



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NEW HAMPSHIRE TROOPERS ASSOCIATION	:	
	:	
Complainant	:	
	:	
v.	:	CASE NO. P-0713:5
	:	
NEW HAMPSHIRE DEPARTMENT OF SAFETY,	:	DECISION NO. 95-02
DIVISION OF STATE POLICE	:	
	:	
Respondent	:	
	:	

APPEARANCES

Representing New Hampshire Troopers Association:

James Donchess, Esq., Counsel

Representing New Hampshire Department of Safety:

Steve Judge, Esq., Counsel

Also appearing:

Major Tom Kennedy, State Police
Dick Foote, State Police
Thomas Manning, State Employee Relations
David Gagne, N.H.T.A.
Lou Copponi, N.H.T.A.
Michael Doucette, N.H.T.A.

BACKGROUND

The New Hampshire Troopers Association (Association) filed unfair labor practice charges against the New Hampshire Department of Safety, Division of State Police (State) on August 9, 1994, alleging violations of RSA 273-A:5 I (a) and RSA 273 A:11 I (b) for refusal to allow union representation for a trooper at investigatory proceedings which led to the imposition of discipline. The State filed its answer on August 24, 1994. The

matter was heard before the PELRB on October 13, 1994, after which the record was held open for one week at the request of the complainant for post-hearing submissions.

FINDINGS OF FACT

1. The New Hampshire Department of Safety, Division of State Police is an employer of troopers and other personnel within the meaning of RSA 273-A:1 X.
2. The New Hampshire Troopers Association is the duly certified representative of troopers and other sworn personnel.
3. The State and the Association are parties to a collective bargaining agreement (CBA) for the period July 1, 1993 through June 30, 1995.
4. Article 40-B.34 of the CBA reads:

Once a disciplinary investigation has been completed and a police employee is required to attend a scheduled disciplinary hearing with the board, he/she shall be entitled to Association representation in the aforesaid hearing. The Association representative's role at the disciplinary board is to consult with the employee, not participate in the hearing. The employer is free to insist on hearing the employee's own account of the matter.
5. Trooper David Gagne is a sworn member of the Division of State Police who was assigned to Troop C when an incident occurred on April 11, 1994 which led to charges of improper behavior and a subsequent charge of lying to his supervisors when questioned regarding the incident of April 11, 1994.
6. On April 11, 1994, when questioned by Sergeant Michael Miles immediately following the incident, Trooper Gagne did not request and was not offered representation. He explained his and a companion's presence at the Alstead Police Station to Sergeant Miles who was in a supervisory capacity to Trooper Gagne.
7. On the evening of April 13, 1994, Captain Richard Foote called Trooper Gagne to inform him that he was scheduled to undergo a polygraph examination on April 22, 1994 regarding the facts of the Alstead

incident. At this time, it was reasonable for Trooper Gagne to believe he was the subject of a disciplinary investigation.

8. Trooper Gagne then contacted Corporal Michael Doucette asking that he be present as a union representative during the polygraph phase of the investigation. Corporal Doucette did appear to represent Trooper Gagne at the test which was scheduled for noon. Just before noon, Captain Foote summoned Trooper Gagne and Corporal Doucette. He stated that Trooper Gagne would not be allowed representation but would undergo the polygraph examination alone pursuant to the order of Major Kennedy.
9. At noon, Officer Gagne was brought into the examination room, attached to the polygraph machine and strapped into the seat. He was questioned by an examiner, Sergeant Wayne Fortier. Afterward, Sergeant Clayton Young released him and Trooper Gagne was questioned by Captain Foote and Major Thomas Kennedy until 4:45 p.m. when he was free to go. Before leaving, he was told that he was not believed. Charges were filed against him.
10. On May 23, 1994, Officer Gagne appeared before a five member disciplinary board from 10:00 a.m. until 5:30 p.m. Corporal Louis Capponi represented him pursuant to Article 40-B.34 of the CBA. (See finding Number 4)
11. Trooper Gagne was subsequently ordered to appear before Colonel Lynn Presby on July 18, 1994. Captain Foote and Major Kennedy also questioned Gagne. For a second time, he requested and was denied union representation. Corporal Copponi appeared to assist Trooper Gagne on the 18th but was denied access to the proceeding. At this hearing, discipline was imposed. Trooper Gagne was suspended without pay for five days and transferred to a different unit. The disciplinary decision has been appealed.

DECISION AND ORDER

The New Hampshire Troopers Association brought unfair labor practice charges citing International Brotherhood of Police Officers v. City of Manchester, Decision No. 92-73 (1992) to support its position that Trooper Gagne was unlawfully denied union

representation when requested at two stages of disciplinary proceedings. The State responded that RSA 273-A affords public employees no right to representation at disciplinary proceedings and that the only such right available to Trooper Gagne was that which was bargained for and which appears as Article 40-B.34 of the CBA.

This Board early on grappled with the issue of public employee representation at preliminary investigations which resulted in discipline. Laconia Education Association v. Laconia School Board, Decision No. 79-20 (August 23, 1979). It was in International Brotherhood of Police Officers Local 464 v. Nashua Police Commission. Decision No. 85-74 (September 26, 1985) that the PELRB wrote that refusal of a chief of police to allow an officer "to have a representative of his choice accompany him in a disciplinary hearing is a violation of RSA 273-11 (a) and therefore is an unfair labor practice" As such, the right in question is an incident of exclusive representation going to the Association, as well as a protected condition of employment under RSA 273-A:5 long settled and based in New Hampshire law.

It was not until the case cited by the complainant, International Brotherhood of Police Officers Local 394 v. City of Manchester, Police Department, Decision No. 92-73 (May 4, 1992) that N.L.R.B. v. Weingarten, 420 US 251 (1975), was cited as authority along with the Laconia Education case. In the 1992 case, International Brotherhood of Police Officers, an unfair labor practice was found when a union representative was requested but was not contacted to be present at a hearing when discipline was the likely outcome. Weingarten has subsequently been cited in PELRB decisions including New Hampshire Troopers Association v. The New Hampshire Department of Safety, Decision No. 94-74 (August 31, 1994).

The denial of Trooper Gagne's request for union representation on two occasions when discipline was reasonably anticipated constitutes an unfair labor practice under RSA 273-A:5 (a) and also (g) had the latter been pled. The State's refusals to allow an Association representative to be present to observe the polygraph test, behind a mirror as is usual in such a case, and to assist the complainant at the disciplinary hearing with Colonel Presby also constitute violations of RSA 273-A:11 I (a) and (b).

The New Hampshire Department of Safety, Division of State Police, is ordered to cease and desist from its practice of denying employees the right to representation at meetings, investigatory proceedings and hearings reasonably expected to result in discipline. Further, the disciplinary action taken against Trooper Gagne shall be vacated forthwith and he shall be reinstated as a member of Troop C with canine duties. He shall be paid back wages for five days and his record shall be expunged.

So ordered.

Signed this 20th day of MARCH, 1995.


EDWARD J. HASELTINE
CHAIRMAN

Members Seymour Osman and E. Vincent Hall voting in the majority.
Chairman Edward J. Haseltine dissenting.

Chairman Haseltine's dissenting opinion is as follows:

I dissent from the majority's opinion in this case, the parties have specifically bargained the circumstances when a unit member may be entitled to Association representation. Article 40-B.34 of the contract provides that the individual "shall be entitled to Association representation" when "required to attend a scheduled disciplinary hearing with the [disciplinary] board." For the PELRB to expand on this provision specifically negotiated by the parties would be an unwarranted intrusion into the results of the negotiating process and the inner workings of their contract. The cases cited by the Association in support of representational rights do not match the facts of this case because the contract language of those cases did not contain specific entitlements as found in Article 40-B of the Troopers' contract. I would dismiss the unfair labor practice charge.