



State of New Hampshire
Public Employee Labor Relations Board

State Employees Association of NH, SEIU Local 1984

v.

Town of Littleton

Case No. G-0171-2
Decision No. 2024-068

Appearances: John S. Krupski, Esq., Milner & Krupski, PLLC
Concord, NH for the Complainant

Peter C. Phillips, Esq., Soule, Leslie, Kidder, Sayward & Loughman,
Salem, NH for the Respondent

Background:

On September 29, 2023, the State Employees' Association of NH, Inc., SEIU Local 1984 (SEA) filed an unfair labor practice complaint under the Public Employee Labor Relations Act against the Town of Littleton. The SEA alleges the Town implemented an arbitration award in violation of RSA 273-A:5, I (h)(to breach a collective bargaining agreement) and (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). According to the SEA, the arbitrator exceeded his authority because:

He expressed his own style of industrial justice by surpassing the discipline to be issued for an alleged violation of driving while under the influence. The Chief agreed to issue a three (3) week suspension but increased it to a termination solely based on an allegation of untruthfulness. The untruthfulness was unfounded and the Arbitrator should have issued the three (3) week suspension not termination.

The SEA also argues the arbitrator's decision "violates a strong and dominant policy that an individual is innocent of a crime until proven guilty beyond a reasonable doubt. As police officer Sean Donahue was not charged with or convicted of a violation of RSA 265-A:2 it cannot serve [as] the basis of a termination."

As relief, the SEA requests that the PELRB: 1) Find that the Town has committed an unfair labor practice; 2) Order the Town to reinstate Donahue; 3) Find that the arbitrator's decision violates a strong and dominant public policy; 4) Find that the arbitrator exceeded his authority; and 5) Grant such other and further relief as is just and equitable.

The Town denies the charges. According to the Town, the parties agreed to the following arbitral submission: "Did the Town [have] just cause to terminate Sean Donahue from the Littleton Police Department? If not, what shall be the remedy?" The Town maintains the arbitrator properly exercised his authority in deciding the question the parties submitted to him, and his decision does not violate a strong and dominant public policy as claimed by the SEA. The Town requests that the PELRB find that the SEA's challenge to the disputed arbitration award is without merit and dismiss the complaint.

The parties submitted this case for decision on stipulations, exhibits, and briefs. See pre-hearing order, PELRB Decision No. 2023-273 (October 31, 2023). All filings have been received, and our decision is as follows.

Findings of Fact

1. The Town is a public employer within the meaning of RSA 273-A:1(X).
2. The SEA is the certified bargaining representative for employees holding the following positions in the Town's Police Department: Police Officer, Police Sergeant, Police Lieutenant, and Police Prosecutor. See PELRB Decision No. 2007-116 (August 1, 2007).

3. The parties submitted the following exhibits¹ into the PELRB record:

- Joint Ex 1 Arbitration Decision, April 3, 2023
- Joint Ex 2 Union Arbitration Brief, February 17, 2023
- Joint Ex 3 Town Arbitration Brief, February 17, 2023
- Joint Ex 4 Arbitration Stipulated Issue
- Joint Ex 5 Arbitration Stipulated Facts
- Joint Ex 6 2020-23 CBA (CBA)
- Joint Ex 7 June 1, 2022, Letter from AAA
- Joint Ex 8 April 25, 2022, Memo Decision on Disciplinary
- Joint Ex 9 March 24, 2022, Termination Recommendation
- Joint Ex 10 January 3, 2022, Notice of Administrative Leave
- Joint Ex 11 Report, Deputy Chief Tyler to Chief Smith
- Joint Ex 12 Police Report
- Joint Ex 13 March 24, 2022, Internal Investigation
- Joint Ex 14 February 2022, MRI Report
- Joint Ex 15 Performance Reviews
- Joint Ex 16 Police Officer Certifications
- Joint Ex 17 Master Patrol Office Program Recommendations
- Joint Ex 18 March 22, 2022, Complaint & Arrest Warrant
- Joint Ex 19 September 13, 2022, Complaint, Disposition, Sentencing
- Joint Ex 20 Awards and Certifications
- Joint Ex 21 Other Commendations
- Joint Ex 22 Intentionally Omitted
- Joint Ex 23 February 2022, MRI Report Town Version
- Joint Ex 24 February 7, 2022, Chief Smith/DMV Correspondence
- Joint Ex 25 February 10, 2022, Arrest Warrant
- Joint Ex 26 Littleton Police Department Code of Conduct
- Joint Ex 27 Canons of Police Ethics
- Joint Ex 28 February 7, 2022, Letter from Chief Keaton
- Joint Ex 29 CV-Sean F. Kelly
- Joint Ex 30 RSA 265:79-b
- Joint Ex 31 RSA 265:25
- Joint Ex 32 RSA 265-A:2
- Joint Ex 33 Retained by parties under seal.
- Joint Ex 34 March 9, 2022, Hearing Notice
- Joint Ex 35 Transcript Bella Boucher Interview (0:19:45-0:21:31)
- Joint Ex 36 Text Messages
- Joint Ex 37 Jalisco Menus
- Joint Ex 38 Pol 402.02
- Joint Ex 39 April 30, 2018, McDonald Memorandum
- Joint Ex 40 Alcohol Dissipation Chart
- Joint Ex 41 September 25, 2022, C-Tox Consulting Summary
- Joint Ex 42 Pol 401.01

¹ We presume these documents are also part of the arbitration record and they are accepted into the record in this case with this understanding.

4. CBA Article 3, Management Rights and Employee Rights, includes the following:

3.1 Management Rights

3.1.1 Except as otherwise expressly and specifically limited by the terms of this Agreement, the Town retains all its customary, usual and exclusive rights, decision making, prerogatives, functions, and authority connected with or in any way incidental to its responsibility to manage the affairs of the Town or any part of the Town. The rights of employees in the bargaining unit and the Association thereunder are limited to those specifically set forth in this Agreement. Without limitation, but by way of illustration, the exclusive prerogatives functions, and rights of the Town shall include the following:

....

- i. To discipline, suspend, demote, or discharge employees for just cause.

5. CBA Article 10, Disciplinary Actions, includes the following:

10.1 Disciplinary action will be for just cause and will normally be taken in the following order:

- a. Verbal warning
- b. Written warning
- c. Suspension without pay or Demotion
- d. Discharge

However, the above sequence need not be followed if an infraction is sufficiently severe to merit immediate suspension, demotion or discharge. Additionally, the Town reserves the right to take disciplinary action in a manner consistent with the efficiency of operations and appropriate to the infraction involved.

6. CBA Article 11, Grievance Procedure, includes the following:

11.5.3 Step 3: If the decision of the Town Manager does not resolve the grievance, the Association shall have the sole right to appeal that decision and the matter shall be submitted to arbitration providing the Association notifies the Town Manager of such request within ten (10) workdays of the receipt by the Association of the Town Manager decision. The following procedure shall be used to secure the services of an arbitrator:

- a. The Parties will attempt to agree upon a mutually satisfactory third party to serve as arbitrator. If no agreement is reached within ten (10) workdays following the date the request for arbitration was received by the Town, the American Arbitration Association will be notified by either or both Parties and requested to submit a roster of persons qualified to function as an arbitrator.

- b. The Parties shall choose a mutually satisfactory arbitrator from the list submitted within ten (10) workdays or request a second list.
- c. If within ten (10) workdays of receipt of the second list the Parties are still unable to agree upon a mutually agreeable arbitrator, they shall request that the American Arbitration Association appoint an arbitrator.
- d. Neither the Town nor the Association will be permitted to assert any evidence before the arbitrator, which was not previously disclosed to the other Party.
- e. The arbitrator shall limit him/herself to the issues submitted to him/her and shall consider nothing else. He/she shall be bound by and must comply with all of the terms of this Agreement. He/she shall have no power to add to, delete from, or modify in any way the provisions of this Agreement. The arbitrator may award a "make whole recommendation," but may apply no penalty payments.
- f. The decision of the arbitrator shall be final and binding on the Parties.
- g. The costs for the services of the arbitrator, including their per diem expenses, if any, and actual and necessary travel, subsistence expenses and the cost of the hearing room shall be borne equally by the Town and the Association. Any other expense shall be paid by the Party incurring same.
- h. It is expressly understood that either Party may initiate a meeting with the other Party to resolve the grievance prior to going to Step 3, and the other Party shall be available for such meeting.

11.5.4 Powers of the Arbitrator: It shall be the function of the Arbitrator, and he/shall be empowered, except as his/her powers are limited below, after proper hearing on a properly filed and processed grievance referred to him/her as set forth above, to make a decision in case of an alleged violation of the specific articles and sections of this Agreement. The decision of the Arbitrator shall be based exclusively on the evidence presented at the arbitration hearing and the provisions of this Agreement. The Arbitrator's decision shall not be based on any [statutes], decision, regulations or other extra contract matters not specifically incorporated into this Agreement. The Arbitrator's decision shall be in writing and shall set forth his/her findings of fact, reasoning and conclusions on the issues submitted.

- 1. The Arbitrator shall have no power to add to, subtract from, alter, or modify any of the terms of this Agreement or any of the functions or responsibilities of the parties to this Agreement.
- 2. The Arbitrator shall have no power to change any practice, policy, or rule of the Town nor to substitute his/her judgment for that of the Town as to

the reasonableness of any such practice, policy, or rule, unless such practice, policy, or rule is in violation of a specific article and section of this Agreement. His/her powers shall be limited to deciding whether the Town has violated the express article and sections of this Agreement; and he/she shall not imply obligations and conditions binding upon the Town from this Agreement, it being understood that any matter not specifically set forth herein remains within the reserved rights of the Town.

3. The Arbitrator shall have no power to substitute his/her discretion for the Town's discretion in cases where the Town is given discretion by this Agreement.
4. The Arbitrator shall only have the authority to pass on a grievance referred to him/her as prescribed herein.
5. The Arbitrator shall be without authority to make any decision which requires the commission of any act prohibited by law or which is violative of the terms of this Agreement.

11.5.5 At the time of the arbitration hearing, both the Town and the Association shall have the right to call any employee as a witness and to examine and cross-examine witnesses. Each party shall be responsible for the expenses of the witness that they may call. The parties shall submit to each other a list of all arbitration witnesses to be called in the hearing no less than forty-eight (48 hours) in advance of the scheduled hearing date. At the close of the hearing, the Arbitrator shall afford the Town and the Association the opportunity to furnish briefs.

11.5.6 The Arbitrator will render his/her decision within thirty (30) days from the date the hearing is closed or the date the parties submit their briefs, whichever date is later.

11.5.7 Jurisdiction of the Arbitrator: The jurisdiction of the Arbitrator shall be limited to the determination of grievances which involve an alleged violation of a specific article and section of this Agreement and which have been properly filed, processed and referred to the Arbitrator as set forth above. If either party shall claim before the Arbitrator that a particular grievance fails to meet the tests of arbitrability, the Arbitrator shall proceed to decide such issue before proceeding to hear the case upon the merits. If the grievance concerns matters not subject to arbitration, the Arbitrator shall return the grievance and all documents relating thereto to the parties without decision.

7. Town Manager James Gleason terminated Donahue's employment with the Town on April 25, 2022. The SEA used the CBA grievance procedure to challenge Gleason's decision in arbitration pursuant to CBA Article 11.5.3.

8. Arbitrator Grossman held hearings on September 29, 2022, and December 19, 2022. He described the issue he was to resolve as follows: “Did the Town of Littleton [have] just cause to terminate Sean Donahue from the Littleton Police Department? If not, what shall be the remedy?”

9. In his decision dated April 3, 2023, Arbitrator Grossman stated that the “parties had a full opportunity to state their positions and present testamentary and documentary evidence. After the hearing concluded, the parties submitted written arguments.” The decision itself is 30 pages, divided into the following sections:

- Background (Decision 2-4)
- Additional Facts and Documents Presented (Decision 4-11)
- Union Position (Decision 12-19)
 - A. Summary (Decision 2-13)
 - B. Donahue was Truthful. (Decision 13-14)
 - C. Donahue truthfully provided that he did not believe he was impaired. (Decision 14-15)
 - D. Donahue truthfully did not know the collision occurred at the time of impact. (Decision 15-16)
 - E. Donahue took responsibility for his actions and did not commit a crime. (Decision 16-17)
 - F. The Town failed to conduct a fair and impartial investigation. (Decision 17-18)
 - G. The Town failed to consider Donahue’s positive work history and to apply progressive discipline. (Decision 18-19)
- Union Conclusion (Decision 19)
- Employer Position – The Town had just cause to terminate the grievant (Decision 19-24)
- Analysis and Opinion (Decision 24-29)
- Award (Decision 29-30)

10. The documents Arbitrator Grossman received and reviewed include an internal affairs investigation summary, police officer incident reports, a Municipal Resources Incorporated (MRI) Investigation, the Littleton Police Department Code of Conduct, and the Canons of Police Ethics.

11. The additional facts portion of Arbitrator Grossman's decision includes the following:

- Donahue worked a 6:00 to 2:00 p.m. shift on December 31, 2021, then picked up his fiancée at his residence in Littleton and drove to North Conway to celebrate New Year's Eve, about an hour's drive.
- He had a large meal and two 18 ounce-margaritas at one restaurant (6-7:00 p.m.)
- He had three beers at another restaurant or bar (7-10:30)
- He drank less than 4 ounces of a beer at a third restaurant or bar and half of a whiskey shot at midnight (10:30 p.m. to 12:30-45 a.m.)
- He could not find a room to stay overnight in North Conway and decided he was able to drive back to Littleton.
- While driving on Route 302 West he noticed he was driving on the wrong side of the road and was falling asleep. He continued driving.
- Later, passing through Bartlett, he drove on the wrong side of the road again and onto the embankment on the far side where the car struck a street sign. The driver's side headlight was disabled and the collision caused significant damage to the driver's side front quarter panel.
- He had fallen asleep again and was awakened by the noise. He continued driving.
- His fiancée had fallen asleep when they left North Conway, was awakened when the car drove off the road and hit the sign, and immediately fell asleep again.
- 20-25 minutes later Donahue stopped the car on the side of the road, got out, and vomited. He lost his balance, fell, and hit his head on the sidewalk.
- Donahue's fiancée drove the rest of the way home (20-40 minutes) and Donahue slept in the passenger seat.
- In Littleton, an on-duty police officer noticed the damaged vehicle and reported his observation. Another officer looked for the vehicle, and eventually went to Donahue's residence because he knew Donahue drove a similar car to the one reported. He found Donahue, apparently "passed out" in the front passenger seat of the damaged vehicle.
- A short time later, after Donahue regained consciousness, the officer noticed Donahue's speech was impaired and he smelled of alcohol. Donahue declined treatment for his head injury and the officer left the scene.

12. Excerpts from Arbitrator Grossman's Analysis, Opinion and Award include the following:

Donahue's termination was based on the Town's determination that he 1) drove while intoxicated, 2) knowingly did not report an accident, and 3) was untruthful. Donahue denies all three charges.

...

Attention is first turned to the charge that Donahue drove while intoxicated. The evidence is indisputable that Donahue was not charged with any crime or convicted of any crime...Donahue pleaded guilty to negligent driving...He twice drove off the road. The main issue to consider is to what extent, if any, was the alcohol that Donahue drank earlier that evening a cause of his negligent driving.

...

Donahue twice passed out and awoke while driving his car.

...

The second incident occurred when Donahue drove off the road and crashed into a sign, causing substantial damage to his vehicle....As he found himself driving, he immediately redirected his car back onto the road, proceeding in a westerly direction. Donahue would have us believe that he was not sure what happened and whether his car struck anything. I conclude that Donahue was, once again, truthful. But his inability to understand what had just happened seemed to stem from something more than merely nodding off while driving. It suggests that he took longer to regain his self-awareness than it would have had he merely fallen asleep. After all, he had been just driving on the road and he could not have lost consciousness for very long prior to hitting the sign. Obviously, his being sleepy and having consumed a significant amount of alcohol both contributed to his state. I find this incident a strong indication that he was impaired...

...

Additionally, Donahue lost his balance and hit his head on the road. His loss of balance is a likely indication of impairment.

...

It is unusual that Donahue would remain in his car after arriving home. That Officer Audit observed him unconscious in his car so long after arriving at home is another indication of impairment.

...

While none of the aforementioned indications of impairment by themselves would result in a finding of impairment, when viewed in totality, they lead to the clear conclusion that Donahue was in an impaired state as he drove home from North Conway.

...

I conclude that the Town of Littleton had just cause to terminate Donahue for operating his vehicle while under the influence of liquor. I also note that the Town did not support the charge that he was untruthful.

...

The Town of Littleton had just cause to terminate Sean Donahue from the Littleton Police Department. It did not have proper cause to determine he was untruthful.

Decision and Order

Decision Summary:

We are not persuaded that Arbitrator Grossman exceeded his authority or that his decision violates a strong and dominant policy as claimed by the SEA.

Jurisdiction:

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

Discussion:

A. The Arbitrator did not exceed his authority.

As was true in *Appeal of Merrimack County*, 156 N.H. 35 (2007)(arbitrator decision to reinstate terminated employee upheld), this case involves final and binding arbitration. We accordingly evaluate the SEA's claim that the arbitrator exceeded his authority based on the following principles:

A judicial challenge to arbitral authority requires the reviewing court to consider both the CBA and the arbitral submission. The overriding concern is whether the contracting parties have agreed to arbitrate a particular dispute, not whether the agreement is within the CBA.

While ordinarily we interpret contractual provisions de novo, the general rule [is] that the interpretation of a CBA is within the province of the arbitrator, subject to certain exceptions recognized by our case law that are not relevant here. [W]hen the parties include an arbitration clause in their CBA, they choose to have disputes concerning constructions of the CBA resolved by the arbitrator. Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. For this reason, the PELRB does not regularly have jurisdiction to interpret the CBA when it provides for final and binding arbitration.

Our review of the arbitrator's interpretation of the CBA is similarly limited. Just as the court may not reject the arbitrator's factual findings simply because it disagrees with them, neither may the court reject the arbitrator's interpretation of the CBA simply because the court disagrees with it. While the arbitrator cannot ignore the plain language of the CBA, because the parties authorized the arbitrator to give meaning to that language, a court should not reject an award on the ground that the arbitrator misread the contract. [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. The court's task is thus ordinarily ... limited to determining whether the arbitrator's construction of the [CBA] is to any extent plausible.

Appeal of Merrimack County, 156 N.H. at 39-40 (quotations and citations omitted). The court went on to conclude that "[w]e cannot say that the arbitrator's interpretation of the CBA and the parties' submission is so implausible as to require reversal." *Id.* at 41. We reach the same conclusion in this case.

Arbitrator Grossman decided the arbitral issue the parties submitted to him, namely was there just cause to terminate Donahue (CBA Article 3.1 (i) and 10.1). His discussion and analysis of just cause is consistent the court's explanation of the just cause standard in *Appeal of Merrimack County*:

Under this [the just cause] standard, the arbitrator ... has the authority to consider the underlying issues and surrounding circumstances necessary to interpret and apply the express provisions of the CBA and reach a final decision. The United States Supreme Court has identified seven criteria for analyzing whether just cause exists: (1) the reasonableness of the employer's position; (2) the notice given to the employee; (3) the timing of the investigation undertaken; (4) the fairness of the investigation; (5) the evidence against the employee; (6) the possibility of discrimination; and (7) the relation of the degree of discipline to the nature of the offense and the employee's past record. Consistent with this standard, the arbitrator examined whether Foote's conduct warranted the maximum penalty under the CBA and determined that it did not.

Id. at 41 (quotations and citations omitted). See also *Appeal of City of Manchester*, 153 N.H. at 293 (citing seven criteria with approval). Since the parties agreed to have Arbitrator Grossman resolve the dispute over Donahue's termination, it is his "view of the facts and of the meaning of the contract that they have agreed to accept." *Appeal of Merrimack County* at 40 (quotations and citations omitted). Arbitrator's Grossman's decision passes the "plausibility" test, and we are not persuaded that he exceeded his authority based on the principles governing our analysis discussed in *Appeal of Merrimack County*.

B. The Arbitrator's decision does not contravene a strong and dominant public policy as expressed in controlling statutes, regulations, common law, and other applicable authority.

The SEA also attacks Arbitrator Grossman's decision on the grounds that it violates public policy. Again, we rely on *Appeal of Merrimack County*, which outlines the analysis when considering such an argument as follows:

To so find, we must conclude that the PELRB's order² contravenes a strong and dominant

² Finding an unfair labor practice because the County refused to implement an arbitration award reinstating a terminated employee.

public policy as expressed in controlling statutes, regulations, common law, and other applicable authority. [I]n such cases our review is limited to the confines of positive law, rather than general considerations of supposed public interests.

In the context of an arbitration award that reinstates a fired employee, the question is not whether the charged conduct offends public policy, or whether some remedy short of unconditional reinstatement ... might have been preferable. Rather, the sole question is whether the award itself--the order for reinstatement--gives offense. In making this determination, we must read the pertinent statutes and regulations in light of background labor law policy that favors determination of disciplinary questions through arbitration when chosen as a result of labor-management negotiation. Further, [w]ith a few limited exceptions not relevant here, [we are] bound by [the] arbitrator's findings of fact. Thus, we examine only whether the reinstatement award, on the facts as found by the arbitrator, contravenes an explicit, well-defined, and dominant public policy.

Appeal of Merrimack County, 156 N.H. at 44-45 (quotations and citations omitted). The SEA argues the Arbitrator's decision "violates a strong and dominant policy that an individual is innocent of a crime until proven guilty beyond a reasonable doubt. As police officer Sean Donahue was not charged with or convicted of a violation of RSA 265-A:2 it cannot serve [as] the basis of a termination." We will not, however, conflate a civil arbitration proceeding concerning an employment issue with a criminal prosecution in a state court with jurisdiction over such matters. The Arbitrator's decision is not a finding that Donahue is guilty under RSA 265-A:2 Driving or Operating Under the Influence of Drugs or Liquor, and the SEA has not identified any strong and dominant public policy in positive law providing that in the employment context, an employee cannot be terminated based on conduct which might also be subject to criminal prosecution unless prosecution and conviction happen. Arbitrator Grossman's award (the Town had just cause to terminate Donahue) does not, on the facts as he found them, contravene an explicit, well-defined, and dominant public policy.

Accordingly, the SEA's claim that the Town has violated RSA 273-A:5, I (h)(to breach a collective bargaining agreement) and (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) is without merit. The complaint is dismissed.

So ordered.

Date: April 29, 2024

/s/ Peter G. Callaghan
Peter G. Callaghan, Esq.
Chair/Presiding Officer

By unanimous vote of Alternate Chair Peter G. Callaghan, Esq., Board Member James M. O'Mara, Jr., and Alternate Board Member Glenn A. Brackett

Distribution: John S. Krupski, Esq.
Peter C. Phillips, Esq.

