State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

New Hampshire Troopers Association	*	
Complainant	*	
v.	*	Case No. P-0754-11
State of New Hampshire, Department of Safety, Division of State Police	*	Decision No. 2003-019
Respondent	*	

APPEARANCES

Representing the Troopers Association

James Donchess, Esq.

Representing the Division of State Police

Thomas Manning, Director of Personnel

Also Appearing:

Russell Frykland
Christopher Rollston, NHTA
Stacie Rollston, NHTA
Bruce Twyon, NHTA
Craig Wiggin, Captain, NH State Police

BACKGROUND

The New Hampshire Troopers Association ("Association") filed Unfair Labor Practice (ULP) charges against the State of New Hampshire, Department of Safety, Division of State Police ("State") on November 5, 2002, alleging violations of RSA 273-A: 5 I (h) and (i) resulting from a breach of contract and relying on a rule to require reimbursement for damaged state property contrary to Article 19.6.3 of the parties' current collective bargaining agreement. The State filed its answer on November 20, 2002. Representatives of the parties attended a pre-

hearing conference in this matter on December 20, 2002 as memorialized in Decision No. 2002-155. This matter was heard by the PELRB on February 25, 2003, concluding with closing oral arguments and the closing of the record thereafter.

It should be noted that that portion of the ULP charge alleging breach of contract under RSA-A: 5 I (h) was brought to and processed by the PELRB under Article 14.5.1 of the parties' 2001-2003 CBA, which provides:

> "If subsequent to the Director's decision the Association feels that further review is justified an unfair labor practice complaint may be submitted to the Public Employee Labor Relations Board. A copy of the complaint must be sent to the Employer at the same time. The decision of the Public Employee Labor Relations Board shall be final and binding."

At the commencement of the hearing before the PELRB, the parties, through their respective representatives, acknowledged that they were proceeding in accordance with the foregoing contractual provision.

FINDINGS OF FACT

1. The State of New Hampshire, Department of Safety, Division of State Police, by virtue of its operation of the Division of State Police and the direction of sworn law enforcement personnel therein, is a "public employer" within the meaning of RSA 273-A: I X.

2. The New Hampshire Troopers Association is the duly certified bargaining agent for Troopers, Corporals and Sergeants employed by the Division of State Police.

3. The State and the Association are parties to a 2001-2003 CBA, (Joint Ex. No. 1), which remains in effect through June 30, 2003. In addition to Article 14.5.1 referenced above, it contains, *inter alia*, Article 19.6.3 which is at issue herein and provides:

> The employer shall not charge the employee for the repair/ replacement of any issued equipment if loss or damage occured in the normal performance of the employee's assigned duty.

4. Alleged and admitted portions of the ULP include paragraphs 1 through 9, inclusive, plus paragraphs 11 and 12. Of these, paragraphs 5 through 9 read as follows:

> 5. On August 24, 2002, Trooper Christopher Rollston was training a trooper trainee. On that day Trooper Rollston and the trainee had worked overtime as a result of have [sic] made a DWI arrest. The[y] finished work at

approximately 1:30 a.m. At approximately that time, the trainee was removing his things from Trooper Rollston's cruiser. Trooper Rollston placed the trainee's computer on the roof of the cruiser, thinking that the trainee would see it and take it with him. When it came time to leave with his cruiser, Trooper Rollston did not notice that the computer was still on the roof. It was dark at the time. As Trooper Rollston drove away, the computer slid off the roof, hit the ground and was damaged.

6. In a memorandum to Col. Gary Sloper, the Director of the Division of State Police, dated August 24, 2002, Trooper Rollston took complete responsibility for the damage to the computer. [Un. Ex. No.1]

7. Captain Craig Wiggin of the New Hampshire Division of State Police wrote Trooper Rollston a memorandum dated September 5, 2002, ordering Trooper Rollston to pay the Division a fine of $700.00, an arbitrary portion of the replacement cost of the computer. As the time it was damaged, the computer was several years old and, upon information and belief, it had a value of less than $700.00. [Un. Ex. No. 2]

8. Trooper Rollston and the New Hampshire Troopers Association responded to Capt. Wiggin by memo pointing out that neither the Collective Bargaining Agreement no[r] the personnel rules authorized the Division to charge Trooper Rollston $700.00.

9. Captain Wiggin wrote Trooper Rollston a memorandum dated October 22, 2002, again ordering Trooper Rollston to pay the Division $700.00 on a payment schedule of at least $30.00 per month. Capt. Wiggin's memorandum concluded as follows in bold type:

> **"You are to consider this a direct order. Your failure to comply will result in disciplinary action, up to and including termination."**

The purported justification for fining Trooper Rollston is a Standard Operating Procedure of the Division of State Police. [Un. Ex. No. 3]

5. At the time of the incident described in Finding No. 4, Rollston was serving as a Field Training Officer (FTO) for Probationary Trooper

Jonathan Stephens. In order to acclimate himself to trooper duty, Stephens routinely transferred his gear, inclusive of the laptop, to Rollston's cruiser when the two rode together. This process required Stephens to empty Rollston's cruiser of his equipment, including the laptop, when the two parted at the completion of the shift. During the incident in question, Rollston assisted Stephens by removing the laptop from its cruiser stand and placing it on the light bar.

6. When Rollston first received notice that he would have to, "make restitution," for damage to the laptop, it came in the form of a memo dated September 5, 2002. (Union Ex. No. 2.) In that memo, Capt. Craig Wiggin said, "it has been determined that the damage to the computer was due to [Rollston's] negligence," and cited violations of the "Professional Standards of Conduct," sub-section 1. 12. 2 (2) relating to equipment maintenance. This sub-section provides in pertinent part, "If it is determined that such [damage] was caused due to negligence or misuse by the employee, the employee shall be considered negligent of duty. In addition..., the Division Member may be required to repair or replace the equipment or property at their own expense." (Union Ex. No. 3)

7. The laptop computer in question continued to be used by Stephens for approximately a week after it was damaged and before it was replaced. Union Ex. No. 3 provided that Rollston's first monthly payment of at least $30.00 must be received on or before November 15, 2002. As of the time of the PELRB hearing, Rollston had made four (4) thirty dollar payments.

8. The requirement to make restitution for damages done to computers being used by troopers has been inconsistently applied. According to unrebutted testimony from Rollston, approximately a week later, Trooper Eric Shirley dropped his computer when removing it from his automobile. The computer had substantial damage, yet Shirley was not required to make restitution. In the intermediate range of the spectrum, according to testimony from Association past president Bruce Twyon, Trooper Christopher LaPorte was charged $400.00 for a computer left on his car but did not contest the assessment because it was reimbursed by his homeowners' insurance. Twyon questioned how the $700.00 figure was arrived at in Rollston's case.

9. Russell Frykland, owner-partner in On-site Information Technology, was asked by the Association, as an expert and commercial provider of computer services, to establish a value for the laptop computer damaged in the August 24, 2002 incident. He described the damaged computer in question as a CF-25 Panasonic laptop, approximately four (4) years old with a 1.6 Pentium chip. Since that item is no longer sold, he established

a price by checking on E-bay for a similar machine of similar vintage. He said E-bay prices were $150.00 to $300.00 for a similar machine. Conversely, Wiggin's memo to Thomas Manning dated January 13, 2003 [Joint Ex. No. 2] said that the 1998 new price for the damaged computer was approximately $3,200.00 and that the current, 2003, replacement cost for a new model with similar features was $3,459.00. The Panasonic material relied upon by Wiggin in Joint Ex. No. 2 described a Panasonic computer known as "Toughbook 28," was printed in October of 2002, and described a machine with a 30 gig hard drive, 256 RAM and an XP/2000 operating system.

10. Craig Wiggin is a State Police Captain who commands the Support Services Bureau. He explained that the laptop computers, such as Stephens was using, were purchased in 1998 with a federal grant and had either a Windows 95 or Windows 98 operating system. He learned of the damage to the computer from Lt. Brown, Troop "D" commander. Brown had recommended "some restitution" so Wiggin checked with Capt. Burke, commander of Troops A, B and C collectively, who also found that there was negligence, not of an intentional nature, and that restitution was appropriate. Ultimately, according to Wiggin, the case went to Colonel Sloper, commander of the Division of State Police, who concurred with the restitution amount recommended by the Lieutenant and two Captains. Wiggin testified that Sloper, earlier in his tenure of command, had made a decision to cap restitution damages which might be assessed to no more than $700.00, unless the damage inflicted was determined to be intentional. Wiggin explained that restitution is contemplated under the rules of the State Police (e.g., Finding No. 6, above) when there is negligence or misuse [State Ex. No. 2] or when loss or destruction of property was due to carelessness or neglect as provided in RSA 106-B: 8 [State Ex. No. 3][1].

11. In speaking to Rollston's duty performance and record, Wiggin said that Rollston is a good Trooper, without a history of abusive or neglectful conduct but "this [incident] could have been avoided." Wiggin noted that another laptop computer had been damaged[2] and resulted in a repair estimate of $1,357.00. [Joint Ex. No. 2] Not withstanding this, Wiggin testified that there had been only eight (8) instances of restitution payments since 1999. This is inclusive of damage to motor vehicles which have had much higher cost consequences, up to $43,000.00 for a new cruiser, without any restitution being sought or collected.

[1]RSA 106-B: 8 provides circumstances under which "the value of such property shall be paid for by such employee," but provides no guidance as to present value, amortized value, replacement value, or otherwise. The Board received no testimony or argument on this issue.

[2] John Palmer memo of 12/31/02 appended to Joint Ex. No. 2 shows damage to have been a cracked LCD.

12. On cross-examination, Wiggin testified that the Division was not taking the position that the departmental rules were controlling over the provisions of the CBA. He acknowledged that damage to department equipment, "happens every day," and that it was probable that the hard drive from the Stephens laptop had been cannibalized and used elsewhere since it was only the screen (LCD) which was damaged. When questioned about the $700.00 restitution amount, Wiggin said that the damaged laptop could not have been repaired for $700.00, and in response to Mr. Frykland's testimony, said that the state cannot purchase from or through E-bay and "does not purchase used equipment." In Rollston's case, Wiggin noted that the issue of restitution does not go into his personnel file whereas, had Rollston been disciplined, either in addition to or in the alternative to restitution, the report of discipline would have been put in his personnel file. As for the Eric Shirley computer incident, Wiggin was unaware of it and did not understand why it was not reported.

DECISION AND ORDER

This case originated with PELRB as the filing of an unfair labor practice on November 5, 2002. It alleged both a breach of contract under RSA 273-A: 5 I (h) and the improper making of a rule relative to terms and conditions of employment which would invalidate a portion of a collective bargaining agreement, a violation under RSA 273-A: 5 I (i). Both the ULP and the issues set forth in the pre-hearing order suggest that the contested matters involved a grievance, more specifically in the form of a violation of Article 19.6.3 of the CBA[3]. Ordinarily, this would be cause for us to remand these issues to the parties so that they might complete their resolution through the grievance process, particularly when Article 14.1.3 of the parties' CBA liberally construes a grievance as an occurrence when "any employee [is] having problems concerning the interpretation or application of any provision" of the CBA. Were it not for the language of Article 14.5.1 of the CBA, appearing on page 2, above, that is exactly what we would have done. Instead, we find ourselves asked to resolve the issues of the pre-hearing order[3] in accordance with and as the final step of the final and binding contractual grievance procedure. The parties affirmed to the PELRB that this was their intention before the PELRB proceeded to hear their presentations on the merits.

The basic issue here is whether the State violated Article 19.6.1 of the CBA when it assessed a $700.00 restitution payment against Trooper Rollston for damage to a laptop computer. A clear preponderance of the evidence suggests that it did.

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[3] Issues identified for determination in the Pre-hearing memorandum and order (Decision No. 2002-155) were:

1. Whether the Division's actions in collecting a payment from Trooper Rollston for damage to department equipment constituted a breach of the parties' collective bargaining agreement or violated RSA 273-A: 5?

2. If the answer to the previous question is in the negative, was the amount of the payment assessed excessive?

The clear meaning of the language of Article 19.6.1 is that the State has agreed, by CBA, that it will not charge an employee for the repair or replacement of issued equipment if loss or damage occurred in the normal performance of the employee's assigned duty. There is no issue that both Rollston and Stephens were in the course of their assigned duties when the damage to the computer occurred. Likewise, we are equally convinced by the testimony that the loss was not caused by purposeful, intentional or abusive conduct by either of them.

Under the foregoing circumstances, the contract says that the employee shall not be charged for the damage. The State, through the testimony of Wiggin, has not challenged/is not challenging the primacy of the CBA language over departmental rules. Likewise, we must assume that there is a protective purpose for having the contract language; it has been in the CBA at least since the parties' 1985-87 CBA. (State Ex. No. 1) This suggests to us that the parties have agreed, by contract, for some 15 years, to a particularized and separate standard relating to reimbursements, a standard which, on its face, intends to be exclusive of Rule 1.12.2 (State Ex. No. 2) and RSA 106-B: 8. (State Ex. No. 3) If this is not the intended result, we cannot explain or understand the purpose for having Article 19.6.1 included in the CBA.

Rule 1.12.2 speaks to damage, "caused due to negligence or misuse by the employee." We have already determined, above, that there was no evidence of misuse, nor is it apparent that any was alleged. When we examine the issue of negligence, as found by the employer, we are both confronted and confounded by a different set of circumstances, namely a divergent, inconsistent and inequitable application of the negligence-leading-to-restitution standards of Rule 1.12.1 and RSA 106-B: 8, both of which we believe to have been obviated by Article 19.6.1. Not one of the three[4] damage-to-computer cases cited to us was handled in the same manner or with the application of the same standards, either as to negligence or to amount of restitution.

We, likewise, fail to understand why the excellent record and reputation of Rollston, exhibited by both the testimony from Capt. Wiggin and Rollston's performance report four months after the incident, were not considered matters in extenuation and mitigation. (Union Ex. No. 4) This does not square with assessing the maximum restitution amount, $700.00, against Rollston or with Wiggin's testimony that the Division looks to a pattern of conduct when considering negligence or misuse involving the much more expensive asset of police cruisers. There was no adverse pattern of misuse or neglect here.

Finally, we are not convinced that the State made its case as to value of the computer. We note that "value" is a term used in State Ex. No. 3 referring to RSA 106-B:8. No evidence was offered as to the meaning of "value," as noted in footnote 1, above. While we understand that the 2002 replacement value of a new "Toughbook" laptop, with far superior capacity and faster operating systems, is upwards of $3459.00 (Joint Ex. No. 2), we do not believe it is the standard to be applied here. As a standard, it fails to account for difference in age, conditions, capacity, wear and tear and other detractors to value. These considerations likely establish the basis why

[4] This includes the Rollston case at $700.00 of assessed restitution; the LaPorte case assessed at $400.00 but covered by homeowners insurance and the Shirley case where no claim for any restitution was made and management was unaware of the incident.

Mr. Frykland's estimated replacement value was between $150.00 and $300.00, a fraction of the $700.00 charged to Rollston.

Based on the foregoing, we find that the State violated both the language and the intent of Article 19.6.1 of the CBA when it assessed restitution damage in the amount of $700.00 against Christopher Rollston. Whether under the statute or under the CBA, we reach the same conclusion. We believe the State's reading of Article 19.6.3 is inconsistent, on its face, with the purposes it espouses. To find otherwise fails to recognize a reason why Article 19.6.3 has been negotiated into the CBA. Thus, the State's reading of Article 19.6.3, such that it coexists with and is subservient to[5] the cited rules and regulations, is a breach of contract under RSA 273-A: 5 I (h).

Looking at the facts strictly as a grievance we come to this same conclusion. "It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner: all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment...."[6] It is generally accepted in cases such as this that discrimination or inequality in the imposition of discipline "is an affirmative defense and, therefore, the union generally has the burden of proving the employer improperly discriminated against an employee."[7] We believe the Association has met that standard relative to the disparity in the three cited computer incidents, as recited in footnote 4, and by a serious inconsistency in the level of inquiry and processing utilized with Rollston versus another trooper whose computer damage apparently was unknown to management.

By way of remedy, we vacate the restitution order (Union Ex. No.3) directed to Rollston and order reimbursement to him of all sums paid under its provisions.

So ordered.

Signed this 17th day of March 2003.

Bruce K. Johnson
Alternate Chairman

By unanimous decision. Alternate Chairman Bruce K. Johnson presiding. Members Richard Roulx and Terry Jones present and voting.

Distribution: James Donchess, Esq.
Director, Division of Personnel

[5] Testimony from Capt. Wiggin already established that the State is not taking the position that departmental rules and regulations are controlling over provisions of the CBA. See finding No. 12, above.
[6] Elkouri and Elkouri, How Arbitration Works, 5th Ed., (Bureau of National Affairs 1997), p. 934.
[7] *Id.*, at 935.