



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Manchester Police Patrolman's Association

v.

City of Manchester Police Department

Case No. G-0103-2

Decision No. 2013-059

Appearances:

John S. Krupski, Esq., Molan, Milner & Krupski, PLLC, Concord, NH for the Manchester Police Patrolman's Association

Thomas I. Arnold, III, Esq., Deputy City Solicitor, Manchester, NH for the City of Manchester Police Department.

Background:

The Union filed this complaint contending the City improperly denied a law enforcement employee (Officer Kevin Covey) his right to union representation (Union President Officer David Connare) during the course of an involuntary polygraph examination administered as part of an investigative interview. The Union representative was not allowed to stay in the examination room during the pre-examination or examination phase but instead was required to listen and observe on a monitor in another room. After a hearing, we issued several decisions¹ finding that the Union representative should have been allowed to remain in the room with the employee and

¹ See PELRB Decision No. 2011-093 and 2011-151, which should be reviewed for a more complete discussion of the complaint filed by the Union and the PELRB's prior rulings.

polygraph examiner for at least a portion of the process but was properly relocated to a separate room once the employee was connected to the polygraph equipment. Our decision also addressed other matters that are not germane to the current proceedings.

The City appealed, and on October 12, 2012 the Court issued an order vacating and remanding the case for further proceedings. *See Appeal of City of Manchester*, N.H. Supreme Court Case No. 2011-0521:

However, we vacate the PELRB's conclusion that the City committed an unfair labor practice. The record before us is unclear as to the PELRB's rationale for concluding that Connare's exclusion from the examination room before the actual polygraph examination of Covey was an unfair labor practice. We note that the PELRB failed to address the City's arguments that Covey was not entitled to union representation before the actual polygraph examination under PELRB precedent, *see International Brotherhood of Police Officers, Local 384 v. City of Manchester*, PELRB Decision No. 92-73 (May 4, 1992)(explaining when police officers are entitled to union representation), and that Connare's presence during the pretest phase would have interfered with the valid administration of the polygraph examination, *cf. Appeal of Waterman*, 154 N.H. 437, 442 (2006)(holding it is lawful to require a police officer to submit to a polygraph examination).

Id. By order dated January 11, 2013 we notified the parties that

"[p]er prior Decision 2012-267, the board (C. Temple, C. Granfield, K. Cash) has reviewed the file and determined that any further order will issue in this matter on the basis of the existing record, the parties' court briefs, and additional briefs to be filed on or before February 15, 2013. Any objection to this scheduling order shall be filed on or before January 22, 2013."

Neither party objected. Our decision is based upon the prior record (the transcript from the prior hearing is on file with the PELRB) and the additional briefs both parties filed.

Decision and Order

Decision Summary:

On remand we find that Officer Covey had the right to Union representation during the pretest phase of the polygraph exam but that restricting his Union representative to a nearby room throughout the entire process, including during the pretest phase, strikes the proper balance

between the employee's right to union representation and the City's right to a valid polygraph examination. This arrangement eliminates the potential for interference in the pretest phase which might be caused by the physical presence of a union representative who actively participates in the process. Such active participation will likely hinder the conduct of a valid polygraph examination based upon the record submitted in this case. Allowing the union representative to act as a passive observer in the examination room during the pretest phase is unnecessary given the adjacent observation room. The complaint is dismissed.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

We begin with the following excerpts from our prior decisions (PELRB Decision No. 2011-093 and 2011-151) as background to our decision in these proceedings on remand:

The court has recognized the right of public employers to use polygraph examinations, at least with respect to law enforcement personnel. *See Appeal of Waterman*, 154 N.H. 437 (2006). In that case the polygraph examination was administered pursuant to the New Hampshire Department of Safety, Division of State Police's professional conduct standards, and the case was appealed to the court from a decision of the State Personnel Appeals Board. (PELRB Decision No. 2011-093)

....

The PELRB has previously recognized the right of public employees like Officer Covey to Union representation even during polygraph examinations. *See New Hampshire Troopers Association v. New Hampshire Department of Safety, Division of State Police*, PELRB Decision No. 95-02. In that case the Board identified RSA 273-A:11, I (a) and (b) as two statutory provisions that are violated by a deprivation of such representation. The Board also noted prior PELRB decisions citing *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 95 S. Ct. 959 (1975)². The Board specifically determined that the State's "refusals to allow [a Union

² "Under *Weingarten*, a union employee has the right to union representation at an investigatory interview he or she reasonably believes will result in discipline." *Appeal of Exeter Police Association*, 154 N.H. 61, 62-63 (2006) (citations omitted). The Supreme Court expressed no opinion as to whether the New Hampshire law affords *Weingarten* protection. *See id.*, at 64. *See also Appeal of City of Manchester*, 149 N.H. 283, 289, 821 A.2d 1019 (2003).

representative] to be present to observe the polygraph test, behind a mirror as is usual in such a case, and to assist the complainant at the disciplinary hearing...also constitute violations of RSA 273-A:11 (a) and (b). (PELRB Decision No. 2011-093)

....

Lieutenant Favreau was the only witness with specific training and experience in the use of polygraph examinations. His testimony established that the reliability of the procedure would be compromised by the continuous presence of Officer Covey's Union representative in the examination room. Although the Union challenged Lieutenant Favreau during cross-examination, we find Lieutenant Favreau's testimony to be both credible and informative as to the polygraph examination process. The record also reflects that the City has resorted to polygraph examinations of law enforcement personnel only sparingly, and there is no evidence to suggest that the City employs polygraph examinations for the purpose of frustrating or undermining Union representation in general, or in the specific case of Officer Covey. Accordingly, based on the foregoing authorities and the circumstances of this case, we find the City did not violate Officer Covey's right to Union representation when his Union representative was excluded during the actual polygraph examination but was allowed to witness and observe the examination on a monitor in another room. (PELRB Decision No. 2011-093)

By "actual polygraph examination" we mean the time period during which Officer Covey was physically connected to the polygraph examination equipment, answering questions, and measurements, data or readings of his responses were being collected and recorded by Lieutenant Favreau. Our review of the record reflects that we have misapprehended the point when the Union representative was excused from the polygraph examination room, as he was in fact excused from the room for an interval of time prior to the actual polygraph examination. As a result, the City did improperly restrict Officer Covey's right to Union representation and commit an unfair labor practice in violation of RSA 273-A:5, I(a) and (g). (footnote omitted) (PELRB Decision No. 2011-151)

Our current decision incorporates our prior decision 2011-093 in its entirety, including the findings of fact, except to the extent we expressly modify that decision herein.

The first issue we address is whether the pretest phase of the polygraph examination under consideration in this case qualifies as an investigatory interview under *International Brotherhood of Police Officers, Local 394 v. City of Manchester, Police Department*, PELRB Decision No. 92-73 (May 4, 1992). We conclude that the polygraph examination effectively began in this case with the pretest phase. During the pretest phase the examiner established a rapport with Officer Covey and reviewed in detail the actual questions that he would ask once Officer Covey was

connected to the polygraph examination equipment. It is clear from the examiner's testimony that the pretest phase is an integral and important part of the polygraph examination which must be completed properly in order to obtain reliable test results. Although the pretest phase can be characterized as preliminary in nature, it is inextricably intertwined with the latter portion of the polygraph exam when the examiner used the polygraph equipment. Although the examiner needed to pause at some point in the process to connect Officer Covey to the equipment, the entire process is relatively seamless. There is a flow that begins with pretest questions and continues until the moment when the examination is complete and Officer Covey is disconnected from the equipment. We therefore conclude that the polygraph examination process consists of both the pretest and examination phase and that it is inappropriate to distinguish between them for purposes of determining when Officer Covey had the right to union representation. Officer Covey's right to union representation therefore attached in this case at the commencement of the pretest phases of the process.

The remaining question is whether Officer Covey was entitled to have a union representative in the examination room with him, either in an active or passive capacity, or whether the City's interest in the conduct of a valid polygraph examination required that the union representative's participation be restricted to that of an observer in an adjacent room, as actually happened.

The testimony of the polygraph examiner (Lieutenant Favreau) establishes, in substance, that having a union representative present for the pretest and the examination phase would interfere in the examination process which could jeopardize the integrity of the examination results.³ At this juncture we have recognized that the pretest phase is an integral part of the polygraph examination process upon which the validity of the examination depends to a

³ See Hearing Transcript.

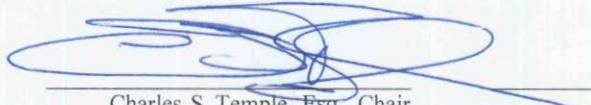
significant extent. With due consideration for Lieutenant Favreau's testimony, our general understanding of the polygraph examination process gleaned from the record as a whole, the court's order remanding this case, as well as the authorities cited and discussed by the parties in their briefs, we now conclude that allowing the union representative to remain in the room during the pretest phase creates a sufficient potential for interference in the examination process such that the City's exclusion of Union representative Officer Connare was appropriate. Although removed to a separate room, the Union representative could still observe and listen to the examination, consistent with the PELRB's order in *New Hampshire Troopers Association v. New Hampshire Department of Safety, Division of State Police*, PELRB Decision No. 95-02.

In reaching this conclusion we emphasize that it is based upon the particular facts of this case. These facts establish, among other things, that the City rarely conducts polygraph examinations of law enforcement personnel as happened in this case, that the polygraph examination process was not a ruse designed to separate an employee from his union representative, that the examination was conducted by someone with extensive training and who approaches his task in a professional manner, and the procedures employed and followed by Lieutenant Favreau were as fair and respectful of the involved employee's interests as could be expected in the circumstances. We do not find that the physical presence of a union representative during the pretest phase will never be appropriate or will in all cases constitute an impermissible interference with the conduct of a valid polygraph examination. We can envision circumstances where such a presence may be necessary to ensure that the examination complies with the standards and protocols like those described and employed in this case.

In accordance with the foregoing the Union's claims against the City are denied and the complaint is dismissed.

So ordered.

Date: April 22, 2013.



Charles S. Temple, Esq., Chair

By unanimous vote. Chair Charles S. Temple, Esq. presiding with Board Member Kevin E. Cash and Board Member Carol Granfield also voting.

Distribution:

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