State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

PORTSMOUTH NH POLICE PATROLMEN'S UNION, NEPBA LOCAL 11

CASE NO: P-0709-31

V.

DECISION NO. 2009-081

PORTSMOUTH POLICE COMMISSION

APPEARANCES

Representing: Portsmouth NH Police Patrolmen's Union, NEPBA Local 11
Peter J. Perroni, Esq., Nolan & Perroni PLLC
Lowell, Massachusetts

Representing: Portsmouth Police Commission
Thomas M. Closson, Esq., Flygare, Schwarz & Closson, PLLC
Exeter, New Hampshire

BACKGROUND

NEPBA Local 11/Portsmouth Police Patrolmen's Union (the "Union") filed an unfair labor practice complaint on May 22, 2008 alleging that the Portsmouth Police Commission (the "Commission") committed an unfair labor practice in violation of RSA 273-A:5, I (a), (b), (c), (d) and (g) on account of its adoption of a police uniform anti-adornment policy. In January 2008 the Portsmouth Police Chief issued a General Order providing that "[n]o team designation, merit award, commemorative or affiliation pins shall be worn on the uniform of the day." The Union complains that the Commission has unilaterally and improperly changed a term and

condition of employment because the police uniform anti-adornment policy is a mandatory subject of bargaining, the Commission and Chief Magnant are retaliating against the Union for exercising its rights as reflected in PELRB Decision No. 2007-140, Case No. P-0709-28, and the new anti-adornment policy constitutes restraint, coercion, interference with and discrimination against the Union because its purpose and/or effect is to prevent the display of Union insignia like NEPBA pins.

The Union requests that the PELRB: a) issue an order that the Commission cease and desist from implementation of the new uniform policy reflected in Chief Magnant's January, 2008 General Order and return to the status quo which existed prior to the implementation of the General Order; b) issue an order requiring the Commission to pay the union's costs and attorney fees incurred in bringing this action; and c) order such other relief as necessary.

The Commission filed its answer on June 6, 2008 and denies the charges. The Commission also asserts that the Union's failure to bargain claim is barred by res judicata and the 6 month limitation period imposed by RSA 273-A:6, VII and that the Union is obligated pursue this matter through binding arbitration. The Commission requests that the PELRB: a) dismiss the charge with prejudice; b) order the Union to reimburse the Commission for its fees, expenses, and lost time in responding to the charge; and c) grant such other relief and may be appropriate under the circumstances.

This matter was originally scheduled for hearing on August 19, 2008. However, at the July 29, 2008 pre-hearing conference the parties requested a continuance of that hearing date, and the matter was thereafter rescheduled for hearing on October 17, 2008. This hearing date was then moved to November 13, 2008 because of a lack of administrative staff. The Union then requested a continuance and rescheduling of the November hearing to January 27, 2009, at which

time the board held a hearing at the PELRB offices in Concord. The record was held open until March 16, 2009 to allow the parties to file post hearing briefs. The parties' stipulations are contained in Findings of Fact 1-10.

FINDINGS OF FACT

1. The Portsmouth Police Commission ("Commission") is a public employer within the meaning of RSA-A:1, X.

2. NEPBA Local 11/Portsmouth NH Police Patrolmen's Union is the exclusive representative of all full-time police officers, below the rank of Sergeant, employed by the City of Portsmouth.

3. The Commission and the Union are parties to a collective bargaining agreement ("CBA") with a commencement date of July 1, 2006 and an expiration date of June 30, 2008.

4. On or about May 1, 2006, Portsmouth Police Officer Brabazon was ordered to remove a 4-leaf clover and a Union pin from his uniform. On or about October 3, 2006, Portsmouth Police Officer Webb was ordered to remove a Union pin from his uniform. In response, on March 30, 2007, the Union filed an unfair labor practice complaint – the 2007 ULP.

5. The 2007 ULP challenged the Portsmouth Police Department Uniform Policy in effect at that time. This policy provided, in relevant part, as follows:

> I. Team Designations and Other Pins: Team designations and merit award pins may only be worn upon approval of the Chief of Police. They are to be worn centered above the right pocket in an orderly arrangement starting just above the nametag. The approved team designations and merit award pins are as follows:
>
> 1. Accident Investigation Team
> 2. Emergency Rescue Team
> 3. Field Training Officer
> 4. Honor Guard
> 5. D.A.R.E. Instructor
> 6. Motorcycle Unit
> 7. K-9 Unit

8. Red Cross Life Saving Pin
9. Detective
10. PPD Memorial Pins (i.e. deceased officer's number)
11. Congressional Awards Pin
12. Any other law enforcement award pins as approved by the Chief of Police.

**No other designations or pins shall be worn on the uniform without the written approval of the Chief of Police.

6. By order dated October 4, 2007, the PELRB sustained the 2007 ULP. Specifically, the PELRB held that:

> [t]he lack of a comprehensive and neutral uniform anti-adornment policy and the evidence in this case persuade [the Hearing Officer] that there are no special circumstances which justify a restriction on Officer Webb's right to wear a NEPBA pin.

7. In the same October 4, 2007 Order, the PELRB held that:

> [t]his order does not mean that the City will be precluded from banning NEPBA pins in the future if the City adopts a comprehensive and neutral anti-adornment uniform policy consistent with the standards discussed in this decision.

8. On January 11, 2008, Portsmouth Police Chief Magnant issued a General Order amending the uniform policy to provide that "[n]o team designation, merit award, commemorative or affiliation pins shall be worn on the uniform of the day."

9. The Portsmouth Police Department Uniform Policy currently in effect provides, in relevant part, as follows:

m. Team Designations and other Pins: No other designations or pins (ie: Team pins, Union pins, Merit pins, etc) shall be worn on the uniform.

10. The Union filed its latest ULP – the 2008 ULP – challenging this new uniform policy and arguing, *inter alia,* that the Commission/Police Chief should have bargained with the Union before its implementation.

11. On November 20, 2007 Portsmouth Police Chief Michael Magnant issued the following Memorandum to Officer Rich Brabazon, the Union President:

> Please be advised that at the public session of the November police commission meeting, I was directed by the commission to develop an anti-adornment policy as recommended by the hearings officer who decided ULP #0709-28. Accordingly, we will be issuing a general order which will remove the chief's discretion from the process of deciding what can and cannot be worn on the uniform of a Portsmouth Police Officer, as well as require the wearing of team affiliation pins.

12. On April 28, 2008 Captain John Yerardi circulated SOP P-102 revisions to department supervisors and the SOP review committee, seeking comment no later than May 3, 2008.

13. Standard Operating Procedure ("SOP") P-102 revisions as of May 14, 2008 contain the changes reflected in Chief Magnant's January 11, 2008 General Order. The revised SOP P-102, Section IV, A, 2, l and m (Commission Exhibit 3) provides as follows:

> l. American Flag Pin: The department-issued American Flag pin shall be worn on the uniform shirt at all times when on duty and in uniform. It shall be worn on the right breast, centered, just above the nametag.
>
> m. Team Designations and other Pins: No other designations or pins (ie: Team pins, Union pins, Merit pins, etc) shall be worn on the uniform.

DECISION AND ORDER

DECISION SUMMARY

The Commission's request to dismiss the charge that the Commission failed to negotiate a mandatory subject of bargaining as untimely or as barred by res judicata is denied. However, the uniform of law enforcement personnel is not a mandatory subject of bargaining and therefore the Union's complaint about the Commission's failure to negotiate changes to the uniform policy is denied. The Union's complaint that the revised uniform policy constitutes illegal restraint, coercion, interference with or discrimination against the Union or retaliation against the Union on account of the 2007 ULP is also denied. The uniform policy was revised in accordance with the standards referenced in PELRB Decision No. 2007-140, and there is insufficient evidence

that the uniform changes were made in retaliation for the Union's filing and prosecution of the 2007 ULP.

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I. PELRB jurisdiction is proper in this case as the Union has alleged violations of RSA 273-A:5, I (a), (b), (c), (d) and (g).

DISCUSSION

The Commission has asked for dismissal of the Union's claim that the Commission was obligated to bargain the subject of the revised uniform policy, arguing that the claim is untimely under RSA 273-A:6, VII. The complaint was filed within six months of the date when Chief Magnant issued the January 11, 2008 General Order. This unilateral action in January, 2008 is the earliest date when the Commission may have breached an obligation to bargain as to the uniform policy. Accordingly, the claim was filed in a timely manner and this request for dismissal of the duty to bargain claim is denied. The Commission also argues that the claim could have been raised and litigated in the 2007 ULP proceedings, and therefore is now barred by res judicata. This dismissal request is also denied.

> Res judicata precludes the litigation in a later case of matters actually decided, and matters that could have been litigated, in an earlier action between the same parties for the same cause of action. For the doctrine to apply, three elements must be met: (1) the parties must be the same or in privity with one another; (2) the same cause of action must be before the court in both instances; and (3) a final judgment on the merits must have been rendered in the first action. The petitioner contests elements (1) and (2).

Meier v. Town of Littleton, 154 N.H. 340, 342 (2006). Here the Union is presenting claims based upon factual circumstances which arose after the conclusion of the 2007 ULP, and because the claim is based upon these subsequent events it could not have been raised and litigated in the 2007 ULP.

As to the merits of the claim, the board finds that the Commission was not obligated to bargain the changes to the uniform policy. The board does not consider a public employee's uniform in a paramilitary organization like the Portsmouth Police Department to be a mandatory subject of bargaining. The uniform of a law enforcement officer qualifies as a matter of "managerial policy within the exclusive prerogative of the public employer." Such matters include the "functions, programs and methods of the public employer, including...the selection, direction and number of its personnel..." RSA 273-A:1, XI. In law enforcement, the uniform is directly related to these matters which are within the employer's exclusive prerogative. The subject is, however, a permissive subject of bargaining, but there is insufficient evidence that the Commission has bargained the uniform in the past and therefore is required to bargain any changes to the uniform policy. There is also insufficient evidence that they have expressly agreed to bargain the changes to the uniform policy.

The Union also claims that the new uniform policy represents illegal restraint, coercion, interference with or discrimination against the Union. As reviewed in the 2007 ULP, the right to wear a Union pin on a law enforcement employee uniform is not absolute. This right can be restricted in "special circumstances" as follows:

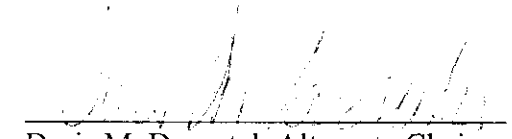
> Under the special circumstances test, "the employee has the right to wear a union pin on his uniform absent special circumstances." *U.S. Department of Justice, Immigration and Naturalization Service,* 955 F.2d at 1004. The factors to consider include "the circumstances in which the insignia is worn, the physical appearance of the insignia, the nature of the employer's activity and the employer's need for production, safety and discipline." *Id.* A para-military law enforcement unit has "many of the same interests as the military in regulating its employees' uniforms...[and] when a law enforcement agency enforces an anti-adornment/uniform policy in a consistent and nondiscriminatory manner, a special circumstance exists, as a matter of law, which justifies the banning of union buttons." *Id. See also Sheriff of Worcester County vs. Labor Relations Commission,* 60 Mass. App. Ct. 632, 642-643.

See PELRB Decision 2007-140.

The Union argues the revised uniform policy is invalid because the Commission only authorized the revised uniform policy in order to eliminate Union pins from the uniform. The board concludes that the relevant inquiry should place more emphasis on the effect and administration of the revised uniform policy than on the Commission's intentions. The effect of the revised uniform policy, on its face, is neutral – it is a comprehensive ban on all uniform adornments like Team pins, Unit pins, Merit pins with the exception of the mandatory American Flag Pin and other uniform components not in dispute in this case. Additionally, there is insufficient evidence of discrimination or other improper action against Union pins or Union members in the administration of the revised uniform policy. Accordingly, the board finds that so long as the revised uniform policy is enforced in a "consistent and nondiscriminatory manner," there is a special circumstance which justifies the banning of Union pins. The board also concludes that the Commission's objective in revising the uniform policy was to create an anti-adornment policy in compliance with PELRB Decision 2007-140, and not to retaliate against the Union for prosecuting the 2007 ULP.

In accordance with the foregoing, the Union's complaint is dismissed.

It is so ordered.
Signed this 20th day of April, 2009.



Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Member Carol Granfield and alternate Board Member Kevin E. Cash also voting.

Distribution:
Peter J. Perroni, Esq.
Thomas M. Closson, Esq.