleged substantively identical violations of Desilets' Weingarten rights. Furthermore, they both arose during an investigation that ultimately resulted in Desilets' termination from the Department.

In ruling that it had jurisdiction to consider Desilets' ULP claim while the just cause grievance was awaiting arbitration, the PELRB, in essence, was deciding the threshold issue regarding the arbitrability of the alleged violations of Desilets' Weingarten rights. In this case, the CBA is silent regarding the arbitrator's authority to determine the arbitrability of a disputed issue. Therefore, the PELRB had the authority to determine, as a threshold matter, whether an alleged violation of Desilets' Weingarten rights fell within the scope of the CBA and was appropriate for arbitration. See Appeal of Police Comm'n of City of Rochester, 149 N.H. at 533.

We are not persuaded by Desilets' assertion that alleging a violation of RSA 273-A:5 is sufficient, in and of itself, to preclude a determination that the

issue falls within the scope of the CBA. RSA 273-A:6, I, grants the PELRB jurisdiction of all violations of RSA 273-A:5. However, when 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. See Appeal of Laconia Sch. Dist., 150 N.H. at 496 (upholding PELRB ruling to proceed to arbitration when the substance of an arbitration demand and a ULP complaint were identical). This determination requires the PELRB to interpret the CBA to the extent necessary to determine whether the alleged violation of Desilets' Weingarten rights was arbitrable. See Appeal of State, 147 N.H. at 109. Because the parties' agreement determines the arbitrator's jurisdiction over the subject matter of a dispute, we look to the relevant portions of the CBA to determine whether the PELRB determination of arbitrability was correct. Our review is de novo. Appeal of City of Nashua, 132 N.H. 699, 703 (1990).

Here, the underlying allegations regarding Desilets' Weingarten rights arose in the context of the investigation of a "disciplinary action" under section 3.1 of the CBA. Section 3.1 states that "no disciplinary action shall be taken against an employee except for just cause." The CBA sets forth a multi-step grievance procedure to be followed for claims "arising out of the application or interpretation" of the CBA. See Agreement Between the City of Manchester, N.H. and the Manchester Police Patrolman's Association, Article 7, Section 7.1 (A) (July 1, 2002- June 30, 2004). Pursuant to article 7, section 7.6, the CBA provides for final and binding arbitration of grievances arising under the terms of the CBA. The express language of section 7.6 allows the arbitrator to consider and decide "what is necessary for the interpretation and application of express provisions of this agreement." Therefore, Desilets' just cause grievance proceeding necessarily encompasses issues pertaining to the propriety of the underlying investigation. See Misco, 484 U.S. at 34 (specifically identifying seven criteria an arbitrator may consider during just cause discipline cases, including the timing and fairness of the investigation). To conclude otherwise would unreasonably limit the arbitrator's ability to interpret and apply the just cause provision in section 3.1 of the CBA. Therefore, we conclude that the CBA provides for final and binding arbitration of alleged violations of Desilets' Weingarten rights in the context of his just cause grievance.

In ruling that it had jurisdiction to consider Desilets' ULP complaint while the just clause grievance was proceeding to arbitration, the PELRB incorrectly concluded that "it is not necessary . . . to interpret the parties' CBA." Furthermore, instead of considering and interpreting the language of the CBA, the PELRB incorrectly concluded that arbitration would not be appropriate in this instance because: (1) "there is no evidence at this stage that the Weingarten claim has been raised within the context of the arbitration proceeding, nor is there any concrete assurance that the issue would be fully addressed in that forum;" (2) an inherent conflict existed since the Union would

be required to arbitrate Desilets' Weingarten issue based upon its own actions or inactions; and (3) Desilets' Weingarten claim was statutory, pursuant to RSA 273-A:5, I (a) & (g), and did not require an interpretation of the just clause provision of the CBA.

For reasons previously stated, we find no merit to these conclusions. In order to determine the threshold matter of the arbitrability of Desilets' Weingarten rights, the PELRB was required to interpret the CBA. See Appeal of State, 147 N.H. at 109. In the context of the just cause grievance, the CBA encompassed the dispute regarding alleged violations of Desilets' Weingarten rights during the two October 2002 interviews. Furthermore, in its determination, the PELRB acknowledged that Weingarten rights are often adjudicated in arbitration within the context of just cause grievances. Thus, we conclude the PELRB erred when it determined that the Weingarten rights were not arbitrable in the instant case.

Furthermore, we are also not persuaded that the Union's representation of Desilets in the just cause grievance presents such an inherent conflict that it precludes arbitration of this issue. At this juncture, Desilets does not have a pending claim against the Union and the Union has complied with all the requirements of the grievance procedure. Moreover, by initiating the just cause grievance, Desilets indicated his intent to be bound by the terms of the CBA, including union representation during the arbitration proceeding.

The primary purpose of the arbitration process is expeditious and economical dispute resolution. Appeal of Police Comm'n of City of Rochester, 149 N.H. at 535. The legislative purpose behind RSA chapter 273-A is to foster harmonious and cooperative relations between public employers and their employees by, among other things, establishing a PELRB "vested with broad powers to assist in resolving disputes between government and its employees." Laws 1975, 490:1, III (emphasis added). Allowing Desilets to contravene the underlying purpose of arbitration, by raising a substantive issue before the PELRB after agreeing to submit it to final and binding arbitration under the CBA, would not be in accord with the legislative purpose of RSA chapter 273-A. See Appeal of Police Comm'n of City of Rochester, 149 N.H. at 535.

Accordingly, we conclude as a matter of law that the PELRB erred by determining that Desilets' ULP complaint in this case was not arbitrable and by exercising jurisdiction over the ULP complaint while the just cause grievance was proceeding to arbitration. In light of our ruling, we need not address the City's remaining arguments.

Reversed.

BRODERICK, C.J., and DALIANIS and DUGGAN, JJ., concurred.

NH Supreme Court reversed this decision on 2/24/2006, Slip Op. No. 2005-264
(NH Supreme Court Case No. 2005-264)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Marc Desilets Complainant v. City of Manchester, Manchester Police Dept. Respondent	Case No: P-0706-34
Marc Desilets Complainant v. Manchester Police Patrolman's Association Respondent	Case No: P-0706-35 Decision No. 2004-168

APPEARANCES

Representing Marc Desilets:

J. Joseph McKittrick, Esquire

Representing the City of Manchester:

David A. Hodgen, Chief Negotiator

Representing the Manchester Police Patrolman's Association:

James W. Donchess, Esquire

BACKGROUND

Marc Desilets (hereinafter "Desilets" or "the Complainant") filed an improper practice charge against the City of Manchester, Manchester Police Department (hereinafter "the City") on December 22, 2003 alleging that the City violated RSA 273-A:5 I (a) and (g) when it prevented him from obtaining a representative of his choice, and interfered with the representative he did obtain, relative to an investigative interview conducted on October 30, 2003. Desilets also alleges that the City violated RSA 273-A:5 I (a) and (g) when it denied him a representative during an interview conducted on October 31, 2003. The City filed its answer denying the Complainant's charges on January 13, 2004 and also filed a Motion to Dismiss. In its Motion to Dismiss, the City claims, among other things, that since Desilets has filed a grievance asserting that his termination is without just cause, the PELRB does not have jurisdiction at this time. The City states that the issue of just cause, including the propriety of the disciplinary interviews, is for an arbitrator to decide, not the PELRB. Desilets 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, Desilets 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 alleges that in a meeting with Union President Todd Boucher on October 27, 2003 his rights under RSA 273-A were violated when Boucher told him that the Union was not going to represent him because he was not a dues paying member of the Union. After submitting an application to join the Union, Desilets alleges that on October 29, 2003 Boucher told him that the application was being held up until the potential investigation involving the Complainant was concluded. Desilets claims that he again asked Boucher for Union representation on October 30, 2003, immediately prior to the internal affairs interrogation. He alleges that 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 Frank 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.

A pre-hearing conference was conducted at the PELRB on February 5, 2004 during which the parties stipulated to the consolidation of the instant matters. The City 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.

The Complainant filed a Motion for Interim Order Enjoining Arbitration on February 13, 2004 and, following an evidentiary hearing before the Hearing Officer on February 24, 2004, it was denied in PELRB Decision No. 2004-024, dated March 4, 2004.

Hearings were conducted before the undersigned Hearing Officer at PELRB offices on May 11 and 17, 2004, during which all parties were present. At the conclusion of the May 17th hearing, the record was closed subject to the filing of post-hearing briefs by the parties, all of which were duly received by the PELRB on or before June 1, 2004. Upon review of all filings submitted by the parties and consideration of all relevant evidence, the Hearing Officer hereby determines the following:

FINDINGS OF FACT

1. The City of Manchester Police Department ("the City") is a public employer within the meaning of RSA 273-A:1, X.

2. The Manchester Police Patrolman's Association ("the Union" or "MPPA") is an employee organization and is the exclusive bargaining representative for all regular full-time police officers employed by the City.

3. The Union and the City are parties to a collective bargaining agreement (CBA) for the period July 1, 2002 to June 30, 2004. Article 3.1 of the CBA provides as follows:

> "The MPPA and the Commission agree that there will be no discrimination against any employee on account of membership or nonmembership in the MPPA and no disciplinary action shall be taken against an employee except for just cause."

(Joint Exhibit No. 18, p. 3).

4. Marc Desilets ("the Complainant") was a police officer employed by the City from January 10, 1988 until November 10, 2003. While employed by the City, he was a public employee within the meaning of RSA 273-A:1, IX.

5. For fourteen (14) years, Desilets was a dues paying member of the Union. In September 2002, he voluntarily ended his union membership and no longer paid union dues.

6. On October 27, 2003, Desilets met with the President of the Union, Officer Tim Boucher ("Boucher") and expressed interest in re-joining the Union. The Complainant told Boucher that he was going to be the subject of an internal affairs investigation and would need the Union's help. He discussed with Boucher the facts and circumstances leading to the investigation, portions of which were untruthful. Boucher himself determined that Desilets' description of the events was not credible, although he did not express this conclusion to Desilets at the time. At some point during the conversation, Boucher told the Complainant that the Union would not represent him in a matter that started prior to his joining the Union. The Complainant requested a dues deduction form and

Boucher said he would have Officer Rich Brennan put one in his mailbox. The Complainant completed the form and delivered it back to Officer Brennan's mailbox for processing. (See Joint Exhibit No. 22).

7. On October 29, 2003, Boucher called Desilets and informed him that his application for membership was going to be held up pending the outcome of his internal affairs investigation.

8. In the past, the only condition precedent to joining the Union has been completion and submission of the dues deduction form. There are no requirements within the Union's by-laws that require a rank and file vote, or other formal procedure to take place, in order for an officer to become a member of the Union.

9. On October 30, 2003, shortly after 8:00 AM, Desilets was contacted by Lieutenant Roach while on duty and ordered to report to his office. Lieutenant Roach advised the Complainant that he was going to be interviewed as part of the internal affairs investigation and stated that he would probably want to have a union representative present. Desilets was given until 9:00 A.M. to find a union representative and return to the office. The Complainant called Officer George Murphy, a former president of the Union, and asked him if he could attend. Officer Murphy declined, stating that he wasn't willing to get involved. The Complainant then called Officer James Curran, who was out of town and unable to be reached.

10. Meanwhile, the lieutenant and Boucher had occasion to speak at the station. As a result of the conversation, the lieutenant learned that Desilets was not a Union member and that the Union was not going to represent him during the internal investigation.

11. Desilets spoke to Boucher in the police station's locker room and informed him that he was being called into the internal investigation. Desilets asked Boucher if he or someone from the Union would come in with him. Boucher indicated that the Union would not represent him in the investigation but provided him with the Union's tape recorder for use during the interview. As acknowledged by Boucher at hearing, the reason the Union would not represent him was due, in part, to the fact that he was not a member. In the past, the Union, and Boucher himself, has represented officers in internal affairs interviews.

12. Desilets returned to Lieutenant Roach and informed him that he was having difficulty finding a Union representative. He described his efforts in calling Officers Murphy and Curran. Lieutenant Roach asked him if there was anyone else on the daily roster and the Complainant responded that there wasn't. The lieutenant informed Desilets that he had spoken with Boucher earlier and had learned that Desilets was not a member of the Union and that the Union was not going to represent him. Lieutenant Roach then informed Desilets that he had fifteen (15) minutes to find a representative, even though there were no time

limitations that required that the investigation or the interview to be completed by that date. After Desilets left, the lieutenant attempted to reach Officer Curran, but was also unsuccessful.

13. Desilets then contacted a fellow officer and friend, Officer Chris Gibbons, who was on duty that morning. They met briefly in the station garage. After the Complainant described his situation, Gibbons stated that he would be willing to be present with him during the internal affairs questioning. Gibbons is a Union member but has not held any union office, although he did serve once on the Union's contract negotiating team. He has not received any specialized training in representing employees during internal affairs interviews. Gibbons had five to ten minutes to speak with Desilets prior to the interview.

14. When Desilets and Gibbons arrived at the lieutenant's office at approximately 9:15 A.M., Lieutenant Roach asked Gibbons if he was aware of the union's position regarding representation of Desilets and recommended that he speak with Boucher. Gibbons left the room and called Boucher.

15. Gibbons spoke with Boucher over the phone. Gibbons asked Boucher whether there were going to be any complications or issues with him going into the interview with Desilets. Boucher told Gibbons that there wouldn't be if he was going into the interview as the Complainant's friend or witness, but there would be if he was going in as a representative of the Union. Gibbons returned to the interview room and told Lieutenant Roach that he was present with the Complainant just as a friend.

16. The interview commenced at approximately 10:00 A.M. At the outset, Desilets was asked to sign a so-called "Reverse Garrity" warning form, which he did. The form indicates that the investigation pertains to "the matter of theft by unauthorized taking." It also reads, in part, that:

> [t]his "warning" is to be used <u>only</u> when a member/employee of the Manchester Police Department is about to be questioned about possible criminal matters and it has officially been determined that any self-incriminating statements made by the member / employee <u>will not</u> be used against him/her in a criminal prosecution....
>
> You will be allowed union representation during this interview. Your union representative may act as your witness but, he/she may not represent you in a legal capacity or as counsel.

(<u>Joint Exhibit No. 23</u>). (Emphasis in original).

17. The interview lasted approximately two to three hours, and was conducted with Officer Gibbons present with the Complainant and Captain Marc Lussier present with Lieutenant Roach. Officer Gibbons spoke up on a number of occasions

during interview and at one point asked for a break in order to confer with the Complainant. Lieutenant Roach granted Officer Gibbons' request. During the break, Gibbons stressed to the Complainant that he needed to be honest and tell the truth during the interview.

18. On October 31, 2003, the Complainant reported to the police station and met with Captain Lussier, who informed him that the Chief of Police had ordered that he undergo a polygraph examination. The Complainant told the captain that he wanted to have a union representative present. The captain told the Complainant that he could not have a union representative during a polygraph exam but that he could take the matter up with the polygrapher.

19. Sergeant Peter Favreau was assigned to administer the polygraph examination. Prior to the commencement of the exam, the Complainant spoke with Sergeant Favreau and requested the presence of a union representative. Sergeant Favreau responded that due to the sensitivity of the polygraph machine, he was not entitled to a union representative. The sergeant did tell the Complainant that he could take a break at anytime in order to consult with a representative.

20. Sergeant Favreau asked the Complainant to again sign a "Reverse Garrity" warning form. The form again included the following wording:

> You will be allowed union representation during this interview. Your union representative may act as your witness but, he/she may not represent you in a legal capacity or as counsel.

(Joint Exhibit No. 24).

21. Before the formal commencement of the polygraph exam, Sergeant Favreau asked the Complainant a series of questions. The interview was tape-recorded. According to excerpts from the transcript of said interview, Sergeant Favreau read to the Complainant the text of the "Reverse Garrity" form. A portion of the transcript reads as follows:

> Favreau: The next line says you will be allowed union representation during this interview. This is a Polygraph Examination. I can't have anybody else in the room. Uh. Obviously, you have – uh – a Right to take this as you're doing, uh, you can, uh you know, certainly ask questions and if you feel uncomfortable and you need to talk to somebody, you can certainly do that, just let me know.
>
> Complainant: Can I just say that I have asked for representation and I was explained that I wasn't allowed representation because of the polygraph exam?

Favreau: Yup, absolutely, um the problem with that is, uh interruption of the test and in any type of polygraph we never allow um, a third party in the room, um, for purposes of the test but like I said, if you feel the need to stop me, and you want to go seek out some answers to your questions, you can do that, just let me know.

Complainant: I understand.

(See 10/31/03 Transcript Excerpt, pp. 2, 3).

22. Sergeant Favreau questioned the Complainant for about an hour. Based upon the Complainant's answers, it was determined that the polygraph examination was no longer necessary and the interview ended without the polygraph machine ever being used.

23. On November 3, 2003, a Letter of Disciplinary Intent was issued recommending that the Complainant's employment be terminated. The charges against the Complainant included, among others, that he had been untruthful during the October 30 and 31, 2003 interviews, and thereby violated certain specified Manchester Police Department Rules and Regulations. (Joint Exhibit No. 19).

24. A disciplinary hearing regarding Desilets' recommended termination was held on November 10, 2003 before the Chief of Police. Desilets did not notify or contact the Union in preparation for the hearing, but was accompanied by Attorney Vincent Wenners. Following the hearing, the Complainant was terminated from his position with the City.

25. Thereafter, Bouchard had occasion to have a conversation with Desilets regarding the filing of a grievance relative to the termination. Desilets asked Bouchard to file a grievance and Bouchard told Desilets that since he was not a member he would not do it for him, but did tell him that he would assist him in filing it himself. Desilets did not provide Bouchard with any information relative to the grounds or merits of his grievance.

26. Article 7.2 of the parties' CBA provides in pertinent part that "[a] member of the bargaining unit must first take up the grievance with his immediate supervisor." Article 7.11 provides, "[t]he employee, when discussing his grievance with management, may at his/her discretion, be accompanied by a Union representative." (Joint Exhibit No. 18).

27. The parties submitted the following factual stipulations to the Hearing Officer:

(a) On December 20, 2003, Edward J. Kelly, Esq., on behalf of Marc Desilets, initiated a grievance with Sergeant Steve Simmons, Desilets immediate supervisor, alleging that Desilets termination was not for just cause.

(b) The grievance has been processed through the initial steps of the grievance procedure, the Union has filed for arbitration, and the AAA has scheduled the arbitration hearing for June 25, 2004 before arbitrator Richard G. Higgins.

(c) For purposes of this hearing only, the Lt., Capt. and Sgt. may testify without contradiction that in their opinion, Marc did not tell the complete truth in his interview of October 30, 2003.

28. In a letter dated January 22, 2004 to Chief Negotiator David Hodgen, Attorney James W. Donchess wrote, in pertinent part, that:

"The Manchester Police Patrolman's Association ("MPPA") supports Marc Desilets' appeal, and the MPPA requests that a pre-arbitration meeting be scheduled and that the matter be arbitrated pursuant to the provisions of the Collective Bargaining Agreement between the City of Manchester and the MPPA."

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 appropriate in the instant matter as the Complainant has alleged numerous violations of RSA 273-A:5 against both the City and the Union.

SUMMARY OF DECISION

The City's Motion to Dismiss is denied. The PELRB's jurisdiction in the instant matter is appropriate and, conversely, it is not appropriate to defer the instant dispute to arbitration, particularly in light of the fact that the Complainant has alleged a breach of the duty of fair representation against the Union. Moreover, the Complainant's framing of the instant complaint is legally sufficient in order for the matter to proceed for a consideration of the merits.

The Complainant's improper practice charges against the City relative to alleged violations of his *Weingarten* rights are sustained. The Complainant's improper practice charge against the Union for breach of its duty of fair representation is sustained in part and denied in part.

DISCUSSION

The City's Motion to Dismiss:

The City asserts that Desilets' case must be dismissed as a matter of law on two (2) separate grounds. First, it contends that since the issue of whether the Complainant was terminated for just cause is currently pending in arbitration, the manner in which the City interviewed the Complainant is appropriately for the arbitrator to decide, not the PELRB. The

City argues that the PELRB must either dismiss the instant complaint against the City for lack of jurisdiction or, at the very least, defer the dispute to arbitration. Secondly, the City claims that the matter must be dismissed because the Complainant has not stated a claim upon which relief can be granted. Its argument in this regard is based upon the assertion that Desilets alleged in his complaint that he was denied a representative, but did not allege that he was denied a *Union* representative. The City maintains that the Complainant's charge, as phrased, is not one upon which relief may be granted by the PELRB.

As to the City's first argument, the Hearing Officer concludes that the PELRB has jurisdiction over the instant matter. The law itself provides that the PELRB has primary jurisdiction of all violations of RSA 273-A:5. RSA 273-A:6 I. It is well-settled by this Board that the denial of an employee's *Weingarten*[1] rights or, more specifically, the right to a union representative during an investigative interview, constitutes an unfair labor practice and a violation of RSA 273-A:5 I (a). *International Brotherhood of Police Officers Local 580 v. Rochester Police Commission*, PELRB Decision No. 1997-085 (October 27, 1997), *New Hampshire Troopers Association v. New Hampshire Department of Safety, Division of State Police*, PELRB Decision No. 95-02 (March 20, 1995), *International Brotherhood of Police Officers, Local 394 v. City of Manchester, Police Department*, PELRB Decision No. 92-73 (May 4, 1992). Since the instant complaint similarly alleges violations of an employee's *Weingarten* rights, there would normally be no question as to the Board's jurisdiction.

Here, the City argues that in light of the pending grievance relative to Desilets' termination, the PELRB does not have jurisdiction, or, in the alternative, the PELRB should first defer to the arbitration process. The City points to the fact that the grievance alleges that Desilets was terminated without just cause. (See Finding of Fact No. 26(a), above). As a "just cause" grievance, the City contends that the Desilets *Weingarten* claims are properly adjudicated in arbitration. While I agree that *Weingarten* rights are often litigated in that forum and within the context of just cause grievances,[2] the instant case does not require such an approach, nor would it be an appropriate manner in which to proceed under the circumstances. First of all, as the above cases reflect, the Board has issued rulings in the past regarding *Weingarten* rights without ordering deferral of the issue to arbitration. In the case of *International Brotherhood of Police Officers, Local 394 v. City of Manchester, Police Department*, PELRB Decision No. 92-73 (May 4, 1992), the PELRB sustained a *Weingarten* violation against the City despite the existence of a contractual grievance procedure. Additionally, none of the cases cited by the City describe a Board precedent whereby any and all *Weingarten* claims must be deferred to arbitration. In *Manchester Police Patrolmen's Association v. City of Manches*ter, PELRB Decision No. 93-155 (December 2, 1993), the PELRB issued an "Order to Arbitrate," wherein it directed the parties to proceed to and complete the arbitration grievance process. As part of its order, it directed the arbitrator to determine whether there was a violation of the officer's *Weingarten* rights, as determined by the Board in Decision Nos. 92-73 and 92-194. The Board did not, however, order that this ruling be applied to all such future cases. On the contrary, the Board determines on a case-by-case basis, within its discretion, whether or not a matter is appropriate for arbitration.

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[1] *N.L.R.B. v. Weingarten*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed. 2d 171 (1975).
[2] See DISCIPLINE AND DISCHARGE IN ARBITRATION 49-53 (N. Brand ed. 1998).

Here, there is no evidence at this stage that the *Weingarten* claim has been raised within the context of the arbitration proceeding, nor is there any concrete assurance that the issue would be fully addressed in that forum. This is not particularly surprising given the fact that in the instant case Desilets has also filed a complaint against the Union for failure to represent him in the investigative interviews. If ordered to arbitrate the *Weingarten* issue, in all likelihood the Union would be forced to argue that the Complainant's rights were violated, at least in part, based upon its own actions or inaction.[3] Based upon this significant and inherent conflict alone, the instant *Weingarten* issue is not appropriate for resolution through the arbitration process and, under these circumstances, the City's request for deferral must be denied.

It is important to note that Desilets' *Weingarten* claim is statutory under RSA 273-A:5 I (a) [to restrain, coerce, or otherwise interfere with its employees in the exercise of the rights conferred by the chapter] and (g) [to fail to comply with this chapter or any rule adopted under the chapter] relative to the interviews that were conducted by the City. In this regard, the Complainant has not alleged a violation of RSA 273-A:5 I (h) [to breach a collective bargaining agreement]. Therefore, it is not necessary for me to interpret the parties' CBA, or specifically its' just cause provision, as to the merits of the Complainant's underlying termination.

The City's second argument for dismissal is also denied. As referenced above, Desilets has alleged that the City violated his *Weingarten* rights under RSA 273-A:5 I (a) and (g). PELRB regulations bestow upon a complainant the burden of going forward with a case and the obligation to prove the proposition that it asserts by a preponderance of the evidence. N.H. CODE ADMIN. R. PUB 201.06 (b) and (c). Whether or not the Complainant may have in artfully (or intentionally) phrased his complaint in the manner that he did, it is still his burden to prove his case. In other words, to the extent that Desilets alleges that he was unlawfully denied a "representative" as opposed to a "union representative," he still carries the burden of proof in establishing a violation of the law in either instance. In this case, the only way in which I can fully assess the Complainant's allegations, and indeed the City's argument for dismissal in the instant context, is to consider the evidence as a whole. I therefore deny the City's Motion to Dismiss.

<u>The Complainant's Case Against the City</u>:

"*Weingarten Rights*:"

This Board has long recognized an employee's right to union representation during investigative interviews. In *Portsmouth Police Officers, I.B.P.O., Local 402 v. Portsmouth Police Commission*, Decision No. 1997-017 (February 14, 1997), the Board summarized so-called "Weingarten rights" as according "employees the right to union representation at an investigatory interview if they reasonably believe the investigation will result in disciplinary action." The PELRB had earlier held that in such situations:

[3] The National Labor Relations Board has itself denied deferral to contractual grievance procedures where "the unfair labor practice charge alleged a breach of the duty of fair representation in connection with the application of the collective bargaining agreement." THE DEVELOPING LABOR LAW 1435 (P. Hardin 3d ed. 1992)(citations omitted).

> a reasonable attempt must be made to contact and have available a union representative of the employee's choice if that representative is reasonably available, with "reasonably available" meaning that the representative is capable of presenting himself without unreasonably delaying the employer's administrative interview and without impeding the employer's ability to fulfill its mandated governmental function, namely, the operation of a police department.

International Brotherhood of Police Officers, Local 394 v. City of Manchester, Police Department, PELRB Decision No. 92-73, p. 7 (May 4, 1992). It also found that "the employee's union representative must be sufficiently skilled so that the employee's procedural rights are not prejudiced." *Id.* at 6. In this regard, the Board has gone on to say, "contract interpretation, imposition of discipline and grievance adjustment are characteristic of [those] purposes...[for which]...access to appropriate and competent union representation [should be protected]." *Amalgamated Transit Union, Local 717 v. Manchester Transit Authority*, PELRB Decision No. 1999-054, p. 5 (June 15, 1999), quoting *International Brotherhood of Police Officers Local 580 v. Rochester Police Commission*, PELRB Decision No. 1997-085 (October 27, 1997).

Desilets alleges that the City violated RSA 273-A:5 I (a) and (g) when it prevented him from obtaining a representative of his choice, and interfered with the representative he did obtain, relative to an investigative interview conducted on October 30, 2003. He also alleges that the City violated RSA 273-A:5 I (a) and (g) when it denied him a representative during an interview conducted on October 31, 2003. It is against the aforementioned legal precedents that the instant allegations and evidence must be measured.

The October 30, 2003 Interview:

The instant facts portray a scenario in which the application of a straightforward rule can somehow become problematic, despite good intentions.

At the outset, I find that the October 30, 2003 interview was of an investigative nature for which Desilets reasonably believed could result in his being disciplined. As the record reflects, he was aware that he was the subject of an ongoing internal investigation regarding his alleged misconduct. (Finding of Fact, No. 6, above). Moreover, the purpose of the October 30, 2003 meeting was to ask him questions relating to his alleged misconduct. (Finding of Fact, Nos. 10 and 17, above). Thus, his right to a union representative during this interview cannot be disputed and, indeed, the City does not contest this right. The City's own "Reverse Garrity" warning form states explicitly that "you will be allowed union representation during this interview," and, in fact, Lieutenant Roach informed Desilets on that morning that he would probably want to find a union representative. (Findings of Fact Nos. 10 and 17, above). In this context, I find that the Complainant's actions in following the lieutenant's recommendation to find a union representative and his later statement to the lieutenant that he was having trouble finding a union representative, constitute his stated desire to exercise of his right to have such representation present during the interview. Likewise, the lieutenant's knowledge of Desilets following his recommendation to find a union representative evidences his understanding that Desilets had in fact chosen to exercise his right to union representation during the interview.

By all accounts, the City was prepared to accommodate Desilets' exercise of his *Weingarten* rights. However, when it learned that he was not able to locate a union representative, the City took a different approach. It was at this time that Desilets was told by Lieutenant Roach that the interview was still going to take place that morning and that he had just fifteen (15) minutes to find someone. Under the circumstances, I conclude this ultimatum did not afford Desilets a reasonable opportunity to find a union representative, let alone adequately consult with any such person that he was able to find. At hearing, the City presented no evidence of urgent circumstances or any other basis under which time was of the essence. In fact, on direct examination, Lieutenant Roach indicated that there were no time limitations that required either the investigation or the interview to be completed on that date. (Finding of Fact No. 13, above). Further complicating the matter, by this point in time the lieutenant had become aware that the Union was not going to represent Desilets during the interview. He had learned this during a conversation with Boucher that morning. (Finding of Fact No. 11, above). I find it particularly troubling that upon learning that the Union was not going to represent Desilets, and despite the lack of any time pressure to complete the interview that morning, Lieutenant Roach nevertheless elected to tell Desilets that he had just fifteen (15) minutes to find someone to represent him.

The record reflects that the Complainant was able to reach Officer Gibbons, who was willing to accompany him into the interview. In complying with the lieutenant's direct instruction to return within fifteen (15) minutes, Desilets and Gibbons only had a few minutes to confer before they needed to present themselves for the interview. At this juncture, the nature of Gibbons' specific status in the room should have been of no concern to Lieutenant Roach. Gibbons had obviously been obtained on short notice as the Complainant's representative. Nevertheless, the lieutenant saw fit to recommend to Gibbons that he contact Boucher regarding the Union's position with respect to Desilets. Regardless of the lieutenant's intentions, the only purpose this ultimately served was to clarify that Gibbons was not participating as a union representative. As the record reflects, after speaking with Boucher, Gibbons returned to say that his presence in the interview was only as a friend to Desilets. (Finding of Fact No. 16, above).[4] Any argument the City may have had that Gibbons served as Desilets' union representative was nullified by Lieutenant Roach speaking to Gibbons about the union representation issue and recommending that he speak with Boucher. Thus, through Lieutenant Roach and Captain Lussier, who was also present in the room, the City became aware that Desilets did not have union representation, despite his right to such representation. Indeed, the City's own "Reverse Garrity" form contains the phrase "[y]ou will be allowed union representation during this interview." (Joint Exhibit No. 23).

While the record does reflect that Desilets was permitted to have a representative present during the interview, Gibbons was not a Union official and did not have experience or training in representing officers in internal affairs interviews. Whether or not Gibbons ultimately served as a competent representative is beside the point, since the right to union representation attaches at the outset, not upon the outcome, of the investigatory interview. Given Gibbons' status, it is

[4] Although Gibbons' testimony indicates that he did not state the nature of his participation upon his return from speaking with Boucher, I credit the testimony of both Lieutenant Roach and Desilets who testified that Gibbons told those present that he was only there as a friend. (Desilets testified that Gibbons also indicated that he was not present as a union representative.)

almost inconsequential that he and Desilets were not afforded an adequate opportunity to confer prior to the interview, but this fact is still reflective of the City's overall consideration of the Complainant's rights.

The City's *Weingarten* obligations were certainly made difficult by the fact that the Union, through Boucher, had indicated that it would not be representing the Complainant. Perhaps the prudent course of action would have been to suspend the interview for that day in order to allow for an appropriate inquiry on how best to proceed. As it stands, the City acted in such a way that its conduct became inextricably intertwined with that of the Union's, in that the City became complicit with the Union in denying Desilets his right to union representation. In summary, the City was aware of Desilets' right to union representation, of his request and desire for union representation, and that he was unable to obtain union representation, and yet was insistent on proceeding with the interview at that time and on that date. While Desilets' request for union representation may not unreasonably delay the City's administrative interview or impede its ability to fulfill its' mandated governmental function, there has been no showing that the City had any concerns in this regard.

I find this course of action by the City to conflict with the Board's holding in *International Brotherhood of Police Officers, Local 394 v. City of Manchester, Police Department*, PELRB Decision No. 92-73, p. 7 (May 4, 1992) and its progeny, and therefore sustain the Complainant's charge against the City. I reach my decision with respect to the October 30, 2003 interview without specific reliance upon the Complainant's credibility, as the facts upon which I rely were either not in dispute or were otherwise left unrebutted by the City.

Based upon the foregoing, I find that on October 30, 2003 the City violated RSA 273-A:5 I (a) & (g) by not affording the Complainant a reasonable opportunity to obtain and consult with a Union representative of his choosing and by interfering with the representation he did obtain. As remedies, I order that the City cease and desist from denying employees their *Weingarten* rights, that any and all information derived from the October 30, 2003 interview be stricken from the investigation and that the charges against the Complainant directly resulting from the October 30, 2003 interview be dismissed. All other allegations and claims for relief are denied.

The October 31, 2003 Interview:

I sustain the Complainant's charge with respect to this interview as well. Here, there is no dispute that the Complainant requested a union representative and that the request was denied under the premise that he was to undergo a polygraph exam. (See Finding of Fact Nos. 20 & 22, above). However, the polygraph exam was never administered. Therefore, the City's basis for excluding a union representative from the interview does not apply and the underlying issue of whether or not an employee has the right to have a union representative present during a polygraph exam similarly becomes irrelevant. The fact remains that the City chose to conduct a taped interview of the Complainant after denying him his request for a union representative. Since this was an investigative interview the results of which the Complainant reasonably anticipated would result in his being disciplined, he had the right to have a union representative present on his behalf, and this right was violated by the City.

While I do not question Sergeant Favreau's knowledge of polygraph techniques, and his credibility in testifying that he conducted matters in accordance with his training, Desilets' rights under the law were still violated. There is no "polygraph exception" to the *Weingarten* rule. I note that this Board has previously held that in polygraph situations, an employee at least has the right to have a union representative present to observe the test and denial of this right constitutes an unfair labor practice as well as a violation of RSA 273-A:11 I (a) and (b). *New Hampshire Troopers Association v. New Hampshire Department of Safety, Division of State Police*, PELRB Decision No. 95-02 (March 20, 1995). However, the interview that ultimately took place here was just like any other investigatory interview in which an employee, as the subject of the investigation and reasonably believing discipline will result, may elect to exercise his or her right to union representation.

Sergeant Favreau's comments to Desilets that he could consult with someone "if he felt uncomfortable", and to "just to let him know" (See Finding of Fact No. 22, above), while made in anticipation of a polygraph examination, do not satisfy Desilets' *Weingarten* rights. The fact is that Desilets specifically requested union representation. "Once an employee makes a valid request for union representation, the employer is granted one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice of continuing the interview unaccompanied by a union representative or having no interview at all." *International Brotherhood of Police Officers, Local 394 v. City of Manchester, Police Department*, PELRB Decision No. 92-73, p. 6 (May 4, 1992)(citations omitted). The City exercised none of these. Desilets' request was denied, under the guise of the polygraph exam, and the interview commenced. Under the circumstances, the City's use, once again, of a "Reverse Garrity" warning form containing the phrase "[y]ou will be allowed union representation during this interview" (See Joint Exhibit No. 24) is rather perplexing.

Based upon the foregoing, I find that the City violated RSA 273-A:5 I (a) & (g) by denying the Complainant his right to union representation at the October 31, 2004 interview. As remedies, I order that the City cease and desist from denying employees their *Weingarten* rights, that any and all information derived from the October 31, 2003 interview be stricken from the investigation and that the charges against the Complainant directly resulting from the October 31, 2003 interview be dismissed. All other allegations and claims for relief are denied.

The Complainant's Case Against the Union:

Desilets alleges that the Union violated RSA 273-A:5 II (a),(c),(d), (f) and (g) in its failure, among other things, to allow him to join the Union, represent him in the internal affairs interviews of October 30 & 31, 2003, and process his termination grievance. He characterizes his claim against the Union, generally, as violations of its' duty of fair representation ("DFR"). (Complainant's Memorandum of Law, pp. 5-7).

This Board has accepted jurisdiction of so-called "DFR" claims in the past. See *Sandra LaVergne v. AFSCME Council #93, Local 2715*, PELRB Decision No. 91-22 (April 25, 1991); *Mascoma Valley Regional School Bus Drivers v. John Fessenden, Uniserv Director, NEA-New Hampshire*, PELRB Decision No. 90-44 (June 7, 1990). It has also stated that an aggrieved employee's proper recourse against a union for wrongfully refusing to proceed with a *bona fide* grievance is to pursue a duty of fair representation unfair labor practice. *Town of Seabrook v. Seabrook Permanent Firefighters Association, Local 2847, IAFF*, PELRB Decision No. 1999-116, p. 3 (October 27, 1999). The Board has also had occasion to address the rights of non-dues paying members of a union, who also happen to hold positions within a certified bargaining unit represented by an exclusive representative. In 1989, the Board held that "[a]n organization awarded certification after an election becomes the exclusive representative of that bargaining unit and has the obligation to represent and negotiate for all members of the unit regardless of whether they are dues paying members of the organization or not..." *Concord Association of Technical Service Employees/NEA-New Hampshire v. NEA-New Hampshire*, PELRB Decision No. 89-74 (October 26, 1989). The New Hampshire Supreme Court has itself declared that "an exclusive representative certified under RSA 273-A:8 (1987) has a duty to represent all employees within the bargaining unit fairly without regard to whether any employee is a union member." *Nashua Teachers Union, et al v. Nashua School District, et al*, 142 N.H. 683, 688 (1998) (citing RSA 273-A:3, I, :11, I).

Accordingly, the Union here, as the certified representative of the bargaining unit, is obligated to represent all police officers in the certified unit, including Desilets. The record reflects, however, that the Union treated the Complainant differently because of his non-membership, non-dues paying status and declined to represent him as a result. The Union does not dispute this fact, but states that the very language of RSA 273-A:5 II (c) permitted it to act in such a manner. (See MPPA Post-hearing Brief, p. 5).

RSA 273-A:5 II (c) specifically provides that it shall be a prohibited practice for the exclusive representative of any public employee:

> to cause or attempt to cause a public employer to discriminate against an employee in violation of RSA 273-A:5, I (c), or *to discriminate against any public employee whose membership in an employee organization has been denied or terminated for reasons other than failure to pay membership dues*;

N.H. REV. STAT. ANN. 273-A:5 II (c) (1999). (Emphasis added). The Union maintains that said language (*italicized*) permits it to discriminate against non-members. This argument is ill

founded, as the instant statutory provision is actually an anti-discrimination provision related to the enforcement of union security clauses.[5]

I conclude that under RSA 273-A:3 I and RSA 273-A:11, I, as cited by the Court in *Nashua Teachers Union, et al v. Nashua School District, et al*, 142 N.H. 683 (1998), an exclusive representative commits a prohibited practice pursuant to RSA 273-A:5 II, when it breaches its duty of fair representation to bargaining unit members. Inherent in the obligation to negotiate in good faith (RSA 273-A:3 I) and the right to exclusively represent employees in the certified bargaining unit (RSA 273-A:11, I), is the duty to represent all such employees fairly and impartially. A breach of this duty or obligation must necessarily result in the violation of one or more provisions of RSA 273-A:5 II, depending upon specific facts and circumstances, as the actions (or inaction) of the exclusive representative impact the rights of public employees under the law.

I therefore find that when the Union declined to accept Desilets as a member and "held up" his application to rejoin the Union it committed an unfair labor practice in violation of RSA 273-A:5 II (a), (f) and (g). Said action constituted a restraint or other interference with Desilets' exercise of his rights under the law. Desilets, as a bargaining unit member, presented himself ready, willing and able to pay membership dues and there were no by-laws of the Union or other impediments to prohibit him from joining at that time. Since the Union has agreed in Article 3.1 of the CBA that "there will be no discrimination against any employee on account of membership or nonmembership," I sustain Desilets' RSA 273-A:5 II (f) [to breach a collective bargaining agreement] allegation.

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[5] The language at issue in RSA 273-A:5 II (c) mirrors that contained in section 8(b)(2) of the National Labor Relations Act. Section 8(b)(2) of the said act, also known as the Labor Management Relations (Taft-Hartley) Act provides that:

> It shall be an unfair labor practice for a labor organization...to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

Labor Management Relations (Taft-Hartley) Act § 8 (b)(2), 29 USC § 158 (b) (2). As stated in National Labor Relations Act: Law & Practice,

> the first clause of Section 8(b)(2) is aimed primarily at preventing a union from causing an employer to violate Section 8(a)(3) by discriminating against an employee for reasons unrelated to the enforcement of a union security clause, *while the second clause is intended to prevent a union from inducing employer discrimination in the enforcement of union security provisions.* Although a union is free, for the most part, to prescribe and enforce its own rules with respect to the retention and acquisition of membership in the union and such restrictions as do exist generally fall under Section 8(b)(1)(A), when internal union discipline or other internal union actions cause an employer to adversely affect the employee's employment relationship, Section 8(b)(2) is violated.

National Labor Relations Act: Law & Practice § 8.10 (M. Bender & Company 2004). (Emphasis added).

I similarly find that when the Union declined to represent Desilets during the October 30, 2003 internal affairs interview, while having full knowledge the meeting was taking place, it committed an unfair labor practice in violation of RSA 273-A:5 II (a), (f) and (g). Testimony by Boucher established that the Union has provided representation to employees in the past during internal affairs investigations when they have asked for such representation. (Finding of Fact No. 11, above). I also conclude that when Boucher discussed the fact of Desilets' non-membership with the investigating officer, Lieutenant Roach, prior to the commencement of said interview, and indicated that the Union would not be representing Desilets, it violated 273-A:5 II (a), (c), (f) and (g). I include the RSA 273-A:5 II (c) violation [to cause or attempt to cause a public employer to discriminate against an employee in violation of RSA 273-A:5, I (c)] because it was based upon this communication that caused the City, through Lieutenant Roach, to ultimately deprive Desilets of his right to union representation during the October 30th interview.

The Union's illegal conduct is particularly evident by virtue of Bouchard's direction to Gibbons on October 30, 2003 that he could be present with Desilets during the interview merely as a friend, but not as a union representative. Even if, *arguendo*, Gibbons was sufficiently qualified to be designated as a Union representative by Bouchard, Bouchard's instructions to him make clear as to what capacity or standing Gibbons carried into the interview. While Bouchard's direction to Gibbons may have been based upon his understanding of the law and concerns for his membership, it nonetheless cannot be excused. I reach this conclusion while noting that Bouchard did offer some verbal guidance to Gibbons prior to the commencement of the Complainant's interview.

As discussed earlier, the performance of Gibbons during the interview is beside the point, even though it would appear that he performed as well as could reasonably be expected under the circumstances. In this context, neither Gibbons nor the Union must bear any responsibility for Desilets' misconduct during the October 30th interview. (see Finding of Fact No. 27 (c), above).

As there is no evidence that the Union had any knowledge that the October 31, 2003 interview was taking place, I dismiss that portion of the Complainant's charge. The record reflects that Desilets made requests of Captain Lussier, and later to Sergeant Favreau, that he be permitted to have a union representative present during the interview on that day. However, there is no evidence that Bouchard or any other Union official had any knowledge that such meeting was taking place or that a request for union representation had been made.

Desilets also alleges that the Union committed an unfair labor practice by failing to file a grievance on his behalf. I dismiss this portion of his complaint based upon the fact that Desilets presented no evidence that he furnished Boucher or any other Union official with any information as to the nature and merits of his grievance. Just as Desilets has the right to be treated as any other bargaining unit member, he is not entitled to special treatment. It is important to note that the Union's obligations of non-discrimination between members of the certified bargaining unit are distinguished from its right to determine whether or not a particular grievance has merit. As the Board discussed in *Town of Seabrook*, above, public policy requires that "neither an outside party, such as a public employer, nor an internal party, such as a bargaining unit member, should have the authority to commit a union to the multi-step process of a grievance procedure when the union determines that the grievance under consideration lacks

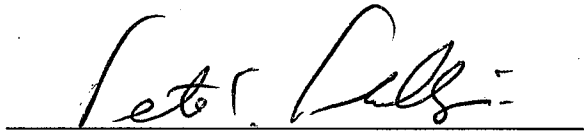
merit." *Town of Seabrook v. Seabrook Permanent Firefighters Association, Local 2847, IAFF*, PELRB Decision No. 1999-116, p. 3 (October 27, 1999). Here, Desilets presented no information to the Union in order for it to reasonably assess whether on not his grievance would have any merit. The fact that Desilets had earlier been untruthful to Boucher about the facts and circumstances leading to the investigation (see Finding of Fact No. 6, above) would itself raise understandable concerns for the Union regarding pursuit of the grievance.

The parties' CBA allows employees to file grievances on their own (Finding of Fact No. 26, above) and ultimately Desilets, through his attorney, proceeded in this fashion (Finding of Fact No. 27(a), above). Therefore, the Union's initial reluctance to participate in the grievance process on behalf of Desilets is of no effect. Moreover, as the Union has processed the Complainant's termination grievance to arbitration and indicated that it supports his appeal (Finding of Fact No. 28, above), I dismiss that portion of the Complainant's charge related thereto as well. Since, as discussed above, I have ordered the charges arising out of the October 30th and 31st interviews to be dismissed, the arbitration may proceed upon any and all remaining charges.

Based upon the foregoing, I find that the Union violated RSA 273-A:5 II (a), (c), (f) & (g) in its failure to represent Desilets, a bargaining unit member. As remedies, I order the Union to cease and desist from discriminating against non-members of its organization, to post a copy of this decision on its official bulletin Board within the police station for a period of no less than thirty (30) days, and to forthwith fairly represent the Complainant in this matter. All other allegations and claims for relief are denied.

So ordered.

Signed this 20th day of October, 2004.



Peter C. Phillips, Esq.
Hearing Officer

Distribution:
J. Joseph McKittrick, Esq.
David A. Hodgen, Chief Negotiator
James W. Donchess, Esq.

NH Supreme Court reversed Decision No. 2004-168 on 2/24/2006, Slip Op. No. 2005-264 (NH Supreme Court Case No. 2005-264)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Marc Desilets Complainant v. City of Manchester, Manchester Police Dept. Respondent	Case No: P-0706-34
Marc Desilets Complainant v. Manchester Police Patrolman's Association Respondent	Case No: P-0706-35 Decision No. 2005-003

ORDER ON RESPONDENT CITY'S REQUEST FOR REVIEW OF HEARING OFFICER'S DECISION

The Public Employee Labor Relations Board ("Board"), meeting on December 29, 2004, took the following actions:

1. It reviewed the City of Manchester's Request for Review of Hearing Officer's Decision, filed with the Board on November 19, 2004.

2. It reviewed the Complainant's Objection to the City's Request for Review, filed with the Board on November 29, 2004.

3. It reviewed the Hearing Officer's Decision (PELRB Decision No. 2004-168), dated October 20, 2004, including all Findings of Fact and legal conclusions.

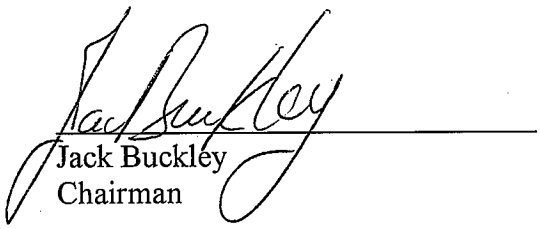
4. It examined the record in this matter, including the Complainant's unfair labor practice complaints, the City of Manchester's Answer and Motion to Dismiss, and the parties' post-hearing memorandums of law.

5. It sustained the decision of the Hearing Officer and DENIED the City's Motion for Review.

6. It also DENIED the City's Motion to Stay Hearing Officer's Decision filed on December 10, 2004.

So ordered.

Signed this 6th day of January, 2005.



Jack Buckley
Chairman

By unanimous decision. Chairman Jack Buckley and Members Seymour Osman and E. Vincent Hall present and voting.

NH Supreme Court reversed Decision No. 2004-168 on 2/24/2006, Slip Op. No. 2005-264
(NH Supreme Court Case No. 2005-264)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Marc Desilets Complainant v. City of Manchester, Manchester Police Dept. Respondent	Case No: P-0706-34
Marc Desilets Complainant v. Manchester Police Patrolman's Association Respondent	Case No: P-0706-35 Decision No. 2005-036

ORDER ON MOTION FOR REHEARING

The Public Employee Labor Relations Board (PELRB), meeting on March 14, 2005, took the following actions:

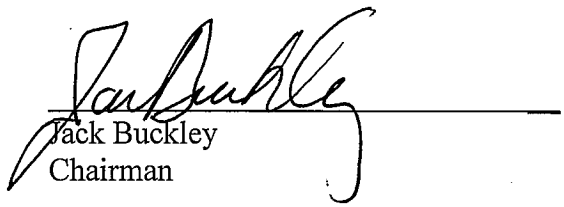
1. It reviewed the respondent *City's Motion for Rehearing* filed on February 3, 2005 and the Complainant Desilets' *Objection to the City's Motion for Rehearing* filed on February 11, 2005.

2. It re-examined the record in this matter, including the Complainant's unfair labor practice complaints, the City of Manchester's Answer and Motion to Dismiss, and the parties' post-hearing memorandums of law.

3. It reviewed PELRB Decision Nos. 2004-168 and 2005-003, previously issued in this matter.

4. It DENIED the *City's Motion for Rehearing*.

Signed this 22nd day of March, 2005.



Jack Buckley
Chairman

By unanimous decision. Chairman Jack Buckley and Members Seymour Osman and E. Vincent Hall present and voting.

Distribution:
David Hodgen, Chief Negotiator
J. Joseph McKittrick, Esq.
James W. Donchess, Esq.