



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

A.F.S.C.M.E., Council 93, Local 3657 for
Milford Police Department Employees

Complainant

v.

Town of Milford

Respondent

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Case No. A-0480-11

Decision No. 2002-080

APPEARANCES

Representing AFSCME, Council 93:

Angela Wessels, Esq., Counsel

Representing Town of Milford:

David McGrath, Esq., Counsel

Also appearing:

- Steven D. Lyons, AFSCME, Council 93
- Michael Funk, AFSCME Local 3657
- Lee F. Mayhew, Town of Milford
- Nelson Taylor, Milford Area Communications
- Richard Fortin, Town of Milford
- Fred Douglas, Town of Milford
- R. J. Winterburn, Town of Milford
- Craig Frye, Town of Milford
- Jim Crane, Town of Milford
- Rainsford G. Deware, III, Town of Milford

BACKGROUND

The American Federation of State, County and Municipal Employees (AFSCME), Council 93, Local 3657 (Union) filed unfair labor practice (ULP) charges on behalf of Milford Police Department employees on September 28, 2001 against the Town of Milford (Town) alleging violations of RSA 273-A:5 I (a), (b) and (d) resulting from coercion, domination and interference with union business and administration in the form of conduct by the chief of police towards the union steward. The Town of Milford filed its response on October 12, 2001. Thereafter, this matter was scheduled for a pre-hearing conference in October and then in December, both of which were continued at the request of one or both of the parties.

Representatives of the parties did attend a pre-hearing conference at the PELRB offices on January 30, 2002 as memorialized in Decision No. 2002-020. The March 26, 2002 evidentiary hearing originally contemplated in the pre-hearing conference order was subsequently postponed by the parties, with the result that this matter was ultimately heard by the PELRB on May 7 and 16, 2002. Thereafter, the parties requested, and were granted, until June 17, 2002 to file post-hearing briefs. Both briefs were timely filed on that date. The Town filed a Motion to Strike certain portions of the Union's post-hearing brief on July 2, 2002. The Union filed a reply to that motion and a cross-motion to strike on July 15, 2002.

FINDINGS OF FACT

1. The Town of Milford, by virtue of the operation and management of its police department, is a "public employer" within the meaning of RSA 273-A:1 X.
2. AFSCME, Council 93, Local 3657 is the duly certified bargaining agent for all full-time patrolmen and detectives and for all part-time personnel working 20 hours or more on a permanent basis at the Milford Police Department.
3. The Town and the Union are parties to a collective bargaining agreement (CBA) for the period April 1, 1999 through March 31, 2002.
4. Patrolman First Class Michael Funk was hired in Milford in April of 1997 after two years in the Wilton Police Department. He has been chief steward for the local since September of 2000. In this role, he investigates and files grievances. Funk is of the opinion that acts in violation of RSA 273-A:5 I (a), (b) and (d) were committed against him by Chief Fred Douglas because of his union duties resulting from various incidents recited below.
5. In March, 2001, Funk was advised that Booth had been in a high-speed automobile pursuit, a pursuit which started, broke off and restarted, where the pursued driver later died in an automobile accident in

Massachusetts. Booth and Funk discussed the possibility of disciplinary action. Funk, a newcomer to steward duties, discussed this with AFSCME Rep. Steve Lyons and then raised it at a union meeting. Then, Funk was advised by Joe Maccarone, President of Local 3657, to get a copy of the dispatch tape. Funk then prepared a letter to Nelson Taylor, Director of the Milford Area Command Center (MACC) requesting a copy of the dispatch tape during the Booth pursuit. Taylor advised Funk that he would tell Douglas, as a courtesy, that Funk had requested the tape. When Douglas learned of Funk's request of MACC, he e-mailed Funk on March 26, 2001, accusing him of violating standard operating procedure 26-1, telling him that the chief or his designee are the "only ones that have authority to obtain that information," and advising him "at this point it has nothing to do with the police Union that you represent." (Un. Ex. No. 3.) On March 30, 2001, Douglas wrote Funk a formal letter which said, "I have since found out that you did not obtain permission from anyone to write a letter requesting the tape on the pursuit that Officer Garret Booth was involved in." "Taking issues out of context, being involved with issues that are not any of your direct business... are some of the issues which have come to my attention... [I]t is very unfortunate that the Union, more particularly you, have resorted to these transparent tactics to cause dissension between Union members and management... I question your motive and your cooperation with management as a Union representative." (Un. Ex. No. 4.) During cross examination Funk testified that Douglas was "doing his best to obstruct me from obtaining that tape.¹ [It was] my job [to get the tape] to protect a union member. A report had already been changed. We wanted to maintain the integrity of the tape." There is no evidence of formal discipline being imposed after this event in accordance with Article 22 of the CBA.

6. Funk worked the day shift (7 a.m. – 5 p.m.) in Sector 2 on July 20, 2001. He had no assigned lunch time so, upon completing a VIN check, he drove through KFC, got food and made a radio call to Officer Bright so that they might meet at "Location 5," shown as Hammond Road on the Town's/Department's list of location codes, the approved places for such meetings. (Un. Ex. No. 7.) Funk testified that it was both taught in the department's field training and a practice that officers would meet, exchange information or have coffee at the designated locations shown on Un. Ex. No. 7. Likewise, he said it was an accepted practice for on-duty officers to leave their patrol sectors for lunch; however, it was the policy that officers should not meet up with each other for lunch in public view. Testifying for the Town, Sgt. James Crane explained that patrol officers were allowed to

¹ See also memo from Douglas to Taylor, March 26, 2001. "...under no circumstances is information to be released to any member of this department or any other organization without my consent." (Un. Ex. No. 13.)

have coffee together but were not supposed to eat together, a policy he has observed for 16 years. He contrasted this rule to non-patrol officers who are allowed to eat together. A standard operating procedure (SOP) dated February 8, 1993, provides, in pertinent part, "Officers will not leave their patrol area for reasons other than police business or meals... Unless they are assigned to the same vehicle, two uniform patrol officers will not eat together." (Un. Ex. No. 9) When Bright and Funk lunched on July 20, 2001, both were outside their patrol areas. Funk subsequently received written counseling for being out of his area and meeting for a meal; Bright did not. (Un. Ex. No. 5.) This was later rescinded by the selectmen on October 10, 2001 (Town Ex. No. 4.) A new directive, entitled "General Order," followed the July 20, 2001 lunch which is more restrictive than the policy in effect when the incident occurred. (Un. Ex. No. 8.) Douglas testified that Funk is the only Milford officer ever disciplined for being out of his sector or for having lunch with another officer.

7. During the July 20, 2001 lunch break, the Milford Police Department (MPD) received a "lobby complaint" about a Gil Paving truck which nearly ran the complainant off the road. The complaint was dispatched/radioed to Funk at 11:56 a.m. whereupon he responded that he was "on detail" and that he would address it when finished with his unspecified duties. (Un. Ex. No. 6.) Funk reported that dispatch said complaint was not on-going so he went back to MPD to discuss the complaint and get the paperwork from Sgt. Deware who was the intake officer. Funk arrived at MPD at 12:18 p.m. (Un. Ex. No. 6 and Town Ex. No. 5.) Meanwhile, a selectmen (Courago) and highway worker (Rouoff) called Douglas directly to complain about the same truck. This prompted Douglas to approach Deware to inquire why Funk was being delayed. By 12:30 p.m. Douglas told Deware that Funk and Bright were having lunch together in violation of MPD policy, that Funk was out of his sector, and that they should be responding to calls even if they have to interrupt lunch to do so. (Town Ex. No. 2.) Funk later told Deware he would have immediately responded to the noontime service call had it been identified as a priority matter. Subsequently, SSGT Crane conducted an internal investigation of the events of July 20, 2001, which included the foregoing plus a failure to take assigned department equipment with him after roll call. (Town Ex. No. 3.) Crane concluded with a recommendation that Funk be given a written warning on 1) staying in his sector, 2) eating a meal with another officer, and 3) prompt response to service calls. On August 9, 2001 Funk received the disciplinary memo (Un. Ex. No. 5) which he grieved. The selectmen subsequently removed the warnings pertaining to patrol sectors and meals. The August 9, 2001 disciplinary memo was reformatted and re-signed by Douglas and

Crane on October 10, 2001. It currently references on Funks "failing to respond to a call for service in a timely fashion." (Town Ex. No. 4.)

8. Prior to preparing Town Ex. No. 2, Deware saw Funk, or vice versa, at Pizza Top. Funk claims Deware told him, "I want you to hear it from my lips you are going to be written up." Funk claims that Deware told him that he (Deware) was pressured and coerced into the "write up," presumably Town Ex. No. 2, because he was on extended probation, just coming into the zone for promotion to sergeant and was expecting a new child. Deware, however, was not called as a witness for either side. SSGT Crane testified that Deware told him that he (Deware) would not have cited some of the items in Town Ex. No. 2 or as mentioned in Union Ex. No. 5 had it not been for the intimidation from Douglas. Deware "felt that he had to do something about it."
9. Richard Fortin began his employment with the MPD in 1985. He is currently a captain and signed a version of Un. Ex. No. 5 on "8/20/01" underneath where Douglas would have affixed his signature, had he (Douglas) signed the first version of the document. Fortin explained that patrol officers are paid through their lunch periods so it is policy for them to respond to dispatch calls during lunch. He confirmed that the Rule and Regulation books formerly issued to officers have been collected and are undergoing revision. He acknowledged meeting with other officers, including Funk, at locations on Un. Ex. No. 7 and noted that Hammond Road is a very common meeting place because of its convenience. Likewise, Capt. Reginald Winterburn was familiar with the location codes on Un. Ex. No. 7 and said he had met with Funk to share coffee and pastries with him, but not to share a meal with him.
10. Chief Fred Douglas has been employed by MPD in various capacities since 1978. He explained his interest in the Booth high speed pursuit because of the subsequent fatality in Massachusetts. When he coordinated with MACC, he spoke with Nelson Taylor and learned that Funk had requested a copy of the dispatch tape. He developed a sense that dispatch tapes were confidential because of an earlier juvenile assault case. While he was reviewing the tape, Douglas claims not to have been denying access to Funk, but, rather, was pursuing his belief of not believing anyone, i.e., in a non-official capacity, had a right of access to that tape. He has since studied the matter further, received and read Nelson Taylor's letter of March 29, 2001 (Un. Ex. No. 13) and changed his mind so that he believes access is appropriate. Nelson Taylor testified, on rebuttal, that Douglas threatened to "seize the [dispatch] tape as evidence" which prompted Taylor to call his legal counsel (Un. Ex. No. 14.) Notwithstanding this change of mind, Douglas did not advise Funk of his new conclusion

that access to the dispatch tape was permitted or rescind his e-mail to Funk of March 26, 2001 (Un. Ex. No. 3).

DECISION AND ORDER

For purposes of this decision, we assess the complained-of conduct, first, as three discrete events and, second, as to their cumulative effect, if any, on the functioning of the employee organization. In this process, we are mindful of the generally accepted definition of "coercion" in a labor relations context, namely, "pressures exerted by employers against employees to prevent their joining a union or *engaging in concerted activities protected by law*. Robert's Dictionary of Industrial Relations, 4th Ed., p. 125, Bureau of National Affairs, 1994. (Emphasis added.) Likewise, "interference," both under Section 8 (a) (1) of the NLRA and RSA 273-A:5 I (a) and (b), relates to a broadly construed unfair labor practice. "It embraces the more specific unfair practices of discrimination, domination, refusal to bargain, plus a variety of additional costs...Coercive questioning of employees about their union membership, espionage and surveillance of employees, removal of privileges, and the circulation of anti-union petitions have also been held unlawful employer interference with employee rights." Roberts Dictionary of Industrial Relations, id., p. 351.

When we examine the lunch and out-of-sector events of July 20, 2001 (Finding No. 6), we find both that Funk was disciplined and subsequently cleared of that discipline at the selectmen's level of the grievance procedure. The appropriate standard or policy to be applied to this situation is the established practice as it existed on July 20, 2001, not the policy as it became after the generation of the new "General Order," identified in these proceedings as Union Ex. No. 8. While Funk is entitled to no remedial remedy because the written counseling was subsequently rescinded, it cannot go unnoticed that this attempted discipline was the first time a patrol officer in the MPD had ever been disciplined for being out of his sector or for having lunch with another patrol officer. There is no evidence that any attempt was made to discipline Bright.

The discipline imposed on Funk, for "failing to respond to a call for service in a timely fashion" is based on the record and was substantiated by the testimony (Finding No. 7). See also Town Ex. Nos. 2 and 5. Obviously, the time limits agreed to by the parties in Article XXII (F) of their CBA apply from the date of Union Ex. No. 5, not Town Ex. No. 4.

The last area we address is the Officer Booth pursuit discussed in Finding No. 5. While this prompted no discipline on Funk or otherwise, the record exhibits very aggressive behavior by the Chief, obviously in his supervisory/employer capacity, towards Funk, as steward. The record gives every impression that Douglas was attempting to tell Funk what was union business and what was not. Douglas, as chief, took Funk to task for his performance as steward. This impinges on the union's right to select its officers and to designate its leaders for the processing, adjustment and, conceivably, settlement of grievances, a protected right under RSA 273-A:11 I. Thus, the behavior exhibited by Douglas towards Funk on the Booth issue was "coercive" within the meaning of RSA 273-A:5 I (a), which defines an unfair labor practice.

We look to the totality of the conduct to determine if there was either domination or interference emanating from management against the union, as charged in the ULP. "Generally, the [National Labor Relations] Board considers a labor organization unlawfully dominated if the employer has the *potential power* to control it, but reviewing courts have generally required evidence of *actual control*." The Developing Labor Law, 3rd Ed., p. 300, Bureau of National Affairs, 1996. Given that we were provided with no evidence of how the Chief's conduct impaired, delayed or disrupted the functions of the union, we find no proof of actual domination having occurred within the meaning of RSA 273-A:5 I (b).

The test for interference, however, is less stringent. "Domination of a union constitutes an irreversible subjugation of the union to the employer's will; interference...is misconduct sufficiently less severe that the union is deemed capable of functioning as a union once the interference...is removed." The Developing Labor Law, 3rd Ed., p. 303, Bureau of National Affairs, 1996; Liquor Salesmen L. 194 v. NLRB, 452 F2d 1312 (1971); NLRB v. Dennison Mfg. Co., 419 F2d 1080 (1969). This seems to be the case here. When Douglas untargeted Funk after the erroneous information about access to public records and the July 20, 2001 events, Funk personally and the union generally gave every appearance of being able to return to their union functions on a "business as usual" basis. Because "the defense of good faith is unavailing in [NLRB] section 8 (a) (2) cases,"² we find that Douglas's conduct, cumulatively of the events described herein, did constitute interference in violation of RSA 273-A:5 I (b). This conclusion is further buttressed by Funk's and Crane's testimony about the pressure Deware felt, in Finding No. 8.

Based on the foregoing, we find that the Town's conduct, by and through the Chief of Police, was violative of RSA 273-A:5 I (a) and (b). By way of remedy, we direct the Town to instruct its officers, agents or employees in the Milford Police Department to CEASE and DESIST from such conduct forthwith.

So ordered.

Signed this 18th day of July, 2002.


BRUCE K. JOHNSON
Alternate Chairman

By unanimous vote. Alternate Chairman Bruce K. Johnson presiding. Members Richard W. Roulx and E. Vincent Hall present and voting.

² The New Hampshire counterpart is RSA 273-A:5 I (b). Quote is from The Developing Labor Law, 3rd Ed., p. 289, Bureau of National Affairs, 1996.