



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Exeter Police Association

Complainant

v.

Town of Exeter

Respondent

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Case No: P-0753-13

Decision No. 2004-166

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

The Exeter Police Association (hereinafter "the Association") filed an unfair labor practice complaint on September 21, 2004 alleging that the Town of Exeter (hereinafter "the Town") committed an unfair labor practice in violation of RSA 273-A:5 I (a), (c), (e) and (g), by violating the *Weingarten* Rights of Officer John Faulkner ("the grievant" or "Faulkner") and terminating his employment. The Association states that on or about March 31, 2004, Lieutenant Stephen Dockery of the Town's police department informed Faulkner in writing that an internal complaint investigation had been commenced against him for alleged misuse of the SPOTS communication system. The Association alleges that Faulkner received this notice when he reported for duty at 1700 hours on that date (although his shift did not commence until 1800 hours). According to the Association, the notice expressly indicated that Dockery intended to conduct an internal investigation interview of Faulkner at 1800 hours. As further averred by the Association, Faulkner contacted Attorney Joseph McKittrick for the purpose of providing him with *Weingarten* representation during the interview. When the interview commenced at 1800 hours, as claimed by the Association, Faulkner informed Dockery that he had contacted Attorney McKittrick to be his Union representative and that he was on his way, but Dockery responded by saying, *inter alia*, that he could not have McKittrick as his Union representative. Later, when informed that McKittrick was present and waiting in the building, Dockery allegedly stated that he (McKittrick) would "have to wait." The Association goes on to claim that despite Faulkner's valid request for Union representation, Dockery neither granted the request nor discontinued the interview, and that he was denied his choice of Union representation because his choice happened to be an attorney.

As a result of the investigation, the Association avers that Faulkner received notice on April 6, 2004 that his employment had been terminated. Faulkner thereafter pursued his administrative remedies, including advisory arbitration, which, as described by the Association, resulted in a recommendation by the arbitrator that Faulkner should be reinstated as a result of substantial and substantive violations of Faulkner's *Weingarten* Rights. The Association requests, *inter alia*, that the PELRB (1) find that the Town violated the Association's and Faulkner's RSA 273-A *Weingarten* Rights, (2) order Faulkner's reinstatement with full back pay and benefits, and (3) order such other relief as it may deem just.

The Town filed its' answer denying the Association's charge on October 4, 2004. It states that Chief of Police Richard Kane informed Faulkner in person on March 17, 2004 of the details of the complaint against him and indicated that the Department would be conducting an internal investigation. Furthermore, the Town avers that Faulkner's shift was scheduled to begin at 1700 hours on March 31, 2004 and that in Dockery's notice to Faulkner regarding the interview of that date in reads, in part, that "[i]f you have a conflict with this time please let me know." While the Town admits that the preliminary portion of the meeting between Dockery and Faulkner was not tape recorded, it contends that the Association's description of what occurred during that time period is inaccurate. Moreover, the Town admits that Attorney McKittrick was asked to wait in the department's reception area, but denies that such action constitutes a violation of the law. In this regard, the Town describes the arbitrator's advisory award as being "based upon erroneous findings of fact and an extremist interpretation of *Weingarten* rights that has no foundation in either PELRB or NLRB decisions."

At the pre-hearing conference, the Town further articulated its positions, raising the question of Attorney McKittrick's status as a Union representative and the Town's knowledge of same. Moreover, it stated its' intent to raise issues of the Board's jurisdiction in this matter, specifically as to *Weingarten* – asserting that this rule is subject to RSA 541-A, the Administrative Procedure Act; and as to the merits of the Town's termination of Faulkner – asserting that the Town's alleged violation of *just cause* was not properly pled in the Association's complaint. Accordingly, the Town requests that the PELRB (1) dismiss the instant improper practice charge with prejudice; (2) order the Union to reimburse the Town for its expenses and fees in connection with this matter; and (3) order such other relief as may be just and fair under the circumstances.

A pre-hearing conference before the undersigned hearing officer was conducted on October 15, 2004 at PELRB offices, Concord, New Hampshire. Both parties were represented by counsel. At the outset of the pre-hearing conference, the hearing officer disclosed to the parties that for a period of time prior to August 2003 he served as counsel to the Association. The hearing officer expressed that he had no personal knowledge as to the facts giving rise to the complaint, and his belief that he could conduct the pre-hearing conference in a fair and impartial manner. The parties' counsel were asked whether or not they had any objection to the hearing officer conducting the instant proceeding. The parties' counsel expressly stated that they had no objection. In light of his relatively recent relationship with the complainant party, the hearing officer does recuse himself from any further decision-making or other participation in the PELRB's consideration of the instant matter.

PARTICIPATING REPRESENTATIVES

For the Association: J. Joseph McKittrick, Esq.

For the Town: Thomas J. Flygare, Esq.

ISSUES PRESENTED FOR BOARD REVIEW

- (1) Is the instant matter within the Board's jurisdiction?
 - a. Is the issue of whether or not the grievant was terminated for *just cause* properly before the Board?
 - b. Is the "*Weingarten* rule" subject to the rule making process set forth in RSA 541-A, Administrative Procedure Act.
- (2) If so, did the Town commit an improper labor practice, within the meaning of RSA 273-A:5 I (a), (c), (e) and/or (g), by terminating Faulkner without *just cause*?
- (3) If so, what shall be the remedy?
- (4) If so, did the Town commit an improper labor practice, within the meaning of RSA 273-A:5 I (a), (c), (e) and/or (g), by refusing to allow Attorney McKittrick to be present during its interview of the Faulkner?
- (5) If so, what shall be the remedy?

WITNESSES

For the Association:

- 1. John Faulkner
- 2. Lt. Stephen Dockery
- 3. Maurice Gagnon
- 4. Chief Richard Kane

For the Town:

- 1. Chief Richard Kane
- 2. Lt. Stephen Dockery
- 3. George Olsen, Town Manager
- 4. Maurice Gagnon
- 5. John Faulkner
- 6. J. Joseph McKittrick, Esq.

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. It is understood that each party may rely on the representations of the other party that witnesses appearing on their respective list will be available at the hearing.

EXHIBITS

Joint Exhibits:

1. CBA for the period of January 1, 2003 to December 31, 2007.
2. Memo from Lt. Stephen Dockery to Faulkner dated 3/31/04.

For the Association:

1. Advisory Arbitration Award dated 8/18/04. (Town Objection).
2. Excerpt from page 7 of the Internal Complaint Investigation Report, dated 4/5/04.
3. Exeter Police Dept. General Order No. 25-01 dated as issued 5/6/97.
4. Summary of SPOTS use by Faulkner.
5. Memo from Chief Kane to Faulkner dated 4/6/04.

For the Town:

None other than those listed above, as joint exhibits, at this time. (Town was not prepared to present its' list of exhibits at the pre-hearing conference, but indicated that one would be forthcoming.)

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. Copies of all exhibits are to be submitted to the presiding officer in accordance with Pub 203.02. It is understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

LENGTH OF HEARING

The time set aside for this hearing will be one (1) day. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least twenty (20) days prior to the date of the evidentiary hearing.

DECISION

1. The parties are directed to exchange relevant, reasonable and necessary information in the preparation of their respective cases.
2. As discussed during the pre-hearing conference, the Association describes the instant improper practice charge as concerning the issues of (1) whether or not the grievant was terminated for *just cause* and (2) whether or not the grievant's *Weingarten* Rights were violated. Conversely, the Town asserts that based upon the face of the complaint, the case only pertains to the *Weingarten* rights issue, and that adding the *just cause* issue at this stage would violate the six-month statute of limitations contained in RSA 273-A. In response, Association counsel indicated that he would assess whether or not to file an amended charge and, if electing to do so, will file said document with the PELRB on or before **October 22, 2004**.
3. The parties' representatives shall meet, or otherwise confer, on or before **November 5, 2004** in order to compose a mutual statement of agreed facts. The parties' representatives shall memorialize those facts upon which they can so stipulate and file that document with the PELRB at least five (5) days prior to the date of the hearing.
4. As indicated above, the Town has listed Association counsel as a witness in this matter, in response to which Association counsel stated his objection during the pre-hearing conference, citing attorney-client privilege. Counsel indicated that they would venture to reach sufficient factual stipulations in order to avoid any need for Association counsel's testimony. Following such efforts, if the Town still desires to call Association counsel as a witness, it shall file a motion on or before **November 12, 2004**, with a copy to the Association, formally requesting his inclusion as a Town witness, describing the nature and legal basis for such testimony, and recounting the specific efforts undertaken to avoid the need for such testimony. In the interim, if the Town files such motion, and unless advised to the contrary, the Association is directed to identify for the PELRB and the Town who will conduct cross-examination of Association counsel no later than **November 29, 2004**.
5. The party representatives shall forward any amendments to, or deletions from, their Witness and Exhibit lists, as detailed above, to the opposing representative or counsel, and to the PELRB, at least five (5) days prior to the scheduled hearing date. The party representatives shall meet, or otherwise arrange, to pre-mark any exhibits, for identification, prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.
6. The parties shall file any other preliminary, procedural or dispositive motions on or before **November 12, 2004**.
7. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an evidentiary hearing between the parties will be held on:

DECEMBER 2, 2004 @ 9:30 AM

at the offices of the Public Employee Labor Relations Board, Concord, New Hampshire.

So ordered.

Signed this 19th day of October, 2004.



Peter C. Phillips, Esq.
Hearing Officer

Distribution:

J. Joseph McKittrick, Esq.

Thomas J. Flygare, Esq.