



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Portsmouth NH Police Patrolmen's Union,
NEPBA Local 11

Complainant

Portsmouth Police Commission

Respondent

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Case No: P-0709-29
Decision No. 2007-089

PRE-HEARING MEMORANDUM AND ORDER

BACKGROUND

The Portsmouth NH Police Patrolmen's Union, NEPBA Local 11 (the "Union") filed an unfair labor practice complaint against the Portsmouth Police Commission (the "Commission") on June 11, 2007. The Union has also included a request for a cease and desist order pursuant to RSA 273-A:6, III.

Much of the background involved in this matter is not in dispute and it will be reviewed in some detail here because of the Union's request for a cease and desist order. The complaint relates in part to the maintenance and use of sergeant promotion lists pursuant to the parties' collective bargaining agreement. Eligible employees must qualify to be included on such a promotion list, and once included they are ranked relative to others on the list. Promotions to sergeant are made from one of the first three names on such a list. It is undisputed that the "first list" was repealed in October, 2006. According to the Union, two of the three officers on the first list at the time it was repealed were active and vocal in Union activities. The Union filed a grievance concerning the disposition of the first list which is scheduled to proceed to arbitration on June 14, 2007. The Commission generated a second list in February, 2007. In March, the Commission made a promotion from the second list.

On or about May 22, 2007 counsel for the parties (attorneys Flygare and Perroni) engaged in settlement discussions in an attempt to resolve the June 14, 2007 arbitration matter but the precise content of the settlement proposal which resulted is disputed. Based on representations of counsel at the pre-hearing conference, and without recounting unnecessary detail at this juncture, the dispute concerns the treatment of the second list. On or about May 30, 2007 Union counsel informed Commission counsel that the settlement was acceptable to the

Union on the condition that the contemplated promotion from the first list would receive retroactive pay and seniority to a date one day prior to the March, 2007 promotion from the second list.

On May 31, 2007 the same parties and counsel appeared at the PELRB for a final hearing on an unfair labor practice complaint in Case No. P-0709-28. The Union called the Chief of Police and the Deputy Chief of Police as witnesses during its case. After the hearing counsel had further discussions about the status of the settlement, and there is some dispute over the precise content and significance of these communications. At the end of the day on June 1, 2007 Commission counsel informed Union counsel that the settlement was off. The parties dispute the basis for this status. The parties appear to agree that the stated basis for the change of position was the Chief's perception that Union members had engaged in improper commentary and communications concerning the proposed settlement.

On June 4, 2007 the Chief notified applicants on the second list that oral board interviews for one promotion to the position of sergeant would be held on June 12, 2007. The parties agree that traditionally the Commission makes promotions on the same day as the oral board interviews, or in this case on June 12, 2007.

On June 5, 2007 counsel for the Commission forwarded a written settlement proposal to the Union which called, among other things, for a promotion from the first list, a promotion from the second list, and the retirement of both lists. According to the Union, this treatment of the second list was new and was never part of the earlier settlement proposal. The Commission claims otherwise and that therefore there was an apparent misunderstanding as to the terms of the earlier settlement proposal. At the pre-hearing the Union confirmed that it has rejected the June 5, 2007 written proposal, apparently on account of its proposed use of the second list.

The Union claims the Commission failed to bargain in good faith because of its repudiation of the settlement agreement and the scheduling of the June 12, 2007 oral board interviews, both events happening after the Union exercised its right to hearing on May 31, 2007. The Union also claims that the Commission is attempting to punish and retaliate against those on the first list for their Union related activity and also because the Union exercised its right to a hearing on a complaint on May 31, 2007. In the process the Union claims the Commission has violated RSA 273-A:5, I (a),(b), (c), (d) and (g).

As remedies, the Union requests that the PELRB: 1) Immediately issue a cease and desist order to enjoin the Commission from making a promotion pending hearing in this matter; 2) Following a hearing, order the Commission to cease and desist from its unlawful activity and order the Commission to honor the settlement proposal agreed upon by the parties; 3) Order the Commission to make whole any members of the Union who suffered monetary loss as a result of the actions of its unlawful actions; 4) Order the Commission to pay the Union's its attorneys' fees and costs; 5) Order the Commission to negotiate in good faith as required by law; and 6) Order such other relief as it may deem just.

By June 11, 2007 the Commission filed its answer. As already noted, much of the background is not contested in this case. The Commission does maintain that the settlement

proposal always included continuing the second list for purposes of one promotion and that any Union belief to the contrary is a misunderstanding of the proposal. The Commission further contends that the Union's counsel was warned in substance that Union treatment of the settlement proposal as, in effect, a "victory" over management would not be tolerated. The Commission claims any unfair labor practice based on the repeal of the first list is barred pursuant to RSA 273-A:6, VII, the Commission has acted properly with respect to the first and second lists, and that the Union has improperly delayed seeking relief with respect to the Commission's use of the second list.

The Commission requests that the PELRB: 1) Dismiss the charge with prejudice; 2) order NEPBA Local 11 to reimburse the City for its fees, expenses, and lost time in responding to the Charge; and 3) Grant such other relief as may be appropriate under the circumstances.

The undersigned Hearing Officer conducted a pre-hearing conference on June 12, 2007 at the PELRB offices in Concord, New Hampshire. The pre-hearing conference was scheduled to review the Union's request for the immediate issuance of a cease and desist order as well as the usual subjects of pre-hearing.

PARTICIPATING REPRESENTATIVES

For the Union: Peter J. Perroni, Esq.

For the Commission: Thomas J. Flygare, Esq.

ISSUES PRESENTED FOR BOARD REVIEW

At the pre-hearing conference the Union confirmed that its unfair labor practice charge is not based on the repeal of the first list which occurred in October, 2006, more than 6 months prior to the filing of the complaint. Instead, the Union's complaint is based upon the actions of the Commission during the time period involving the recent settlement discussions. The Union specifically states in its complaint that it does not allege that Counsel for the Commission has acted inappropriately in any way. Based on the complaint and the pre-hearing, the issues raised in this case are:

- 1) Whether on or before June 1, 2007 the parties' representatives had agreed to the terms of a settlement proposal subject to final approval by the Commission and the Union and if so what are the terms of the proposal and is it enforceable in whole or in part?
- 2) Whether the Commission retaliated or discriminated against the Union in violation of RSA 273-A:5, I (a),(b), (c), (d) or (g) by its actions with respect to the parties' proposed settlement agreements and its plan to proceed with a promotion from the second list?
- 3) Whether the Commission failed to bargain in good faith by attempting to unilaterally withdraw from a settlement and thereafter "fast track" a promotion from the second list in violation of RSA 273-A:5 I (a), (b), (c), (d) or (g).

WITNESSES AND EXHIBITS

The parties have not yet filed their witness and exhibit lists, but the hearing officer anticipates that the parties will accomplish this filing in accordance with the previously issued Notice of Filing.

LENGTH OF HEARING

The time set aside for this hearing will be three hours. 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

With respect to the Union's request for the immediate issuance of a cease and desist order pursuant to RSA 273-A:6, III the following is noted. At the pre-hearing both parties agreed that rescission of any promotions made as a result of the June 12, 2007 oral board interviews may be necessary as a result of any rulings by the board on the merits of this complaint or on account of any decision issued as a result of the June 14, 2007 arbitration. Neither the Commission nor the Union contended that any such rescission could not be done. Presumably, in fairness to any employee promoted from the second list, the parties will share this possibility with them.

I cannot construe the first settlement agreement as binding and enforceable as of June 1, 2007 based upon the information presented in the complaint and presented at the pre-hearing. There are a number of matters in dispute with respect to the first settlement agreement which need to be resolved to determine its significance and application in this case. Because of the uncertainty as to the status of the first settlement agreement at this time it cannot be used as a basis to find that the Union will likely succeed on its claim that it is entitled to a promotion from the first list and the repeal of the second list. Further, because both parties agree that rescission of any promotion can be implemented if ultimately ordered by this board, I cannot find that a cease and desist order is in the public interest or is necessary to avoid prejudice to one party or another or to avoid irreparable harm. Therefore, I conclude that the Union has not established that the immediate issuance of a cease and desist order is proper pursuant to RSA 273-A:6, VII and Pub 304.02.

1. The parties' representatives shall meet, or otherwise confer, on or before July 1, 2007 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 two days prior to the date of the hearing.
2. The party representatives shall forward any amendments to, or deletions from, their Witness and Exhibit lists 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.

3. The parties shall file any additional preliminary, procedural or dispositive motions no later than fifteen calendar days prior to the scheduled hearing date and any responses thereto shall be filed no later than seven calendar days prior to the scheduled hearing date.

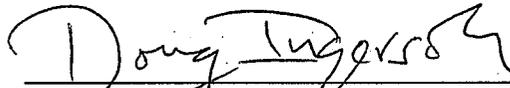
4. Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, an evidentiary hearing between the parties will be held on

July 17, 2007 @ 9:30 a.m.

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

So ordered.

June 13, 2007.



Douglas L. Ingersoll, Esq.
Hearing Officer

Distribution:

Peter J. Perroni, Esq.

Thomas J. Flygare, Esq.