



State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME Local 3657, Weare Police Employees

v.

Town of Weare

Case No. G-0092-3
Decision No. 2014-006

Order Re: Motion for Cease and Desist Order

The Union seeks an immediate cease and desist order requiring the Town to provide a copy of the police department's internal affairs investigation files which formed the basis for disciplinary action (termination) against Joseph Kelley, who until November 21, 2013 was employed as a Sergeant in the Weare Police Department. On that date the Board of Selectmen terminated Kelley's employment based upon Police Chief Valleca's internal affairs investigation and recommendation. Kelley was not provided with a formal RSA 41:48 hearing before the Weare Board of Selectmen prior to his termination, although the Town argues that it otherwise followed a process that meets any statutory pre-termination due process requirements. On November 26, 2013 the Union requested a copy of the internal affairs files. Chief Valleca declined, stating that the file was referred to the Attorney General's office for review and "[t]herefore, they are not available for release at this time." The Union again requested a copy of the internal affairs investigation files on December 9, 2013, citing violations of Kelley's due process rights and Union rights under RSA 273-A. Alternatively, the Union requested that

Kelley be placed on paid administrative leave. The Town did not provide a copy of the files as requested and did not change Kelley's status to paid administrative leave.

On December 12, 2013 the Union filed an unfair labor practice charge under the Public Employee Labor Relations Act, citing violations of RSA 273-A:5, I (a), (b), (c), (g), and (i). The Union also filed a motion for a cease and desist order, seeking an order requiring the Town to provide a copy of the internal affairs investigation files as previously requested. The Town has answered the complaint and objected to the motion, stating that "the Attorney General has requested that the files not be made available while its investigation is ongoing" and that "[a] brief delay in producing the internal affairs investigation files will not prejudice the Union in this matter." The PELRB notified the parties that they should be prepared to address the pending motion at the time of the January 8, 2014 pre-hearing conference. *See* PELRB Decision No. 2013-271 (December 23, 2013).

Both parties appeared on January 8, 2014 and addressed the Union's pending motion. Based upon the information on file and provided by the parties on January 8, 2014 and for the reasons discussed in this order, the Union's motion for a cease and desist order requiring the Town to provide a copy of the internal affairs investigation files is granted.

The Town terminated Kelley's employment on November 21, 2013 and ever since has refused to provide him with documentation that is essential and integral to the Union's ability to represent him in grievance proceedings.¹ The Town does not claim that Kelley or the Union is precluded from having a copy of the internal affairs investigation files by law. Instead, the Town justifies its continuing refusal to provide a copy of the file on the grounds that withholding the files will preserve the integrity of any investigation by the Attorney General's office and prevent

¹ The Union's statutory right to represent bargaining unit employees includes the specific right to represent employees in the "settlement of grievances" per RSA 273-A:11, I (a).

Kelley from engaging in any improper interference in the Attorney General's investigation. However, no information has been offered to suggest that providing the file material to the Union and Kelley as requested will result in any improper activity by the Union or Kelley with respect to any investigation the Attorney General's office may be conducting. On the other hand, it is very clear that the Union's ability to access complete information about the basis for the Board of Selectmen's November 21, 2013 termination decision, and its ability to evaluate Kelley's case and determine what level of representation is appropriate and justified, has been frustrated, undermined, interfered with, and delayed by the Town's continuing refusal to provide the file material. As a result, the Union has been unable to develop and advance a grievance and utilize the statutorily required grievance procedure² to challenge the Town's treatment of Kelley.

To date the Union and Kelley have been deprived of the requested file material for approximately 7 weeks. The interests of the Union and Kelley in having the file material at this time outweigh the Town's interest in continuing to prevent access to this material. Providing the Union and Kelley with access to the internal affairs investigation files will allow them to exercise their legal and contractual rights to evaluate and develop a grievance. The parties' contractual grievance procedure (as well as the Union's general representation rights) should not be further undermined at this point by the unilateral action of one party to the contract given the circumstances presented, as will be the case if the Town's continuing refusal to provide the requested file material is upheld.

The authority for this order granting the Union's motion includes the following:

RSA 273-A:6 Violations.

I. The board shall have primary jurisdiction of all violations of RSA 273-A:5...

² All collective bargaining agreements must include a workable grievance procedure per RSA 273-A:4.

II. *The board may issue a cease and desist order if it deems one necessary in the public interest, pending the hearing.*

Pub 304.02 Interim Orders.

(a) When the board considers it to be in the public interest, it shall issue a cease and desist order under RSA 273-A:6, III pending a hearing under Pub 201.05.

(b) The board shall issue such an order for reasons to include, but not limited to:

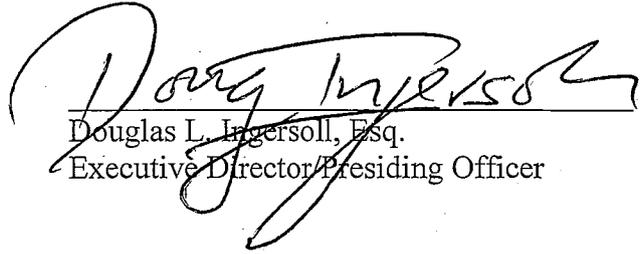
- (1) Protection of the public safety;
- (2) To avoid prejudice to one party or another; or
- (3) To avoid irreparable harm.

The public interest is served in this case by balancing the competing interests of the parties and resolving the current dispute in a manner that allows the Union and Kelley to enjoy and exercise statutory rights conferred by the Act. These rights include the Union's general right to provide representation to bargaining unit employees in precisely these types of situations and Kelley's corresponding right to such representation. The Union's and Kelley's rights also include meaningful and timely access to the contractual grievance procedure. Any preference by the Town or the Attorney General's office for the continued withholding of the requested file material is no longer justified. The record reflects that the Union has a strong likelihood of success on the merits of its complaint. Further, to deny the Union's motion for a cease and desist order would allow the Town to continue to unnecessarily frustrate and interfere with the Union's and Kelley's statutory rights. This is inconsistent with "the policy of the state to foster harmonious and cooperative relations between public employers and their employees and to protect the public by encouraging the orderly and uninterrupted operation of government." *See* Legislature's Statement of Policy, RSA 273-A.

In accordance with the foregoing, the Union's motion for a cease and desist order is granted. On or before January 15, 2014 the Town shall provide the Union with a copy of all requested internal affairs investigation file material.

So ordered.

Date: 1/8/2014



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