

unfair labor practice complaints against the Department and the Union, respectfully, alleging several grounds upon which the respondent parties had violated his rights under RSA 273-A. Through the instant motion, the Petitioner now requests that the PELRB issue a cease and desist order enjoining the further processing of his termination grievance until the pending unfair labor practice cases are adjudicated and decided by the PELRB. The Petitioner states that a cease and desist order is necessary under the circumstances in order avoid his suffering prejudice and irreparable harm.

The Department filed an objection to the Petitioner's motion on February 24, 2004. It contends that since the Petitioner has filed a grievance, the PELRB lacks jurisdiction to rule on his request for a cease and desist order.

A hearing was conducted before the undersigned hearing officer at PELRB offices on February 24, 2004 at which all parties were present. On said date, following his counsel's withdrawal from the case by letter to the PELRB dated February 16, 2004, the Petitioner filed an appearance *pro se*. During the course of the hearing, counsel for Union expressed the Union's position that the Petitioner's "Motion for Interim Order Enjoining Arbitration" should be approved and requested relief granted. The hearing officer reviewed all filings submitted by the parties, considered all relevant evidence and argument, and determines the following:

FINDINGS OF FACT

1. The City of Manchester Police Department ("the Department") is a public employer within the meaning of RSA 273-A:1, X.
2. The Manchester Police Patrolman's Association ("the Union") is an employee organization and is the exclusive bargaining representative for police officers employed by the Department.
3. Marc Desilets ("the Petitioner" or "Desilets") was a police officer employed by the Department until November 10, 2003. He was a public employee within the meaning of RSA 273-A:1, IX.
4. Desilets was terminated from his position with the Department on November 10, 2003 and thereafter filed a grievance seeking his reinstatement.
5. The grievance has been processed through the multi-step contractual grievance procedure negotiated between the Union and Department. The Union and the Department mutually agreed to waive the grievance procedure's "pre-arbitration meeting" which had been scheduled for February 12, 2004. In accordance with Sec. 7.5(C) of said procedure, the grievance may now "be submitted by the Union to arbitration by the American Arbitration Association or to another mutually agreed upon neutral arbitration and conciliation service" on or before March 5, 2004, or otherwise the grievance shall be deemed to have been abandoned.

6. Sec. 7.9 of the parties' grievance procedure provides, in pertinent part, that "[i]f the grievant does not process the grievance within the time limits set forth in sections 7.2, 7.3, 7.4 and 7.5, it shall be considered as dismissed..."
7. Sec. 7.10 of the parties' grievance procedure provides that "[t]he above times may be extended by mutual written agreement of the parties."
8. Desilets claims that if not postponed, the arbitration will require the Union to advocate his grievance. He maintains that "[h]is interests will certainly be compromised when the very organization required to advocate his interests (was) complicit in violating them." (Petitioner's Motion, ¶ 15).
9. Desilets asserted at hearing that the Union "does not have his best interests at heart." He stated that as relief in his pending ULP against the Union, he requests the PELRB to order the Union to represent him to the fullest extent and to consult with his attorney.
10. Desilets also claims that "if not postponed, the arbitration will result in unnecessarily complicating the cases pending before this board and will likely result in future Unfair Labor Practice Complaints by the parties." (Petitioner's Motion, ¶ 16).
11. In a letter dated January 22, 2004 to Chief Negotiator David Hodgen, Attorney James W. Donchess wrote, in pertinent part, that:

"The Manchester Police Patrolman's Association ("MPPA") supports Marc Desilets' appeal, and the MPPA requests that a pre-arbitration meeting be scheduled and that the matter be arbitrated pursuant to the provisions of the Collective Bargaining Agreement between the City of Manchester and the MPPA."
12. A hearing before the PELRB regarding Desilets' complaints of improper practice against the Department and the Association is presently scheduled for March 18, 2004 at 9:30 AM.

DECISION

It is well settled that the PELRB has initial authority to define the broad statutory language of RSA 273-A. *Appeal of Campton School District*, 138 N.H. 267, 269 (1994)(citations omitted). As the Petitioner's motion seeks injunctive relief pursuant to RSA 273-A:6 III, and Pub. 304.02, the PELRB has jurisdiction to consider and rule upon the instant matter.

A review of the statute and regulation referenced by the Petitioner as the procedural mechanisms for the issuance of interim relief is appropriate under the circumstances. RSA 273-

A:6 III specifically provides that “[t]he board may issue a cease and desist order if it deems one necessary in the public interest, pending the hearing.” Pub. 304.02 reads, in relevant part, that:

(a) When the board considers it to be in the public interest, it shall issue a cease and desist order under RSA 273-A:6, III pending a hearing under Pub 201.05.

(b) The board shall issue such an order for reasons to include, but not limited to:

- (1) Protection of the public safety;
- (2) To avoid prejudice to one party or another; or
- (3) To avoid irreparable harm....

In applying this statutory and regulatory language to the instant case, and despite the broad discretion afforded the PELRB under same, the hearing officer is constrained to deny the Petitioner’s “Motion for Interim Order to Enjoin Arbitration.”

As set forth in Pub. 201.06 (c), in “all adjudicative hearings under [PELRB] rules, the party asserting the affirmative of a proposition shall bear the burden of proving the proposition by a preponderance of the evidence.” Here, the Petitioner presented insufficient evidence of irreparable harm, prejudice or other substantial grounds to warrant the granting of the interim relief requested.¹ Other than expressing concerns over what may happen in the event the grievance procedure is allowed to go forward, the Petitioner presented no evidence of imminent harm or prejudice that will be suffered. While an inherent conflict may exist between the Petitioner and the Union based upon the allegations as raised in the pending complaint of improper practice, it is still speculative to claim that as a result of such conflict, the Petitioner will be prejudiced if the grievance continues to go forward. If the Union breaches its duty of fair representation, if any, to the Petitioner, the Petitioner can take appropriate recourse at the appropriate time. Even though, as alleged by the Petitioner, allowing the grievance process to continue may result in future complaints being filed with the PELRB and, perhaps, adding complexity to the matters already pending, this is also a speculative assertion and an inappropriate basis to grant interim relief.

It is significant to note that interim orders under 273-A:6, III and Pub. 304.02 are temporary in nature, in that, if granted, they are only effective pending an unfair labor practice hearing under Pub. 201.05. A hearing before the PELRB regarding the merits of the Petitioner’s unfair labor practice complaints is presently scheduled for March 18, 2004. The Petitioner has made no showing of prejudice or irreparable harm that he will suffer pending the convening of this hearing. The hearing officer recognizes that there is a due date of March 5, 2004 for submitting the grievance to arbitration by the American Arbitration Association, but there is no indication from the record that this filing deadline will not be satisfied. On the contrary, the Union has already requested “...that the matter be arbitrated pursuant to the provisions of the Collective Bargaining Agreement between [the Department and the Union]” per its January 22,

¹ The Petitioner has made no specific claim that an interim order is necessary for the “protection of the public safety.”

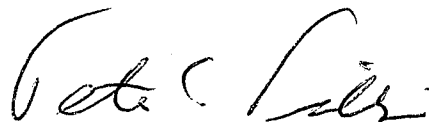
2004 letter from counsel to the Department's chief negotiator. (Finding No. 11, above).² Given the current status of the grievance, there is no evidence that an arbitration hearing is scheduled or even likely to occur prior to a PELRB ruling on the merits of the Petitioner's unfair labor practice charges. Accordingly, the issuance of an interim order enjoining arbitration at this juncture would appear to be unnecessary.

The Petitioner requests that the PELRB effectively inject itself into what appears to be a workable grievance process that has been negotiated in good faith between the Department and the Union. Barring unprecedented and extraordinary circumstances, the hearing officer is reluctant to otherwise interfere with the administration and operation of the Union and Department's grievance procedure. The hearing officer is nonetheless cognizant and sensitive to the current predicament faced by the Petitioner, the Union and the Department. The rights and/or obligations of each party with respect to the pending termination grievance are in question. It may very well be in the best interests of all parties to jointly agree to hold the grievance in abeyance until such rights and obligations, as raised in the unfair labor practice charges, are resolved. The instant decision should not be construed as prohibiting such an agreement. However, at this stage it is not appropriate for the hearing officer to essentially impose such an agreement, particularly where the Union and the Department have specifically established a mechanism within their grievance procedure by which they can do so on their own. (Finding No. 7, above).

The Petitioner's "Motion for Interim Order Enjoining Arbitration" is therefore denied.

So Ordered.

Signed this 4th day of March, 2004.



Peter C. Phillips, Esq.
Hearings Officer

Distribution:
Marc J. Desilets
David A. Hodgen, Chief Negotiator
James W. Donchess, Esq.

² The hearing officer notes that Section 7.5(C) of the parties' grievance procedure provides for submission to arbitration "by the Union." (Finding No. 5, above). However, Section 7.9 appears to place the burden of satisfying grievance procedure time limits, including those for arbitration, upon the grievant. (Finding No. 6, above).