Affirms PELRB Decision No. 2005-035

THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2005-436

APPEAL OF THE TOWN OF PELHAM
(New Hampshire Public Employee Labor Relations Board)

Argued: May 11, 2006
Opinion Issued: August 23, 2006

Devine, Millimet & Branch, P.A., of Manchester (Mark T. Broth and Jennifer M.N. Koon on the brief, and Mr. Broth orally), for the appellant.

AFSCME Council, Local 3657, of Boston, Massachusetts (Erin L. Goodwin and Jennifer Springer on the brief, and Ms. Goodwin orally), for the appellee.

Bernstein, Shur, Sawyer & Nelson, P.A., of Manchester (Dawnangela Minton and Andru Volinsky on the brief) for the New Hampshire Association of Chiefs of Police, as amicus curiae.

DALIANIS, J. The appellant, Town of Pelham (town), appeals a decision of the New Hampshire Public Employee Labor Relations Board (PELRB), in which the PELRB ordered the town to comply with an arbitrator's award mandating the reinstatement of an employee represented by the appellee, The American Federation of State, County and Municipal Employees Council 93, AFL-CIO, Local 3657, Pelham Police Employees (the union). We affirm.

The record supports the following facts. The town is a public employer within the meaning of RSA 273-A:1, X (Supp. 2005). The union is the exclusive bargaining representative for certain members of the Pelham Police Department (PPD), including dispatchers. The town and the union were signatories to a collective bargaining agreement (CBA) that governed the terms and conditions of their relationship, including a workable grievance procedure as required by RSA 273-A:4 (Supp. 2005). The CBA included several progressive levels of disciplinary action, ranging from a verbal warning to termination, though it provides that the sequence "need not be followed if an infraction is sufficiently severe to merit immediate suspension or discharge." The CBA contained no language mandating discipline, such as termination, for any particular form of misconduct.

The town employed Debra Desmarais as a PPD dispatcher from June 1998 until June 2002, when her employment was terminated. As a dispatcher, her normal responsibilities included: answering and initiating telephone calls; receiving members of the public at the PPD; watching video monitors, including those that monitored the lock-up area; recording walk-in 911 reports; and performing computer research regarding criminal records. Desmarais was not a sworn officer; she did, however, wear a uniform shirt with the PPD logo on it. Though dispatchers such as Desmarais are, at times, required to testify and author written reports in criminal matters, it is improbable that a dispatcher's report of an event will rise to the level of essential testimony for a prosecution.

In September 2001, the PPD began investigating allegations that Desmarais had, on numerous occasions, solicited and accepted a "police discount" at a local McDonald's restaurant. The investigation included interviews with Desmarais and employees of the McDonald's where she allegedly demanded the discounts. Though Desmarais acknowledged receiving discounts "three to four times," she claimed that she had requested a discount only once. Various restaurant employees, however, claimed that she had solicited discounts on ten to thirty separate occasions. As a result of the investigation, Desmarais, who had been on administrative leave from September 24, 2001, to March 14, 2002, received a five-day suspension in April 2002 for violating departmental rules regarding solicitation of discounts or gratuities.

Because of the discrepancies between the testimony of Desmarais and that of the restaurant employees, the town initiated a separate investigation into whether Desmarais had been truthful during the original investigation. The town re-interviewed Desmarais and the employees, and found the same testimonial disparities regarding the number of times Desmarais had solicited and received discounts. Following the second investigation, the town concluded that Desmarais had violated the PPD's "General Rules of Conduct," which require that "[o]n any official matter whatsoever, employees shall not

knowingly make any false statements or misrepresentations of the facts, nor withhold information that would assist in resolving the matter." Finding this to be just cause, the town notified Desmarais that she would be terminated from her employment as a dispatcher effective June 10, 2002.

As a result of the termination, the union proceeded to arbitration pursuant to the CBA. The town, without objection, voluntarily participated in the arbitration with the understanding that it would yield a final and binding award. A one-day arbitration was conducted on November 5, 2003, and the arbitrator rendered a decision on February 6, 2004. An arbitrator has the authority, in the context of a just cause grievance, to consider the underlying issues and surrounding circumstances necessary to interpret and apply the express provisions of the CBA and reach a final decision. Appeal of the City of Manchester, 153 N.H. ___, ___, 893 A.2d 695, 698 (2006). The arbitrator considered, among other things, the testimony of witnesses, the PPD's rule prohibiting false statements in connection with official matters, and our holding in State v. Laurie, 139 N.H. 325 (1995). Though the arbitrator found that Desmarais deliberately misrepresented the number of times she requested and received discounts at McDonald's, he concluded that termination was too harsh a penalty. Accordingly, while he did not order back pay or other contract benefits for the unemployment period beginning June 10, 2002, he did award reinstatement. The union thereafter requested, in a letter dated February 17, 2004, that the town comply with the award and reinstate Desmarais.

Rather than reinstate Desmarais, the town filed an improper practice charge with the PELRB, alleging that the union committed an unfair labor practice by demanding Desmarais' reinstatement. Specifically, the town asserted that the arbitrator's award was violative of public policy, as it required the reinstatement of "an individual proven to have been untruthful in her official duties and in her sworn testimony." The PELRB conducted an evidentiary hearing in the matter on September 23, 2004, and on March 16, 2005, issued a decision denying the town's complaint against the union and finding, instead, that the town committed an unfair labor practice by refusing to implement the arbitrator's award. The PELRB ordered the town to immediately reinstate Desmarais as a police dispatcher. The town subsequently filed a motion for reconsideration, which the PELRB denied.

On appeal, the town argues that the PELRB erred by "ignor[ing] the well-defined and dominant public policy against reinstating untruthful police department employees" and by applying an incorrect standard of review. "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 Nashua Police Comm'n, 149 N.H. 688, 689 (2003); see also RSA 541:13 (1997). Though the PELRB's findings of

fact are presumptively lawful and reasonable, we require that the record support the PELRB's determinations. Appeal of City of Laconia, 150 N.H. 91, 93 (2003).

We first address the town's assertion that the PELRB erred as a matter of law by issuing a decision in contravention of public policy. To so find, we must conclude that the PELRB's order contravenes a "strong and dominant public policy as expressed in controlling statutes, regulations, common law, and other applicable authority." Appeal of Amalgamated Transit Union, 144 N.H. 325, 327 (1999). Thus, in such cases our review is limited to the confines of positive law, rather than general considerations of supposed public interests. Cf. Harper v. Healthsource New Hampshire, 140 N.H. 770, 775 (1996) (court may refuse to enforce contract that contravenes public policy of statutory or nonstatutory origin).

The town argues that there is a "strong and dominant public policy" against the reinstatement of police department employees who are found to be untruthful and who may, however unlikely the possibility, be required to testify in future criminal matters. It finds support for its position in Laurie, a criminal case in which we ordered a new trial for a defendant convicted of first-degree murder after concluding that the State had failed to disclose evidence favorable to the defense. Laurie, 139 N.H. at 329-33. In Laurie, the State knowingly withheld pre-employment and personnel files detailing numerous instances of conduct that reflected negatively upon the character and credibility of a Franklin Police Department detective who was a key prosecution witness. Id. at 330-32. Finding that the detective's testimony "went directly to the issue of the defendant's guilt," and noting that the undisclosed evidence could have been used to impeach that testimony, we held that the defendant was denied due process of law and remanded the matter to the superior court for a new trial. Id. at 333.

To buttress its assertion that Laurie gave rise to a "strong and dominant public policy" justifying the reversal of the PELRB's decision, the town proffers two arbitration awards that cite Laurie as support for the just cause termination of police officers in New Hampshire. In International Brotherhood of Police Officers and Town of Derry, AAA No. 11 390 00173 98 (Oct. 26, 1998), the arbitrator noted that, in light of Laurie, an incident of untruthfulness in an officer's permanent record "may have an impact if he were called as a witness in a criminal case." Id. at 10. The arbitrator concluded that he had no authority to require the Town of Derry to "retain a police officer who has potentially jeopardized prosecution of criminal defendants." Id. at 11. In Dover Police Association I.B.P.O, Local 466 and City of Dover, New Hampshire, AAA No. 11 390 00871 95 (Dec. 21, 1995), the arbitrator noted that "[j]udges, juries, . . . and the public invest in [police officers] a confidence and trust that is central to the proper functioning of our democracy. The Laurie case evidences

the importance that the New Hampshire Supreme Court places on this fact." The town contends that "[t]his well defined and dominant public policy derived from Laurie" is easily extended to encompass police dispatchers, who may also be called as witnesses in criminal prosecutions for a variety of reasons.

In the context of a labor grievance, an arbitrator is free to consider general notions of the public interest when determining whether just cause for termination exists. The PELRB, however, as an administrative agency acting in a "quasi-judicial capacity," is granted only limited and special subject matter jurisdiction when reviewing such arbitral determinations. See Appeal of Amalgamated Transit Union, 144 N.H. at 327. Thus, the PELRB is limited to applying only "strong and dominant public policy as expressed in controlling statutes, regulations, common law, and other applicable authority, to address matters necessary to resolve questions arising within the scope of their jurisdiction." Id. at 327-28. Though the PELRB may refuse to enforce a CBA term that contravenes public policy, it may only do so within the confines of its limited jurisdiction. Id. at 328.

Therefore, when reviewing a decision of the PELRB, we cannot look to an arbitrator's award in a labor grievance as an expression of public policy. To conclude that the PELRB erred by enforcing an arbitration decision that violates a strong and dominant public policy, we must first conclude that such a policy is "expressed in controlling statutes, regulations, common law, and other applicable authority." Id. at 327-28. Because an arbitrator's award has no precedential effect upon this court, such an award does not fall within any of these categories.

More importantly, we disagree with the town's assertion that Laurie expresses a strong and dominant public policy against the reinstatement of civilian police department employees who are found to be untruthful and who might possibly be required to testify in future criminal matters. In Laurie, we addressed only a defendant's right under the State Constitution to receive exculpatory evidence from the State. Laurie, 139 N.H. at 327. The fact that the potentially impeachable witness in Laurie was a police officer was not dispositive of our decision, and we did not address the issue of terminating the employment of police officers who are known to be untrustworthy. While Laurie, as a practical matter, may influence a police department's internal hiring and disciplinary policies, it does not express a strong and dominant public policy to the extent posited by the town.

We do not mean to suggest that the town's assertion of a "public policy" against the reinstatement of police department employees who, as a result of certain misconduct, are deemed to be untrustworthy is, on an intuitive level, incorrect. However, as discussed above, we are compelled to look for strong, dominant public policy only within the confines of positive law, including

common law. See Appeal of Amalgamated Transit Union, 144 N.H. at 327; cf. Eastern Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000) (explicit, well-defined, and dominant public policy barring enforcement of CBA must be ascertained "by reference to laws and legal precedents, and not from general considerations of supposed public interests"). Because we find that no such public policy exists, we hold that the PELRB did not err as a matter of law by ordering the town to comply with the arbitrator's award.

The town next argues that the PELRB ignored the standard of review for arbitration awards as set forth in Appeal of Amalgamated Transit Union, 144 N.H. at 327, and instead "looked to federal labor law and derived a new standard of review." Specifically, the town asserts that the PELRB improperly relied upon Eastern Associated Coal Corp., 531 U.S at 62, in concluding that the "public policy exception" is limited to instances where an arbitration award violates positive law. Having reviewed the record before us, we find the town's argument to be without merit. In its order, the PELRB plainly identifies Appeal of Amalgamated Transit Union as setting forth the pertinent standard of review, and dutifully applies that standard in reaching its conclusion.

Affirmed.

DUGGAN, GALWAY and HICKS, JJ., concurred.

NH Supreme Court affirmed this decision on 8-23-2006, Slip Op. No. 2005-436.
(NH Supreme Court Case No. 2005-436)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Town of Pelham Complainant v. AFSCME Council 93, Local 3657, Pelham Police Employees Respondent	*	Case No: P-0775-1 Decision No. 2005-035

APPEARANCES

Representing the Town of Pelham:

Mark T. Broth, Esquire of Devine, Millimet & Branch, P.A.

Representing the Pelham Police Employees, AFSCME Council 93, Local 3657 :

Katherine M. McClure, Esquire, Associate Counsel

BACKGROUND

The Town of Pelham (hereinafter "Town") filed an improper practice charge on March 10, 2004 alleging that AFSCME Council 93, Local 3657 acting on behalf of the Pelham Police Employees (hereinafter "Union") committed an unfair labor practice in violation of RSA 273-A:5 II (a) and (f) by demanding that the Town implement an arbitrator's award. The previous arbitrator's award, issued on February 8, 2004, ordered the reinstatement of Debra Desmarais, without back pay or other contract benefits, to her former position as police dispatcher. Ms. Desmarais had been discharged from her position with the Town on June 10, 2002 following an internal investigation that determined she had been untruthful. The Town presents the instant complaint after receiving a letter dated February 17, 2004 from Union counsel demanding that the Town reinstate Ms. Desmarais in compliance with the arbitrator's award. The Town

contends, inter alia, that the arbitrator's award is violative of public policy, to the extent that it requires the Town to reinstate an individual proven to have been untruthful in her official duties and in her sworn testimony.

The Union filed its answer denying the Town's complaint on April 16, 2004. While it generally admits to the chronological history of the case as set forth in the Town's complaint, the Union denies that it has committed an unfair labor practice. In further response to the Town's complaint, the Union asserts that the Town has failed to state a claim upon which relief can be granted, that the Town's complaint is time barred, that the Town has acted in bad faith, and has otherwise waived any right to now contest Ms. Desmarais' reinstatement. In this regard, the Union counter-claims that in failing to honor the mutually agreed upon arbitration procedure, the Town has itself violated RSA 273-A:5 I (a), (e), (g), (h) and (i).

A pre-hearing conference was conducted at the PELRB on April 20, 2004. Thereafter, following requested continuances by the parties, an evidentiary hearing was convened at the offices of the Public Employee Labor Relations Board in Concord on September 23, 2005 at which both parties were represented by counsel, presented witnesses and exhibits and had the opportunity to cross-examine witnesses. The parties submitted "Joint Stipulations of Fact" that appear below as Findings of Fact #1-#15. The Board held the record open until October 29, 2004 for submission of legal memoranda from the parties. At the outset of the hearing scheduled on the merits, the Union's Motion to Dismiss the Town's complaint based on the expiration of the period of time allowed a complainant to file a complaint with the Board, the Union's Motion to Exclude Witnesses and Exhibits, and the Town's objections thereto were heard. The Board then reviewed all filings submitted by the parties, considered and weighed the credibility of all witnesses and of all relevant evidence and determined the following:

FINDINGS OF FACT

1. The Town of Pelham ("Town") employees (sic) individuals within its police department and therefore is a public employer within the meaning of RSA 273-A:1, X.

2. The American Federation of State, County And Municipal Employees (Council 93) is the exclusive bargaining representative for certain members of the Pelham police department, including dispatchers.

3. The parties were signatories to a collective bargaining agreement, during the relevant period of time, that governs the terms and conditions of the parties' relationship that includes a workable grievance procedure as that term in defined by RSA 273-A: 4.

4. The relevant grievance procedure terminated in final and binding Arbitration.

5. The grievance procedure reads, in relevant part, "the decision of the arbitrator will be considered final and binding on the parties." (Article 16.6e)

6. The collective bargaining agreement does not reference RSA 542.

7. On or about June 10, 2002 the Town terminated Ms. Desmarais from her position as police dispatcher.

8. As a result of the termination, the Union proceeded to arbitration pursuant to the collective bargaining agreement between the parties.

9. Arbitrator John Cochran was appointed by the Public Employee Labor Relations Board to preside on the arbitration case. (Case No. A-0465-43)

10. The one-day arbitration was conducted on November 5, 2003.

11. The parties stipulated to the following issue before the arbitrator: "Was there just and proper cause to terminate the grievant Deborah Desmarais? If not, what shall be the remedy?"

12. The Town, without objection, voluntarily participated in arbitration that it understood would result in a final and binding award.

13. On February 6, 2004 Arbitrator Cochran rendered his decision which ordered Ms. Desmarais reinstated to her position with no back pay or benefits.

14. By letter dated February 17, 2004 the Union requested that the Town comply with the decision of the arbitrator and reinstate Ms. Desmarais.

15. The Town rather than reinstate Ms. Desmarais filed an improper practice charge with the PELRB stating that the reinstatement of Ms. Desmarais would violate public policy.

16. The Town filed its complaint on March 10, 2004 contesting the arbitrator's award issued on February 6, 2004 and the Union's February 17, 2004 letter requesting implementation of the award, including reinstatement of Ms. Desmarais.

17. The relevant CBA between the parties contains no reference to RSA 542 (reservation of review of arbitration award by court) or any specific reservation of rights by either party to have an arbitrator's award reviewed by the PELRB.

18. Dispatchers are not sworn officers and do not take an oath of office upon being employed.

19. Dispatchers, at times, are required to testify and author written reports in matters involving charges brought by the Town of Pelham on behalf of the State of New Hampshire against individuals.

20. The position of dispatcher does not require that sworn personnel within the police department fill the position and Ms. Desmarais is not a sworn employee.

21. The normal responsibilities of a dispatcher include:

    a. answering and initiating telephone calls
    b. receiving the public in the lobby area
    c. watching video monitors, including lock-up area
    d. recording walk-in 911 reports
    e. undertaking computer research regarding criminal records

22. There have been two past instances where Pelham dispatchers have testified in court.

23. Dispatchers may be required to provide written reports to add credibility to a case

24. The Pelham Police Department General Rules of Conduct dated 09/15/99, delineate the Department's "expectations for personal behavior." Among these expectations and departmental rules are statements providing for employees of the department to "display absolute honesty" (Article VII. C.) and "not knowingly make any false statements of misrepresentations of the facts" (Article VI. G) (Joint Exhibit #4)

25. A memo was issued by the Attorney General's Office on March 29, 1996 intended to provide direction to state prosecutors regarding their responsibilities to disclose evidence in criminal cases, including disciplinary actions contained in potential "police officer/witness" personnel files, to criminal defense counsel as may be required following *State v. Laurie*, 139 N.H. 325.

26. The parties' CBA reserves to the Town, "the right to make rules, regulations, and policies not inconsistent with the provisions of this agreement and to require compliance therewith." Article III – Management Rights, §3.1(f)

27. The parties' have agreed in their CBA that "Any disciplinary action based upon the complaint shall be subject to the disciplinary and grievance articles of this agreement." Article XVII – Disciplinary Procedures, § 17.5(b).

28. The parties' CBA also provides for so-called "progressive" discipline normally involving a sequence of a verbal warning, a written warning, suspension without pay, and discharge. The CBA allows for an exception to progressive discipline, "if an infraction is sufficiently severe to merit immediate suspension or discharge." Article XVII – Disciplinary Procedures, § 17.1.

29. Ms. Desmarais' discharge, pursuant to the agreement of the parties, went to arbitration and was the subject of a twenty-one page arbitrator's decision that includes six pages of facts found by Arbitrator Cochran based upon substantive evidence presented to him by both parties during their hearing before him. This included his detailed examination of the conduct of Ms. Desmarais and the Town's actions that resulted in her termination and that led the Arbitrator to his

conclusions and his decision to reinstate Ms. Desmarais to her position of dispatcher without back pay. (See Joint Exhibit #1 – Arbitrator's Award).

30. The Arbitrator found that Ms. Desmarais did "misrepresent the number of times she requested and received a discount on food at McDonald's" during her internal investigation and during the arbitration hearing.

31. The Arbitrator found that Ms. Desmarais' conduct in making such misrepresentations violated internal departmental rules regarding honesty as referenced above at Fact #24.

32. The Arbitrator concluded that the level of discipline, *i.e.* discharge, must be "reasonably related to the particular infraction." (joint Exhibit #4, p.18). After evaluating the evidence, Ms. Desmarais' conduct and giving consideration to the department's concerns about her ability to testify credibly if she were ever required to do so, he found that "termination was too harsh a penalty for her untruthfulness," as related to requesting food discounts at McDonald's.

33. While it is possible that Ms. Desmarais, as a dispatcher, at some time in the future may be witness to an event that is either not audio recorded or video-taped within the police department, it is not a probable occurrence that her report of the event would rise to the level of essential testimony without which prosecution would fail.

34. The Town retained Ms. Desmarais in the position of dispatcher for three months after she returned from administrative leave before they discharged her.

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has sole original jurisdiction to adjudicate claims between the exclusive representative of a certified bargaining unit comprised of individuals employed by a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I). The PELRB also is authorized to determine whether claims alleging the commission of an improper or unfair labor practice pursuant to RSA 273-A:5, I and II are filed in a timely manner as calculated in RSA 273-A:6,VII.

In matters involving the interpretation of language used by the parties in their collective bargaining agreement (CBA) and the parties' mutual pursuit of final and binding arbitration through utilization of a proper grievance procedure to which they have both agreed and which they have included in their CBA, the PELRB most often limits its exercise of jurisdiction. This general self-restraint on the exercise of its jurisdiction by deference to binding arbitration and refusal to rehear matters presented to an arbitrator or to second guess the conclusions, decisions and awards of arbitrators is a long recognized practice at the PELRB and is well settled at law. A narrow exception has been reserved for the exercise of jurisdiction to review an arbitrator's decision. The PELRB, as the agent of the citizens of New Hampshire acting through the

enactments of the General Court, does have the authority to overturn an arbitrator's decision that it determines violates an expressed, strong and dominant public policy.

The PELRB also is empowered to determine whether actions of either party constitute an improper labor practice as that term is defined by RSA 273-A:5. Here we have an arbitrator's decision which the Town has not implemented and which it says violates public policy. The Town claims the Union's demand that it implement the arbitrator's award constitutes an improper practice as defined in RSA 273-A:5.II. Here also the Union has alleged that the Town has violated the statute (RSA 273-A:5,I) by failing to implement the same arbitrator's award that the Town's complaint alleges violates public policy and that should be overturned by the PELRB.

The PELRB accepts jurisdiction over both the charges filed by the Town and the charges filed by the Union.

UNION'S MOTION TO DISMISS

Before considering the merits of both parties' complaints, we first consider the Union's Motion to Dismiss the Town's complaint on the basis that the Town complaint was not filed with the PELRB in a timely manner. The governing statute provides that, "The board shall summarily dismiss any complaint of an alleged violation of RSA 273-A:5 which occurred more than 6 months prior to its filing." Here, where the arbitrator's decision and award form the basis of the Town's complaint, the triggering event is the issuance of that decision and award. The date of the arbitrator's decision is February 6, 2004. The date the Town's complaint was filed with the PELRB was March 10, 2004. The Town's filing was within the required six- month period and, therefore, we DENY the Union's Motion to Dismiss on this ground.

DECISION

We have considered the complaint of each party at the hearing and, for incorporation in this decision, we first examine the Town's complaint and assign to the Town the burden of proof that the Arbitrator's decision more probably than not violates "public policy" as that term has been defined by the court in connection with labor arbitration decisions. See generally, *Appeal of Amalgamated Transit Union*, 144 N.H. 325 (1999) for the court's affirmance of our underlying decision there (See Decision #97-101) and as we have recently applied it in *Professional Firefighters of Hanover, Local 3288 v. Town of Hanover*, Case No. F-0137-7 and *Town of Hanover v. Professional Firefighters of Hanover, Local 3288*, Case No. F-0137-8 (See Decision #2004-106, dated 7/28/04, Summarily affrm'd by the court at #2004-0714).

The Town's complaint alleges two misdeeds and requests two distinct forms of relief, one is related to the Union's actions and the second is related to the decision and award of the parties' Arbitrator. We consider the Union's actions first to determine whether or not it has committed an improper practice against the Town.

The action the Union has undertaken is to attempt to enforce an arbitrator's decision. First this was done by request to the Town and then following the Town's refusal, by its own

counter-complaint to the Town's improper practice complaint against the Union. Both parties' allegations stem from their participation in a grievance procedure that resulted in a decision and award of their Arbitrator. We say here what we said in the *Hanover* cases, referenced above, regarding the actions of a party seeking to enforce an Arbitrator's decision. "Each party had previously agreed to follow the grievance procedures expressed within their collective bargaining agreement ("CBA"), including resolution by an arbitrator that is "final and binding." Since the Union is attempting to follow the decision of the arbitrator, '[i]t simply cannot be that a party who complies with a CBA's contractual duty to be bound to an arbitration award can be found to have breached the CBA by fulfilling this duty." citing *Appeal of Belknap County Comm'rs,* 146 N.H. 757,761. We do not find that the Union's actions constitute a statutory breach of the parties' agreement and therefore deny the Town's unfair labor practice complaint against the Union.

The Town's second request for relief seeks to have us set aside the arbitrator's decision as contrary to public policy and remand the matter back to the arbitrator with specific instructions to fashion a remedy that would reverse the arbitrator's original decision to reinstate Ms. Desmarais and instruct the arbitrator to issue a new award that would not violate public policy. This request describes the reason for the Town's inaction since the arbitrator's decision. It also leads to consideration of the Union's complaint that the Town has committed an unfair labor practice in refusing to reinstate Ms. Desmarais to her position as a dispatcher for police and fire services in Pelham as was required by the arbitrator's award. Failure to implement an arbitrator's award can be the basis for a finding that the Town has breached their agreement with the Union and consequently violated the provisions of RSA 273-A:5, I.

The Town and the Union are parties to a collective bargaining agreement that contains a workable grievance procedure ending in final and binding arbitration of grievances such as that which arose involving Ms. Desmarais' discharge. When parties agree to be bound to arbitration awards as part of the terms and conditions of a CBA, failing to comply with an award results in a breach of the contractual duty to be bound. The parties definitely intended to submit this matter to final and binding arbitration. By doing so, they were generally obligating themselves to abide by the determinations of the arbitrator.

The issue before the arbitrator was not in question as the parties stipulated to the wording of the issue. They framed their dispute in their own language and consistent with the terms of their grievance procedure. The parties agreed that they wanted the arbitrator to decide the matter and submitted the following issue for his determination:

> "Was there just and proper cause to discharge the grievant Debra Desmarais? If not, what shall be the remedy?"
>
> -Arbitration Award, page 1.

The language used to form these questions is common in labor arbitration. It allows the arbitrator to first determine if a party, in this case the Town, had just and proper cause to discharge Ms. Desmarais as provided by the terms of the CBA, and what remedy, within the normal and customary practices of labor relations, would be appropriate under the circumstances. When the parties proceeded with their arbitration proceeding before the arbitrator, they were not engaging in an extraordinary event. They were merely engaging in a contractually agreed to process they

had promised to each other in the course of bargaining, a process which is not only sanctioned but required by RSA 273-A:4.

The decision of an arbitrator, particularly where there is no issue raised regarding arbitrability, is not usually subject to review by the Board. While the legislature has provided a statutory remedy for parties desiring to appeal arbitrator's decisions, (See RSA 542 – appeal to the Superior Court) these parties have not incorporated that option into their CBA.

Until the *Appeal of Amalgamated Transit Union*, 144 N.H. 325 (1999), the Board needed to exercise this review authority "only in two narrow areas: first, where the collective bargaining agreement either restricts the arbitrator's discretion or provides for administrative or judicial review, and second, where "in the case of an unrestricted submission to arbitration, an allegation is made that the arbiters either expressly intended that the case be decided according to principles of law and were mistaken in their application thereof, or were so mistaken on the facts as to preclude a fair consideration of the issues." See *Board of Trustees of the University System of New Hampshire v. Keene State College Education Association*, 126 N.H. 339,342 (1985). Later, in *Amalgamated* the court stated that the "[Board] inherently has limited jurisdiction to apply strong and dominant public policy as expressed in controlling statutes, regulations, common law and other applicable authority, to address matters necessary to resolve questions arising within the scope of [its] jurisdiction." and can decide that it "will not enforce a contract or contract term that contravenes public policy," *Ibid. Amalgamated* at 327, citing *Harper v. Healthsource New Hampshire*, 140 N.H. 770, 775 (1996).

For all other purposes of our analysis we have reviewed the arbitrator's decision and find it to be a comprehensive treatment of the issues presented to the arbitrator that need not be cited in full in our decision. (See Joint Exhibit #1 - Arbitrator's Award). A fair reading of the arbitrator's decision reveals that the arbitrator thoroughly considered all of the evidence and made factual findings sufficient to support his decision. The arbitrator authored a twenty-one page decision that included six pages of factual findings, after considering the evidence presented by both parties, their witness testimony and exhibits, their Collective Bargaining Agreement and the briefs submitted by both parties. His conclusion, as expressed in his award, was,

> "There was not just and proper cause to discharge the grievant, Debra Desmarais. Therefore, for the reasons set out above, the Town shall immediately offer to reinstate Desmarais to her former position as a police dispatcher, without back pay or other contract benefits for the period between June 10, 2002 and the date of her reinstatement." (Joint Exhibit #1 – Arbitrator's Award, page 21).

We find the arbitrator's award to be consistent with the application of labor relations law and the terms of the parties' CBA in effect at the time and supported by sufficient evidence. We also support the arbitrator's rationale in light of the Town's good faith but expansionary argument that Ms. Desmarais cannot perform the functions of her position because of the revelation of exculpatory evidence requirement that may flow from *State v. Laurie,* 139 N.H. 325,327 potentially extending the rule to impeachment materials. The arbitrator found that,

> "A dispatcher's role is fundamentally different from that of a uniformed police officer, who issues citations, serves warrant, and makes arrests part of their normal duties. Even though there is always a possibility that a dispatcher or any other municipal employee might be called as a witness, the likelihood is remote when compared to a police officer. Further, as the record here reflects, the cell blocks at the Town's police stations are monitored by camera and it is unlikely that Desmarais or any other dispatcher would be the sole witness to any activity in the lobby of the police station. Therefore, the principal reason cited by the Town for deciding to terminate Desmairais – the potential effect on her credibility as a potential witness – is too speculative to require termination as an automatic penalty for her untruthfulness."
>
> -Arbitrator's Award, p.19

The arbitrator further found that her conduct was not "so egregious to justify the ultimate penalty of termination" especially since the Town permitted her "to function as a dispatcher for three months after she returned from administrative leave before it terminated her reflects that it did not consider her dishonesty to be an absolute impediment to her ability to continue functioning as a dispatcher." *Ibid.* at p.20. We do not find the arbitrator's logic misplaced nor do we find any additional relevant evidence presented to us that is contradictory to that before the arbitrator or that adds to the strength or dominance of the express policy statement contained within the department's rules of conduct.

Our responsibility is to decide whether the parties' adherence to their contract term that provided for a final and binding arbitrator's decision that resulted in the reinstatement of Ms. Desmarais violates public policy. Our analysis begins with consideration of the public policy clearly expressed in RSA 273-A to foster harmonious and cooperative relations between public employers and their employees and to protect the public by encouraging the orderly and uninterrupted operation of government. RSA 273-A Statement of policy. 1975, Chapter Laws 490:1). New Hampshire's labor relations statute also clearly states that "Every agreement negotiated under the terms of [RSA 273-A] shall be reduced to writing and shall contain workable grievance procedures. RSA 273-A:4. This is so because, "there must be a mechanism for resolving the dispute or else the agreement is meaningless. *Appeal of Pelham*, 124 N.H. 131(1983). It is undisputed that the parties have a collective bargaining agreement with a workable grievance procedure that, lacking other resolution, requires the rendering of a final and binding decision of an arbitrator. It is also undisputed that the parties agreed to have the underlying grievance arbitrated and that they stipulated as to the issue to be decided by the arbitrator and his authority to fashion a remedy. The enforcement of the written collective bargaining agreements entered into by groups of employees and their employers, including clauses providing for "final and binding" arbitration, assures that each gets the benefit of what they bargained for and that the interruption of government service is not threatened by actions of either party that breach their agreements with each other and thereby violate the law. If a party seeks to avoid the decision of the arbitrator by asserting that the decision violates public policy, it can only do so in the light of the specific statutory policies clearly expressed in the provisions

of RSA 273-A and sufficient evidence of an express countervailing public policy that is stronger and more dominant.

As we stated in our decision in *Hanover*,

> "We do not believe that the 'public policy exception' represents a lowered drawbridge by which to easily assail arbitration decisions, nor license to conduct broad or general reviews of arbitration decisions. After all, the parties have otherwise mutually agreed to abide by them through their bargaining. We must then weigh against the express, strong and dominant policies of long standing contained in RSA 273-A, (enacted 1975) the public policy raised by a party contesting an arbitration award by evaluating the strength and dominance as expressed in other controlling statutes, regulations, common law and other applicable authority. (See *Amalgamated, Ibid.* at 327). As the "public policy exception" to the limited review doctrine afforded to arbitration decisions has been applied in this jurisdiction we interpret the court's reference in *Amalgamated* to policies that are "strong and dominant... as expressed in controlling statutes, regulations, common law and other applicable authority" to have been prescient in view of the United States Supreme Court's later decision in *Eastern Associated Coal Corp. v. Mine Workers District 17*, 531 U.S. 57 (2000). They recognize that the "public policy" relied upon, in this case by the Town, is to be found in positive law and legal precedent and not "merely a general public interest consideration (See also Ekouri and Ekouri, How Arbitration Works, Sixth Edition, ABA Section on Labor and Employment Law, p.1344, citing Board of Education of School District U-46 v. Illinois Education Labor Relations Board., 576 N.E.2d 471(Ill. Ct. App. 1991). See also Mayes, *Labor Law—The Third Circuit Defines the Public Policy Exception to Labor Arbitration Awards* –Exxon Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357 (3d Cir. 1993), 67 Temple L. Rev. 493 (1994). We agree that to qualify as a "public policy exception" from the implementation of an otherwise legal and fact supported arbitrator's decision pursuant to New Hampshire law that the policy cited must be express, well defined and dominant."

In the *Amalgamated* case we were presented with a case involving alleged use of drugs by transit workers and in which we found, in a 2-1 decision, that the express, strong and dominant labor relations policies embodied in RSA 273-A supporting the contractual provisions of the parties' CBA were counter balanced where other public policy was expressed in several federal statutes, *e.g.* Drug Free Workplace Act 41 U.S.C. § 701; National Highway Safety Administration Authorization Act, 49 U.S.C. § 30101; Omnibus Transportation Employee Testing Act, federal regulations as expressed in the Federal Motor Examiner Safety Regulations,

see 49 CFR § 382.605 and in light of *Exxon Corporation v. Esso Workers' Union,* 118 F.3d 841 (1st Cir. 1997), a case also involving drug usage wherein the First Circuit referenced specifically the Exxon Valdez incident as an example of drug related accidents. We believe the instant case is distinguishable from *Amalgamated* because it does not involve vehicle operators, does not involve drug use, and that public policy condemning transportation operator's involvement with drugs as addressed by Congress and as weighed in that case is strong and dominant. The only express policy presented to us in the instant case is contained in an intra-departmental standard operating procedure document entitled "General Rules of Conduct" calling upon employees to be truthful. (See Joint Exhibit #4; Article VI, G. and Article VII, C.). Such a document expresses perhaps the desire of all employers regarding their employees but particularly so of those employees sworn to uphold the law. An internal document, unilaterally formulated by a municipal department head although expressly published cannot be said to embody the same position of strength or dominance as the nationally applied laws that were presented in the *Amalgamated* case. We might note here, to the extent that it is relevant, that as a dispatcher Ms. Desmarais was not a sworn officer albeit still subject to the rules of conduct referenced above as a non-sworn member of the department.

In the *Hanover* decision we addressed a similar weighing of public policies, that like many others, can sometimes be seen at variance, if not in opposition to each other. In that matter involving the termination of a firefighter we were not evaluating an arbitrator's decision in light of strong and dominant public policy as specifically expressed in several federal statutes. Instead, we were presented with little evidence of pre-existing public policy, although admirably held concerns, requesting that we apply the "public policy exception" based upon public officials' expressions of "safety concerns" or "concerns of public safety" or concerns for "me and my family" or concerns of future exposure to risk of liability. We found that while public safety is an important area for government involvement, the limited review of arbitrator's decisions could not be employed to build strength into a policy statement nor to elevate to a position of dominance a policy that was not otherwise so such as to require the board to ignore the express, strong and dominant policy incorporated by the legislature into RSA 273-A favoring grievance procedures and deference to arbitrator's decisions.

Now, in the instant case, we apply this same evaluative logic balancing an internal departmental rule of conduct, notwithstanding the supportive testimony and correspondence sought by the Town to enhance the policy expressed in the departmental rule of conduct, with the long-established state policy embodied in RSA 273-A that has not substantively been altered in thirty years. When we consider these respective expressions of policy for the strength and dominance necessary for us to vacate an arbitrator's decision, we do not find a sufficiency in the municipal rule of conduct to ignore the existing statutory labor relations policy. We believe that to set aside the arbitrator's decision we need evidence that a policy has been forged "from the exercise of a democratic proceeding as contemplated by the court or this board in order to overturn this arbitrator's award or deprive the town employees represented by the Union of the benefit of their bargain when they negotiated the provisions of the grievance provision or the application of progressive discipline provision into their collective bargaining agreement."(*Hanover,* Decision #2004-106)

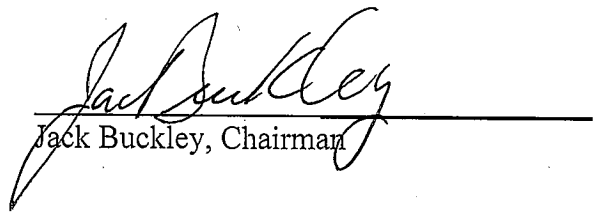
To find, as the Town argues, that public policy has been violated, we would need to find that we have to expand the time-honored "limited review of arbitrator's decisions" policy present in labor relations. We do not find it necessary to take that action in this case and are reluctant to

loosen, what could be referred to as the proverbial "flood gates" to review the many arbitrators' awards issued each year.

In conclusion, and as stated above, we deny the Town's complaint against the Union and we find, instead, that the Town committed an unfair labor practice by not implementing the arbitrator's award by immediately offering to reinstate Ms. Desmarais to her former position as a police dispatcher and we further order the Town to do so immediately.

So ordered.

Signed this 16th day of March, 2005.



Jack Buckley, Chairman

By unanimous decision. Jack Buckley, Chairman presiding. Members Richard E. Molan and Seymour Osman present and voting.

Distribution:
Mark T. Broth, Esq.
Katherine M. McClure, Esq.

NH Supreme Court affirmed decision No. 2005-035 on 8-23-2006, Slip Op. No. 2005-436.
(NH Supreme Court Case No. 2005-436)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Town of Pelham Complainant v. AFSCME Council 93, Local 3657 Pelham Police Employees Respondent	Case No. P-0775-1 Decision No. 2005-059

MOTION FOR REHEARING

The Board, conferred for the purpose of considering the Petitioner's Motion for Rehearing and took the following actions:

1. It reviewed the Town of Pelham's Motion for Reconsideration filed on April 14, 2005 pursuant to RSA 541 and N.H. Admin R. Pub 205.02 and AFSCME Council 93, Local 3657, Pelham Police Employees Objection thereto filed on May 2, 2005.

2. It examined the previous Decision #2005-035 issued on March 16, 2005.

3. It reviewed the previous filings of the parties in this matter.

4. It DENIED the Town's Motion for Reconsideration.

So ordered.

Signed this 16th day of May, 2005.

Jack Buckley

JACK BUCKLEY
Chairman

By unanimous decision. Chairman Jack Buckley presiding. Members Richard E. Molan and Seymour Osman voting.

Distribution:
Mark T. Broth, Esq.
Wayne Soini, Esq.