



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Portsmouth NH Police Patrolmen’s Union,
NEPBA Local 11 (formerly represented by
International Brotherhood of Police Officers,
Local 402

Complainant

v.

City of Portsmouth

Respondent

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Case No: P-0709-26

Decision No. 2006-100

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

The Portsmouth NH Police Patrolmen’s Union, NEPBA Local 11 (hereinafter “the Union”) who was originally represented by IBPO, Local 402 initially filed an unfair labor practice complaint with the Public Employee Labor Relations Board (hereinafter “PELRB”) on January 13, 2006 alleging that the City of Portsmouth and its Police Commission (hereinafter “the City”) committed unfair labor practices in violation of RSA 273-A:5 I by requiring the Union president to attend mandatory weapons training at a training facility that pre-conditioned his training on his signing a document whose effect was to release the training facility from liability to a trainee. Further, the trainee was ordered by a superior officer to sign the document after his initial refusal. Thereafter the trainee signed the document under fear of discipline if he did not and indicated that he was executing the document “under protest.” The trainee later suffered a minor injury due to the range facility being “under construction” at that time. Thereafter, the parties to the collective bargaining agreement discussed the situation and the Union president was informed that police officers would no longer be ordered to sign the waiver document but that if the officer did not participate in the training, “it could jeopardize the department’s certification.

As remedies, the Union requests that the PELRB (1) order the Portsmouth Police Commission to cease and desist its requirement that officers sign a document amounting to a waiver of liability of the training facility; and (2) order management to negotiate on what the

union characterizes as a "mandatory subject[s] of bargaining" in violation of employees' rights under RSA 273-A.

On January 23, 2006, the City filed its answer denying the Union's charge. While the City generally admits to the chronology of events as described in the Union's complaint, it denies that it has committed any improper labor practice. By way of further answer, the City asserts (1) that the Union's complaint is not sufficiently complete in violation of Administrative Rules Pub 201.02(b)(4) and (6); (2) that the Union has failed to adequately describe relief available to it beyond statutory relief under RSA 273-A:6 nor allege that it has exhausted administrative remedies; and (3) that the Union has failed to seek relief through arbitration. The City requests, that the PELRB (1) dismiss the charge with prejudice and reimburse it for its "fees, expenses, and lost time in responding" to the union's complaint.

On March 20, 2006, the parties entered into a "Memorandum of Agreement" holding this matter in abeyance pending proceedings leading to a change in the Union's affiliation and further agreed that the matter would be removed from the hearing docket and administratively dismissed unless either of the parties requested further proceedings in the instant matter within thirty days of any change of affiliation.

On April 4, 2006 the Union filed its answer to the City's request that the matter be dismissed (found within the text of the City's answer and not filed as a separate pleading). The Union's answer, in brief, asserts that the PELRB hear the merits of the matter because the City's conduct amounts to a unilateral action without mandatory negotiations; ignores a clear and concise statement of the facts required by the Administrative Rules; illegally attempts to deny officers their rights against third parties for injury; and that the City is attempting to compel arbitration of an issue that is outside of the existing collective bargaining agreement. On May 3, 2006 the PELRB certified the change in affiliation of the Union to the New England Police Benevolent Association (NEPBA). (See Case No. P-0709). On May 22, 2006 the NEPBA, as successor in interest to the original complaint filed a request with the PELRB for additional proceedings in the instant matter.

A pre-hearing conference before the undersigned Hearing Officer, and with counsel present on behalf of both parties, was conducted on June 21, 2006 at the PELRB offices, Concord, New Hampshire. The Union was represented by its new affiliate the New England Police Benevolent Association (NEPBA). Preliminary discussions were undertaken regarding the procedural path of this complaint between the PELRB's Presiding Officer and the two parties and inquiries of the Presiding Officer of both parties regarding matters requiring additional offers of evidence or exhibits. The parties reiterated to the PELRB that another case, P-0709-27, between them had been settled.

PARTICIPATING REPRESENTATIVES

For the Union: Peter J. Perroni, Esq.

For the Union: Thomas J. Flygare, Esq.

ISSUES PRESENTED FOR BOARD REVIEW

- (1) Whether the PELRB has jurisdiction to hear this matter?
- (2) Whether the Union was required to pursue arbitration as an administrative remedy prior to filing its complaint?
- (3) Has the Union met filing requirements?
- (4) Did the City make a unilateral change on a mandatory subject of collective bargaining?
- (5) Did the City act to restrain coerce and or interfere with its employees in the exercise of their rights?

WITNESSES

For the Union:

1. Officer Richard Brabazon, Union President
2. Officer David Colby,

For the City:

1. Dave Young
2. Earl Case
3. Michael J. Magnant, present Chief of Police

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

For the Union:

1. Collective Bargaining Agreement
2. General Release of Liability and Assumption of Risk
3. Sigarms/Firearms Safety Rules

For the City:

1. None identified at the time of the pre-hearing (to be further identified and notice of those to be presented filed no later than twenty (20) days prior to the evidentiary hearing)

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-half (½) 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 evidentiary hearing scheduled for July 11, 2006 is hereby continued for a period of not less than 45 days.
2. Within 30 days of the date of this ORDER, the Union representative shall amend its initial complaint to indicate with greater specificity what actions of the City constitute violations of which sections of RSA-A:5,I.
3. Both parties shall utilize the available time to develop additional evidence relative to the training facilities available to the City for training in the use of the M-16 rifle and alternative actions that may be employed to close the gap in exposure to injury at a training facility.
4. The parties' representatives shall meet, or otherwise confer, no later than ten (10) days prior to the scheduled evidentiary hearing, and attempt to review the facts relevant to their respective cases and to attempt to reach agreement on all or any facts that are not in controversy. A signed stipulation expressing those facts not in controversy shall be forwarded to the PELRB no later than five (5) days prior to the scheduled evidentiary hearing.
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.

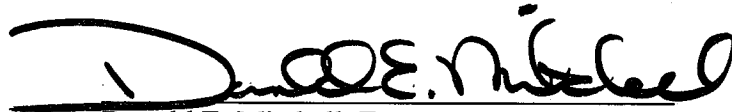
6. The parties shall file any additional preliminary, procedural or dispositive motions no later than twenty (20) calendar days prior to the scheduled hearing date.
7. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an evidentiary hearing between the parties will be held on:

August 31, 2006

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

So ordered.

Signed this 22nd day of June, 2006.

A handwritten signature in black ink, appearing to read "Donald E. Mitchell". The signature is written in a cursive style with a large initial "D".

Donald E. Mitchell, Esq.
Presiding Officer

Distribution:

Peter J. Perroni, Esq.

Thomas J. Flygare, Esq.