



State of New Hampshire
Public Employee Labor Relations Board

AFSCME Council 93, Local 534

v.

Town of Moultonborough

Case No. G-0270-2

Decision No. 2018-190

Appearances:

Sean Cronin, Esq., AFSCME Council 93,
Burlington, Massachusetts for Complainant

Mark T. Broth, Esq., Drummond, Woodsum & MacMahon, P.A.,
Manchester, New Hampshire for the Respondent

Background:

On May 14, 2018, the AFSCME Council 93, Local 534 filed an unfair labor practice complaint charging that on May 1, 2018 town public works department (DPW) director Chris Theriault threatened to terminate the employment of DPW employee Travis Colby if he attended the bargaining unit determination hearing scheduled for that day at the Public Employee Labor Relations Board (PELRB). Colby, who was scheduled to testify at the hearing, did not appear, ostensibly because of Theriault's threats. AFSCME then obtained a continuance based on Colby's absence, and the hearing ultimately proceeded on June 22, 2018.

AFSCME requests that the PELRB find that the town violated of RSA 273-A:5, I (b), (c), and (d) and order the town to 1) cease and desist from interfering with its employee in the exercise of the rights under RSA 273-A; 2) post the PELRB's decision for 30 days; and 3) reimburse AFSCME for all costs and expenses incurred in filing and prosecuting this complaint.

The town denies that it has committed an unfair labor practice in violation of RSA 273-A:5, I (b), (c), and (d). According to the town, nothing Theriault said to Colby could reasonably be construed as threatening or intimidating.

A hearing on the complaint was originally scheduled for July 11, 2018 but was rescheduled at the AFSCME's request because of witness availability issues. The undersigned held a hearing on September 20, 2018 at which both parties presented evidence and argument. Witnesses were sequestered until they testified, and after their testimony they remained in the hearing room. The decision is as follows.

Findings of Fact

1. As of September, 2018 Travis Colby had been employed in the town DPW for approximately two years as an equipment operator.

2. Chris Theriault is the town DPW director, and he has worked for the town since August of 2016. He previously worked for the City of Concord engineering department as an engineering technician, which was a bargaining unit position. The record does not reflect Theriault's attitude about public sector collective bargaining during his employment in Concord.

3. James Nave is a DPW heavy equipment operator and a co-worker of Colby.

4. Kenneth Filpula is the DPW landfill supervisor.

5. Ron Deducca is a DPW foreman. He is second in command after director Theriault, and he assigns work to Nave and Colby.

6. Katherine Joyce is the DPW highway office clerk.

7. In early 2018, Colby was the leader of DPW employees interested in forming a bargaining unit. He initiated contact with an AFSCME representative and hosted an organizing meeting at his home. Prior to this meeting Colby's relationship with DPW director Theriault and

town administrator Walter Johnson had been good and comfortably casual. After the meeting he noticed a change, as their interactions with him had become less informal and more “professional.”

8. On March 7, 2018 the AFSCME filed a petition for certification asking the PELRB to approve a bargaining unit comprised of certain employees of the town public works department. See PELRB Case No. G-0270-1.

9. The town filed an answer in Case No. G-0270-1 on March 29, 2018 and raised a number of objections.

10. The PELRB scheduled a May 1, 2018 hearing on the petition in Case No. G-0270-1. Colby planned to testify at this hearing, and he was listed on the AFSCME witness list.

11. Approximately a week before the hearing Colby told Deducca that he planned to attend the hearing in support of the union and wondered about taking a town vehicle to Concord since the hearing was work related. A few days before the hearing Deducca informed Colby that town administrator Walter Johnson had denied Colby’s request to take a town vehicle, so he should take his own. At some point Deducca also mentioned that director Theriault was attending the hearing using a town vehicle, which led Colby to wonder about riding with Theriault.

12. On the morning of May 1, Colby and Nave reported for work at the DPW garage around 6:00 a.m. They received their first work assignment for the day from Deducca and left. By 7:30 a.m. they had returned, and Filpula was standing outside the DPW offices next to a town van. Colby approached and learned Filpula was attending the hearing to support management’s position because he had to do what management wanted him to do. Colby was surprised and disappointed, and his discussions with Filpula quickly became heated until Filpula ended the

conversation by telling him “we’ll discuss this later.” Notwithstanding the clear tension, Colby felt Filpula maintained his self-control and acted in a professional manner.

13. Director Theriault, who was inside the DPW offices at the time, overheard Colby and Filpula and could tell there was some kind of disagreement between the two. He came outside and asked “what’s going on.” Colby responded that he wanted to attend the hearing and asked if he could ride in the town van. According to Colby, Theriault responded “you are not riding in this buggy (the van), take your own vehicle, and don’t bother coming back.” Colby understood Theriault to mean that he (Colby) would be fired if he testified at the hearing. As he walked away Colby said “I can’t believe you’re against your employees like that.”

14. Theriault admits he told Colby he couldn’t ride in the town van, which he felt was appropriate because of the tension between Colby and Filpula, but he denies that he said “don’t bother coming back” or anything similar to Colby.

15. Joyce testified that she was also present, standing on the other side of the van, and she never heard Theriault tell Colby not to return.

16. In the meantime, Nave was collecting tools needed for the next work assignment. Although he could not hear what was being said, he could see Colby, Theriault, and Filpula, and he sensed there was some kind of confrontation taking place. After speaking to Theriault, Colby left with Nave to do ditching work on Marvin road. During the drive, Colby vented and complained to Nave, telling him that Theriault said “if you’re going to the hearing, you’re not going to ride in this buggy (the town van), you need to take your own vehicle, don’t bother coming back afterwards.”

17. Colby did not attend the May 1 hearing, and the PELRB granted the AFSCME’s motion to continue and reschedule based upon his absence. See PELRB Decision No. 2018-050

(May 1, 2018). The hearing on the petition was eventually held on June 22, 2018, and Colby appeared and testified at that time.

18. On the afternoon of May 1, after returning from Concord, Theriault and Joyce drove out to Colby's work site in a town truck. Without explanation, Joyce took pictures of Colby with her cell phone, and then she and Theriault drove away. This had not happened before and has not happened since. Later Colby complained to Deducca, who said it wasn't right and that Joyce shouldn't be taking pictures like that without letting them know why.

19. At hearing Joyce attempted to justify the picture taking by linking it to a directive she claimed to have received from the select board to publicize DPW work on the town website. However, there was no evidence that DPW employees were ever informed about this new initiative, Joyce did not obtain access to the town website to upload pictures until June, and she confirmed that the May 1 pictures were never placed on the town website.

20. Colby's last day of work for the town was September 21, 2018 and he has obtained new employment elsewhere. He explained he is leaving town employment because he still feels his job is in jeopardy, and if the effort to form a bargaining unit fails he believes he would be fired.

Decision and Order

Decision Summary:

The town committed prohibited practices in violation of RSA 273-A:5, I (b) and (c) as charged. The town shall cease and desist from engaging in such conduct, and shall post this decision for 30 days in the workplace as detailed in this decision. The sub-section (d) claim is dismissed.

Jurisdiction:

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

Discussion:

Under the Public Employee Labor Relations Act (Act), it is a prohibited practice for any public employer:

- (a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;
- (b) To dominate or to interfere in the formation or administration of any employee organization;
- (c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization;
- (d) To discharge or otherwise discriminate against any employee because he has filed a complaint, affidavit or petition, or given information or testimony under this chapter;
- (e) To refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations;
- (f) To invoke a lockout;
- (g) To fail to comply with this chapter or any rule adopted under this chapter;
- (h) To breach a collective bargaining agreement;
- (i) To make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule.

See RSA 273-A:5, I. The AFSCME complains that the town engaged in a prohibited practice under sub-sections (b), (c) and (d) because Theriault threatened Colby with termination if he participated in the May 1 hearing.

There was conflicting testimony at the hearing as to director Theriault's discussion with Colby. However, shortly after his encounter with Deducca and Theriault, Colby left the DPW garage area with Nave. He was clearly upset and immediately related to Nave what happened, who in turn had no difficulty at hearing remembering what Colby told him. I sensed nothing in Colby's testimony, or the evidence presented at hearing, that leads me to believe that, as soon as

Colby drove away with Nave, he fabricated a version of the events that had just transpired and lied to Nave about what Theriault had said.

On the other hand, it is clear Theriault bore some animus toward Colby as demonstrated by events later in the day, when Theriault drove with Joyce to Colby's worksite and Joyce took pictures. By itself, this behavior was somewhat innocuous. However, when considered in the context of what happened earlier in the day, this episode, clearly orchestrated by Theriault, was nothing less than petty harassment and intimidation of Colby for his interest in organizing and supporting the formation of a bargaining unit. Attempts to dismiss this encounter as routine town business, and nothing more, are not persuasive given: 1) the timing; 2) the fact that something like this had not happened before, and has not happened since; 3) the failure of Theriault or Joyce to explain at that time, or previously by advance notice to DPW employees, that they were, or would be, taking pictures to document ongoing DPW work for the town website; 4) the fact that Joyce did not even have access to the town website until a month later; and 5) the fact that none of the pictures were ever uploaded to the town website. Any argument that Theriault's purported animosity toward Colby's organizing activity should be discounted because he previously held a bargaining unit position while employed by the City of Concord is a non-starter; this status, by itself, does not measure or establish an individual employee's affinity, or lack thereof, for organizing activity or collective bargaining.

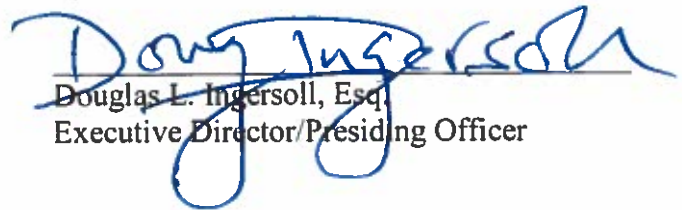
In summary, Colby had an absolute right to engage in organizing activity, and attend and participate in hearings before this board, without repercussion in the workplace or threat to his employment status. He was denied these rights because of the way he was treated and threatened by the DPW director, which then cast a subsequent pall over the remainder of his employment at the DPW. The town engaged in prohibited practices in violation of RSA 273-A:5, I (b)(to

dominate or to interfere in the formation or administration of any employee organization) and (c)(to discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization). The sub-section (d) claim is dismissed.

The Town shall cease and desist from engaging in such conduct and shall respect the rights of its employees to participate in organizing activities under the Public Employee Labor Relations Act. Within two business days of receipt, the town shall post this decision for 30 days in the same locations where the complaint was posted. A PELRB Certificate of Posting shall be completed and returned within two business days after the posting is complete.

So ordered.

Date: October 10, 2018


Douglas L. Ingersoll, Esq.
Executive Director/Presiding Officer

Distribution: Sean Cronin, Esq.
Mark T. Broth, Esq.