State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

State Employees Association of New Hampshire, SEIU Local 1984, for Belknap County Jail Employees Complainant v. Belknap County, Department of Corrections Respondent	*	Case No. S-0333-3 Decision No. 2002-054

APPEARANCES

Representing SEA-New Hampshire, SEIU Local 1984, Belknap County Jail Employees:

William McCann, Negotiator/Field Representative

Representing Belknap County, Department of Corrections:

Elizabeth A. Bailey, Esq.

Also appearing:

Timothy M. Doris, Belknap County Department of Corrections
R. A. Grenier, Beklnap County Department of Corrections
Nancy E. Cook, Belknap County Jail
Joe Panarello, Superintendent, Belknap County

BACKGROUND

The State Employees Association of New Hampshire, SEIU Local 1984, (Union), on behalf of Belknap County Jail employees, filed unfair labor practice (ULP) charges on December 12, 2001 against Belknap County (County) alleging violations of RSA 273-A:5 I (a), (d), (g), (h) and (i) resulting from restraint and coercion of a correctional officer/union steward who exercised rights conferred under RSA 273-A, from discrimination against that correctional

officer/union steward in the processing of a grievance he filed, and from a breach of contract which occurred by the manner in which the correctional officer/union steward was reassigned to a different shift. The County filed its response on December 26, 2001.

Representatives of the parties attended a pre-hearing conference at the PELRB offices on January 28, 2002, the results of which were reported in a Pre-hearing Conference Memorandum and Order dated January 30, 2002 (Decision No. 2002-019), including a scheduled date of April 4, 2002 for an evidentiary hearing. Subsequent to the pre-hearing conference, the Union filed a motion to amend its ULP complaint on March 18, 2002. On March 21, 2002 the County filed a motion to strike certain portions of the Union's original ULP, followed by a second filing on March 28, 2002 objecting to the Union's motion to amend that original filing. The Union then filed objections (1) to the County's motion to strike on April 1, 2002 and (2) a response to the County's objections to the Union's motion to amend on April 2, 2002. Additional motions pertaining to exhibits and identification of potential witnesses were filed by both sides after the Pre-hearing Conference Memorandum of January 30, 2002, the last of which was the County's Motion to Deny Subpoena or, in the alternative, to Quash Subpoena of Inmate Matthew Bellmore also filed on April 2, 2002.

Concurrently with the pre-hearing conference and subsequent processing of this ULP complaint, the parties were involved in grievance arbitration proceedings before Arbitrator Allan McCausland whose award was dated and issued February 11, 2002. As the result of the issuance of that arbitration award, the parties were able to further narrow the issues remaining to be presented to and considered by the PELRB and did so by stipulation prior to the evidentiary hearing on April 4, 2002. Those issues involved (1) the implementation of the [County] commissioners' order of May 7, 2001 (Joint Exhibit B), (2) whether the temporary assignment of the correctional officer/steward was a violation of the collective bargaining agreement (CBA), and (3) whether the "fact-gathering interview" of November 15, 2001 was either a violation or an unfair labor practice.

At the conclusion of the evidentiary hearing, the parties agreed to file post-hearing briefs on or before April 19, 2002. Both briefs were timely filed.

FINDINGS OF FACT

1. Belknap County, by virtue of its operation and management of the Belknap County Jail and the personnel employed at that facility, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The State Employees Association of New Hampshire, S.E.I.U. Local 1984, is the duly certified bargaining agent for full-time and part-time employees in the positions of Sergeant and Correctional Officer employed by the County.

3. The County and the Union are parties to a collective bargaining agreement covering personnel in the categories listed above for the period January 1, 2000 through December 31, 2002. Article 13 of

this document is a "grievance procedure" consisting of three steps, the last of which is arbitration. The contract defines "grievance" as a "dispute, claim or complaint raised by an employee covered by this Agreement involving the meaning, interpretation or application of the express provisions of this Agreement." The arbitrator's authority under Step 3 of the grievance procedure is to issue an award binding on the parties, except in those instances where the arbitrator's award would require the expenditure of unappropriated funds or funds not appropriated for the specified purpose, in which case the arbitrator's award is advisory. (Joint Exhibit B, Article 13.)

4. Timothy M. Doris has been employed by the County as a correctional officer for four years. He has 13 years of experience in police dispatch jobs, as a 911 operator and as an Army National Guard military policeman. On or after August 29, 2001, Doris was appointed as a steward for his bargaining unit. Corrections Superintendent Joseph Panarello learned Doris was a steward at the October 1, 2001 Commissioner's meeting. Union representative Bill McCann formally notified Commissioner Mark Thurston of Doris's status as a steward by letter dated November 27, 2001 (Joint Exhibit No. F) which made reference to training needs Doris would have under the provisions of the CBA, presumably, but not articulated, under Article 14.4.

5. On or about December 12, 2000, Doris received a letter of warning from Supt. Panarello based on a alleged violation of the jail's sexual harassment policy. Upon appeal and review by the county commissioners, on May 7, 2001, the commissioners issued a report of their non-public session on May 1, 2001. They found that the Superintendent had not "met the burden of proof" and that there was not "sufficient evidence to substantiate a sexual harassment violation." By way of remedy, they directed that the "letter of warning dated December 11, 2000 and all pertinent information relating to this case will be removed. Further, we will be granting your request for the difference in shift differential pay between the second and third shift from December 11, 2000 through May 1, 2001." (Joint Exhibit No. B.)

6. On or about August 29, 2001, Doris was involved in another disciplinary proceeding before Panarello on an unrelated matter which has been resolved by an arbitration proceeding, referenced above. According to Doris, this meeting was difficult because he and his representative, McCann, were not allowed to record the proceedings, or to cross-examine witnesses for the County. Doris testified that McCann informed Panarello of Doris's new assignment as union steward at this meeting.

7. On or about October 24 or 29, 2001 (depending on whether one credits the Nancy Cook letter found at Joint Exhibit No. H or the Bill McCann letter found at Joint Exhibit No. I), McCann and Doris "inspected" Doris's personnel file and found a Sexual Harassment Sign-Up Sheet signed by Doris and dated 9/9/2000. (Joint Exhibit No. E.) The single statement on the sign-up sheet was a certification that Doris had viewed the sexual harassment training tape. There was no reference to any other proceedings, allegations or charges in the text of this document. McCann sought the removal of this document from Doris's personnel file. The Union has subsequently alleged in the pending ULP that the County's failure to remove this document was violative of the previsions of Joint Exhibit No. B, as cited in Finding No. 5, above. No other documents found in or reviewed as part of the personnel file were alleged to be there in violation of the "removal" provisions of Joint Exhibit No. B.

8. On or about November 15, 2001, Doris, accompanied by McCann, was called to a "fact gathering interview" before Panarello and Lt. Richard Grenier, the latter having testified that there were occasions of raised voices between Panarello and Doris during this meeting. Doris testified, "I felt more like a suspect than a witness." Doris expressed concern that he thought he was going to be disciplined, either in or as a result of this meeting. Grenier testified Doris was not the subject of this investigation. Panarello confirmed that this interview was heated, with raised voices and with his criticism of Doris for having raised the issue of a disparaging remark by one employee about another employee some two years after its occurrence. Because Doris was the person who allegedly conveyed the news about the disparaging remarks to the employee about whom it was made, Panarello wanted to question Doris about when the remark was made, who else heard it, why he waited 2 years to report the incident, and why he did not follow established procedures involving the chain of command. Grenier observed that Panarello had to "pry information out of [Doris]." Up to the date of the PELRB hearing, no discipline had been imposed on Doris either as to his involvement with the incident which caused the interview to occur or as to his behavior at that interview.

9. On or about November 28, 2001, Panarello wrote a memo to Doris (Joint Exhibit No. G) "temporarily reassigning" him to the third shift on which there was what Panarello described as a "staffing crisis." Doris testified that he believed this reassignment was the result of his confrontational interview on November 15, the result of

his being a union member and officer and the result of his having grieved the December 12, 2000 warning letter from Panarello. Doris and the Union further assert that Doris's temporary reassignment was violative of the CBA, in particular Articles 7.8 and 19.2.1. They provide, respectively, as follows:

> 7.8 At any time a vacancy exists in the schedule, the County shall allow employees to change their shift assignments, subject to the needs of the County, based on seniority, employee quail-fications and demonstrated ability. (Emphasis added)
>
> 19.2.1 Any vacancy in existing or new bargaining unit position will be filled by the promotion or transfer of a full time employee from within the department if there are interested qualified applicants. In considering the promotion or transfer of a full time employee within the Department, the County shall consider among other things, the employee's qualifications, seniority, capacity for the position, and demonstrated ability. (Emphasis added)

Given that there were other employees less senior than Doris who were not temporarily reassigned, the Union asserts that his transfer was violative of seniority provisions in the CBA.

10. Supt. Panarello, in his direct testimony, established that he was the person who reviewed Doris's file to assure conformity with the Commissioners' order (Joint Exhibit No. B) and who removed all the "pertinent information" referenced therein. As for Joint Exhibit No. E, which Doris and McCann found in the file during their October inspection, that document was dated 9/9/00 and had no stated relevance or connection with any investigatory or disciplinary proceedings. Instead, Panarello explained that all employees were required to watch the sexual harassment tape if they could not attend the actual training session. County Administrator and Finance Officer Nancy Cook confirmed that the Joint Exhibit No. E form was a regular verification procedure for personnel who watched the training tape rather than attend the live training session. She also confirmed that she checked Doris's personnel file to be sure that any documents related to the Joint Exhibit No. B sexual harassment matter had been removed, noting that some were secured at the finance office inasmuch as the directive was to "remove," not

"destroy," and because there were, at that time, on-going legal proceedings in another forum such as might have required the County to prepare a defense for itself. Notwithstanding that the Union wanted Joint Exhibit No. E removed from the personnel file, Cook said the County declined to do so. It was a training document, not related to the May 7, 2001 (Joint Exhibit No. B) order or separate Human Rights Commission proceedings.

11. Panarello also explained that there were extenuating circumstances why it was necessary to temporarily assign Doris to the third shift (Joint Exhibit No. G). First, if a less senior employee had been assigned, this would have resulted in a female preponderance ratio of 3:1 or 4:0 on that shift. Second, Doris had worked the third shift before. Third, other personnel replacement possibilities would have involved and resulted in displacing a split shift correctional officer who had no experience on the third shift. Fourth, experience on the third (11 p.m. to 7 a.m.) shift was important because of protective custody cases as well as the need to hold intoxicated or incapacitated persons until they could either be released to the custody of another individual or be capable for caring for themselves. Finally, the CBA contains a Management Rights clause which reads:

MANAGEMENT RIGHTS

> 4.1 The management and the conduct of the business of the County and the direction of the working force are the rights of the County, the County shall have the right, to hire and layoff employees; to classify, assign, transfer and promote; to discipline or discharge them for cause; and in general to maintain discipline, order and efficiency in the County. The County reserves the right to publish and enforce reasonable rules and regulations from time to time as it may deem necessary and proper for the conduct of the business of the County and to direct the work force during the work day as the County Commissioners and/or their designated agents may in their sole discretion deem reasonable and necessary provided the same are not inconsistent with the terms of this agreement
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> 4.2 It is agreed that these enumerations of management rights shall not be deemed to exclude other proper management rights not specifically enumerated

herein. The County shall retain all rights and authority exercised prior to the execution of this Agreement, except as modified in this Agreement. The County not exercising any function hereby reserved to it, or its exercising of such function in a particular way, shall not be deemed to be waiving its rights to exercise such function or preclude the County from exercising the same in some other way not in conflict with the express provisions of this Agreement.

DECISION AND ORDER

As it was ultimately presented to us, this case involves three areas or actions for which the Union seeks redress: (1) the County Commissioners' removal order of May 7, 2001 vis-à-vis the training sign-up sheet (Finding Nos. 5, 7 and 10), (2) the temporary assignment of Doris to the third shift (Finding Nos. 9 and 11) and (3) the "fact gathering interview," (Finding No. 8).

The single document complained of by the Union relative to the commissioners' order of May 7, 2001 (Joint Exhibit No. B) was the training sign-up sheet (Joint Exhibit No. E) signed and dated by Don's on "9/9/ 2000." (Finding No. 7.) There is no evidence that any requirements were placed on Doris concerning this "sign-up" or "sign-in" sheet which were any different from requirements placed on other employees who watched the training tape in lieu of attending the "live" training sessions. Second, the document, on its face, is neither prejudical to Doris nor suggestive of any activity which would bring it within the scope of the commissioners' order as recited in Joint Exhibit No. B. Third, the date of the sign-up sheet, 9/9/2000, is some three months before the letter of warning issued to Doris on December 12, 2000 (Finding No. 5). The Union has failed to show any nexus between these two documents. Fourth, the County has plausibly, adequately and uncontrovertedly (Finding No. 10) established that Joint Exhibit No. E was a regular and normal business record used to verify training activity when employees complete training requirements by watching a video rather than by attending the actual on-site training session. Our review of these circumstances discloses no basis upon which to find a ULP has been committed.

When we revisit the staffing needs relating to the reassignment of Doris in November of 2001, we likewise find no circumstances warranting a finding of a ULP. As was the case with the commissioners' removal order, above, here, too, the Union failed to establish any nexus between the temporary reassignment of Doris and his previous dealings with his supervisors, particularly Panarello. The Union failed in its essential burden to prove by a preponderance of the evidence that the County "possessed some degree of retaliatory motivation." Appeal of Prof. Firefighters of East Derry, 138 NH 142, 145 (1993). Conversely, the County established a bona fide and non-discriminatory rationale as to why Doris was selected over other employees to fill the temporary third shift assignment, as shown in Finding No. 11, above. The Union's reliance on the contract, specifically Articles 7.8 and 19.2.1 as shown in Finding No. 9, is not persuasive

because, in each instance, "seniority" is only one of several variables to be considered in making assignments. The Union cannot rely soley on "seniority" and ignore variables such as "capacity for the position," "demonstrated ability" and "subject to the needs of the County" when these standards or criteria have been jointly negotiated into the language of the CBA. Finally, we do not address the Management Rights provisions of Article 4 of the CBA because the Union failed to clear its *prima facie* hurdles, addressed earlier in this paragraph. Had it done so, it still appears that the County has reserved unto itself in Article 4.1 the right to "transfer" employees and "to direct the work force...as the County Commissioners...may deem reasonable and necessary." We conclude there is no ULP associated with the temporary reassignment of Doris.

Finally, as for the "fact gathering interview," as was the case above, the Union failed in its burden to prove retaliatory motivation. "Appeal of Professional Firefighters of East Derry, *supra*. Notwithstanding this deficiency, the fact situation which led to the interview in question was a creature of Doris's own making. It was he, Doris, who belatedly raised the issue of a two year old disparaging remark. Having done so, he cannot now complain that his supervisors are asking him about the circumstances associated with its utterance. We find nothing in the circumstances of this interview which rises to the level of a ULP.

Based on the foregoing, the complaint of unfair labor practices, as to each of its charges and specifications, is DISMISSED.

So ordered.

Signed this 28th day of May, 2002.

BRUCE K. JOHNSON
Alternate Chairman

By unanimous vote. Alternate Chairman Bruce K. Johnson presiding. Members Seymour Osman and E. Vincent Hall present and voting.