



State of New Hampshire
Public Employee Labor Relations Board

Teamsters Local 633

v.

Northwood Fire Department

Case No. G-0320-1
Decision No. 2023-256

Appearances: Alyssa Croteau, Organizer, for the Teamsters Local 633

Mark T. Broth, Esq., and Nicholas J. Blei, Esq., Drummond Woodsum & MacMahon, P.A., Manchester, New Hampshire for the Northwood Fire Department

Background:

On May 10, 2023, the Teamsters Local 633 (Union or Teamsters) filed an unfair labor practice complaint under the Public Employee Labor Relations Act claiming that the Town of Northwood Fire Department (Town) had violated RSA 273-A:5, I (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"); 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 Union alleges as follows: (1) on May 3, 2023, Fire Captain Schaub informed the Fire Chief and the Town Board of Selectmen of the intent to organize employees of the Fire Department; (2) on May 4, 2023, the Fire Chief began questioning the validity McGinn's Firefighter certification and eventually informed Captain Schaub that McGinn would not be allowed to return to work until he provided proof of Firefighter certification; (3) McGinn had been

employed by the Fire Department for 3 years and the Chief had not questioned the validity of his Firefighter certification prior to May 4, 2023; (4) on May 8, 2023, McGinn presented proof of his Firefighter certification to the Chief, but was not allowed to return to duty; and (5) although McGinn also has a valid Emergency Medical Technician (EMT) certification, he is no longer allowed to respond to calls as an EMT. The Union also alleges that on May 8, 2023, Captain Schaub's administrative privileges to maintain the department schedule, as he had done for many years, were revoked. The Union claims that the Chief retaliated against Firefighter McGinn and Captain Schaub for their union organizing activity¹ and requests that the PELRB order the Town and the Chief to cease and desist from retaliatory activities.

The Town denies the charges and asserts, among other things, that Captain Schaub informed the Chief of his concerns regarding McGinn's certification status on April 3, 2023 – one month prior to the notice of employees' intent to organize; and that the Chief immediately directed Captain Schaub to investigate. The Town also claims that McGinn's placement on administrative leave was based on his inability to produce a valid Firefighter I and/or II certification or an official transcript from Maryland Fire Institute, where he allegedly received his Firefighter certification, and not on his organizing activity. Furthermore, according to the Town, McGinn's "inability to produce a valid certification despite holding himself out as a certified firefighter for three years calls his honesty and integrity into question, creates potential liability for the Town and poses safety risks to the general public." The Town also asserts that Captain Schaub's scheduling privileges were revoked because he violated policy by scheduling McGinn for Firefighter/EMT shifts after McGinn had been placed on administrative leave and without the Chief's knowledge or approval.

¹On May 23, 2023 Teamsters Local 633 filed with the PELRB a petition for certification seeking to represent certain employees of the Northwood Fire Department. See PELRB Case No. G-0320-2.

A hearing was held on July 12, 2023. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. The record was kept open for submission of Union Exhibit 4 (Transcript of McGinn's Firefighter II Certification), but it was never filed. The parties filed post-hearing briefs on July 31, 2023.² The parties' Joint Stipulation of Facts is incorporated into the Findings of Fact below and the decision is as follows.

Findings of Fact

1. The Town is a municipal corporation and a public employer as defined in RSA 273-A:1, X. Among other functions, the Town operates a municipal Fire Department. See Joint Stipulation of Facts at 1 & 2.

2. Fire Chief Mark Tetreault has been the head for the Town's Fire Department since January 7, 2019. Chief Tetreault has been a firefighter for over forty years. See Joint Stipulation of Facts at 4.

3. Fire Captain Adam Schaub is a full time employee of the Town's Fire Department. He was hired on December 3, 2018. See Joint Stipulation of Facts at 5. Among other responsibilities, Captain Schaub is tasked with maintaining records of EMT and Firefighter certifications. See Joint Stipulation of Facts at 12. Captain Schaub was also responsible for employee training and for scheduling per diem Firefighters and EMTs for shifts/calls.

4. Firefighter Michael McGinn was hired by the Fire Department as a per diem Firefighter I & II/EMT in June of 2021. In his application for employment, Firefighter McGinn represented to the Town that he held Firefighter I & II certifications. Based on his representation, Firefighter McGinn was placed on Grade 11 of the Town's wage scale for per diem firefighters

²The Town's post-hearing brief was inadvertently misplaced and not discovered until after the issuance of this decision on October 5, 2023. I reviewed the Town's brief on October 6, 2023. Upon review of the brief, my decision is unchanged, except for the following: (1) name of the law firm representing the Town has been corrected; and (2) the statement that the Town did not submit a post-hearing brief has been removed. Accordingly, this decision replaces the decision issued on October 5, 2023.

holding Firefighter I & II/EMT certifications. See Joint Stipulation of Facts at 7 & 8 and Town Exhibit A.

5. In the fall of 2022, Captain Schaub was looking into firefighters' certifications in order to determine whom he can sign up for an upcoming training. He was unable to locate McGinn's Firefighter I or II certifications. He attempted to contact the Maryland Fire and Rescue Academy, where McGinn received his Firefighter training but received no response.

6. At some point in early 2023, Captain Schaub informed Chief Tetreault of his inability to access Firefighter McGinn's certifications. See Joint Stipulation of Facts at 13.

7. In spring of 2023, Captain Schaub informed Firefighter McGinn that he was unable to locate his Firefighter I or II certifications and advised McGinn to obtain copies of his certifications or transcripts.

8. Firefighter McGinn did not attempt to obtain copies of his certifications or transcripts at that time.

9. Over the past year, Captain Schaub had explored a possibility of forming a bargaining unit and seeking union representation. He polled the firefighters about their interest in forming a bargaining unit. Thereafter, he contacted the Teamsters, participated in meetings with the Teamsters, and started the organizing process.

10. Firefighter McGinn's involvement in organizing was limited to participating in the first meeting with the Teamsters along with Captain Schaub. The next meeting was attended by almost all employees of the department.

11. On April 3, 2023, Captain Schaub informed Chief Tetreault that he had been unable to verify that Firefighter McGinn held Firefighter I and II certifications. See Joint Stipulation of Facts at 14. Captain Schaub ceased his search for McGinn's certifications. The Chief informed Captain Schaub that he would look into the situation himself.

12. Chief Tetreault continued to investigate Firefighter McGinn's certification status but was unable to locate certifications or transcripts establishing that he held either Firefighter I or Firefighter II certifications. See Joint Stipulation of Facts at 15.

13. On May 3, 2023, Captain Schaub sent an email to Chief Tetreault and the Board of Selectmen expressing a desire to organize a union of certain Town Fire Department personnel. See Joint Stipulation of Facts at 16.

14. On May 4, 2023, Captain Schaub informed Chief Tetreault that he had seen an unofficial transcript of McGinn's Firefighter I certification via Firefighter McGinn's phone, but that he had not seen evidence of Firefighter II certification. See Joint Stipulation of Facts at 17.

15. As a result of the investigation, on May 4, 2023, Chief Tetreault requested that Firefighter McGinn produce transcripts of his Firefighter I and II certifications. See Joint Stipulation of Facts at 18. Mr. McGinn did not produce such transcripts at that time.

16. On May 8, 2023, Chief Tetreault informed Firefighter McGinn that he would not be eligible to sign up for per diem or call shifts until he provided proof of his certification status. See Joint Stipulation of Facts at 20.

17. According to Chief Tetreault, he placed Firefighter McGinn on leave because of suspected dishonesty regarding his Firefighter I and II certifications, as McGinn had been paid at a higher Firefighter II rate than employees without certification, and because of the potential lack of training to perform his duties.

18. Chief Tetreault ordered Captain Schaub not to schedule Firefighter McGinn for per diem or call shifts.

19. Captain Schaub normally prepares schedules several months in advance and he did not remove Firefighter McGinn from the previously prepared schedule.

20. On May 8, 2023, Captain Schaub was relieved of his duty to approve per diem Firefighter/EMT schedule requests. This action did not result in any change in Captain Schaub's rank or compensation. See Joint Stipulation of Facts at 24.

21. According to Chief Tetreault, Captain Schaub's responsibility to schedule per diem firefighters was taken away because Captain Schaub disobeyed the Chief's order not to schedule McGinn for shifts/calls.

22. On May 23, 2023, the Union filed a petition for certification seeking to represent certain employees of the Town Fire Department. The Town objected to this petition. See PELRB Case No. G-0320-2. The Union later withdrew its petition. See PELRB Decision No. 2023-200 (July 31, 2023).

23. On June 8, 2023, the following text exchange between Chief Tetreault and Captain Schaub took place:

Chief Tetreault: "We work together twice a week, we could have had a conversation before pulling the trigger."

Captain Schaub: "I sent you all heads up prior to the union pulling the trigger. I didn't have to do that but did in the kindness of my heart... And out of respect."

Chief Tetreault: "But you could have stopped it or had a man to man conversation."

Captain Schaub: "... This isn't a bad thing and we can have an amazing department as long as we work together just you and me."

Chief Tetreault: "You know my opinion on collective bargaining. There is no bigger betrayal."

See Union Exhibit 3.

24. The Town does not require that per diem or call firefighters possess Firefighter I or II certifications, but certification level determines which wage scale the firefighter is placed on, and preference in scheduling is given to certified firefighters. See Joint Stipulation of Facts at 9.

25. Uncertified firefighters are placed on Grade 3 of the Town's wage scale. See Joint Stipulation of Facts at 10.

26. The rate of pay for per diem Firefighter/EMTs holding Firefighter I & II certifications with Firefighter McGinn's years of experience is currently \$18.86/hour. The rate for firefighters with no certifications and Firefighter McGinn's years of experience is \$12.77/hour. See Joint Stipulation of Facts at 11.

27. If Firefighter McGinn does not, in fact, hold Firefighter I and II certifications, then he has been paid at a higher pay rate than he was entitled to for each of the 3,176 shift hours and 123.5 call back hours he has worked for the Fire Department since he was hired. See Joint Stipulation of Facts at 19.

28. Firefighter McGinn's personnel file, which has been provided to the Teamsters, does not indicate that he has ever produced evidence of Firefighter I or II official transcripts. See Joint Stipulation of Facts at 21.

29. Firefighter McGinn has claimed that his certifications were issued by the Maryland Fire and Rescue Institute. Official transcripts and certification history are available to students upon request. See Joint Stipulation of Facts at 22.

30. On June 26, 2023, Teamsters representative Alyssa Croteau provided an unofficial transcript from the Maryland Fire and Rescue Institute indicating that Firefighter McGinn passed the Firefighter I program. This was the first evidence produced to the Town indicating that Firefighter McGinn holds either Firefighter I or II certifications. See Joint Stipulation of Facts at 25.

31. On June 28, 2023, the Town reinstated Firefighter McGinn as a Firefighter I/EMT at Grade 10, Step 6, consistent with his presently documented certification level. The Town

reserved "its right to take disciplinary action should it determine that Firefight McGinn misrepresented his certification status at the time of hire." See Joint Stipulation of Facts at 26.

32. On July 3, 2023, the Union notified the Town of Firefighter McGinn's decision to reject the terms of the reinstatement as outlined above. He was willing to accept an offer of reinstatement at his current rate of pay and with back pay for the hours missed since May 4, 2023. The Union was willing to settle the Unfair Labor Practice charge should the Town agree to recognize the proposed bargaining unit. See Joint Stipulation of Facts at 27.

33. By July 6, 2023, Firefighter McGinn had not produced official Firefighter I or II certifications or transcripts. See Joint Stipulation of Facts at 23.

34. Despite being given additional time at the hearing, the Union has never submitted proof of McGinn's Firefighter II certification. (proposed Union Exhibit 4 - Firefighter II Certification Transcript).

Decision and Order

Decision Summary:

The evidence is insufficient to prove that Firefighter McGinn was engaged in organizing or that the Town has retaliated against McGinn in violation of RSA 273-A:5, I. Although Captain Schaub was actively engaged in union organizing activity, the evidence is insufficient to prove that the Town retaliated against Captain Schaub in violation of RSA 273-A:5, I.

Jurisdiction

Under RSA 273-A:6, I, the PELRB has primary jurisdiction of all unfair labor practice claims alleging violations of RSA 273-A:5.

Discussion:

The Union claims that the Town violated RSA 273-A:5, I (a), (b), and (c) when it retaliated

against Captain Schaub and Firefighter McGinn for their involvement in union organizing efforts.

RSA 273-A:5, I provides in relevant part as follows:

It shall be 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;

In cases involving alleged retaliation, the Supreme Court held that a complainant must prove illegal motivation at least to some degree. See *Appeal of Sullivan County*, 141 N.H. 82, 84 (1996). See also *AFSCME Council, Local 863/Rochester Public Works Dept., Buildings and Grounds v. City of Rochester, Dept. of Public Works and Buildings and Grounds*, Decision No. 2009-131. “[T]he union bears the burden to prove some minimal degree of proscribed motivation in order to establish an unfair labor practice under RSA 273-A:5.” *Appeal of Sullivan County*, supra, 141 N.H. at 85. Furthermore, the employer can meet the union’s evidence of retaliatory motivation with its own evidence; and if the PELRB finds by a preponderance of the evidence that the employer was unlawfully motivated to some degree, an employer can still avoid being adjudicated a violator by proving by a preponderance of the evidence that regardless of the unlawful motivation, the employer would have taken the same action for wholly permissible reasons. See *Appeal of Professional Firefighters of East Derry*, 138 N.H. 142, 144-45 (1994). See also *Hampton Firefighters Local 2664, IAFF, AFL-CIO, CLC v. Town of Hampton*, Decision No. 2008-068 (finding union failed to prove town’s budgetary decisions and firefighter layoffs were in retaliation for union activity).

In this case, the evidence shows that Firefighter McGinn's involvement in organizing was limited to attending the first meeting with the Teamsters, along with Captain Schaub. He did not lead the effort to organize. The evidence is insufficient to establish that the Town interfered with McGinn's statutory rights or discriminated against him in retaliation for his union-related activities. Among other things, the Union failed to prove that the Chief was aware that Firefighter McGinn attended the meeting with the Teamsters. The evidence shows that it was Captain Schaub who started to investigate the status of McGinn's certifications and not the Chief. Captain Schaub continued his search for proof of McGinn's certification since the fall of 2022 until the spring of 2023 when he finally ceased his search upon informing the Chief of his inability to find proof of McGinn's Firefighter I and II certification. At this point, the Chief continued the search for proof of McGinn's certification himself. Furthermore, despite being told by Captain Schaub that his certifications are missing and that he should provide copies of his certification/transcript, Mr. McGinn failed to even attempt to obtain any proof of certification, such as an official or unofficial transcript from the Maryland Fire and Rescue Institute, until the Chief ordered him to produce transcripts on May 4, 2023. Proof of McGinn's Firefighter II certification has never been provided.

On balance, the evidence shows that the Town's treatment of Mr. McGinn was because of Mr. McGinn's inability to produce missing certifications/transcripts, and not for other reasons.

With regards to the Union's claim of retaliation against Captain Schaub, the evidence shows that Captain Schaub was actively involved in union organizing, a protected activity, and it is sufficient to show some degree of proscribed motivation demonstrated by the June 8, 2023 text exchange between Chief Tetreault and Captain Schaub (e.g. "You know my opinion on collective bargaining. There is no bigger betrayal"). However, the analysis does not stop there. Once a union has satisfied its burden to prove some minimal degree of retaliatory motivation, the burden shifts to the employer to prove by a preponderance of the evidence that regardless of the unlawful

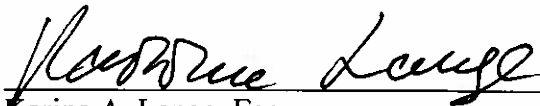
motivation, the employer would have taken the same action for wholly permissible reasons. *Appeal of Sullivan County*, supra, 141 N.H. at 85.

The preponderance of the evidence here proves that the Chief ordered Captain Schaub not to schedule Firefighter McGinn for any shifts/calls until McGinn provided proof of his Firefighter I and/or II certification. It is also undisputed that Captain Schaub did not remove McGinn's name from the schedule. Captain Schaub's testimony that he prepared the schedules months in advance is of no consequence as he could have taken McGinn off the schedule after receiving the Chief's order but failed to do so. Captain Schaub's failure to follow the Chief's direct order is a "wholly permissible reason" to revoke Captain Schaub's scheduling responsibilities. See *id.* Furthermore, this action did not result in any change in Captain Schaub's rank or compensation.

For the foregoing reasons, the evidence is insufficient to prove that the Town committed an unfair labor practice in violation of RSA 273-A:5, I (a), (b), and (c). Accordingly, the Union's complaint is dismissed.

So ordered.

Date: 10/06/2023


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