RECEIVED
AUG 18 2010
PELRB

This order affirms in part and vacates in part the appeal of PELRB Decision No. 2009-057.

MANDATE
Certified and Issued as Mandate Under NH Sup. Ct. R. 24
Michele A. Carraway
Clerk/Deputy Clerk
8/17/2010
Date

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2009-0384, Appeal of Town of Derry, the court on August 3, 2010, issued the following order:

The Town of Derry (Town) entered into a collective bargaining agreement (CBA) with the Derry Police Patrolmen's Association (Union). The Town appeals an order of the public employee labor relations board (PELRB) finding that the Town committed an unfair labor practice (ULP) when it investigated use by certain Union members of the laundry allowance provision of the CBA. The Town argues that the PELRB erred in: (1) exercising jurisdiction over the merits of the claim; (2) mandating the manner in which the Town should have responded to the issue; and (3) vacating the disciplinary action taken by the Town in response to the laundry allowance issue. We affirm in part and vacate in part.

When we review a decision of the PELRB, we defer to its findings of fact and absent an erroneous ruling of law, we will not set aside its decision unless the appealing party demonstrates by a clear preponderance of the evidence that the order is unjust or unreasonable. Appeal of City of Manchester, 153 N.H. 289, 292 (2006).

In this case, the CBA contained the following provision: "The Town will provide for the cleaning of fifty-two garments per year (such as one shirt, one trousers) and in addition, will provide for the cleaning of outerwear twice during the winter season." The PELRB found that the CBA also contained a "workable grievance procedure," see RSA 273-A:4, that culminated in final and binding arbitration. Neither party disputes this finding.

The Town began to suspect that union members were "pooling" their laundry allowances such that some members exceeded the fifty-two garment allowance. After conducting an investigation, the Town, through its police chief, issued written reprimands to eight officers for their roles in the pooling. The Union filed an unfair labor practice complaint with the PELRB. The PELRB found that the Union had grieved the reprimands and they were subject to arbitration; the PELRB further found that the Town's use of a non-contractual process to address the laundry allowance dispute constituted a breach of the parties' CBA and should have been addressed through the procedures established in the CBA.

The Town first argues that the PELRB erred in exercising jurisdiction over the merits of the claim. The PELRB has "primary jurisdiction of all violations of RSA 273-A:5." RSA 273-A:6, I (2010); see RSA 273-A:5, I (h) (prohibited practice for any public employer to breach collective bargaining agreement). Because the Union argued that the Town's investigation breached the parties' CBA, the PELRB had jurisdiction to review the Union's complaint. See Appeal of City of Manchester, 153 N.H. at 293.

The Town also argues that the PELRB exceeded its jurisdiction in mandating the manner in which the Town should have addressed the alleged violation and in vacating the Town's disciplinary action. While the PELRB has primary jurisdiction of all ULP claims alleging violations of RSA 273-A:5, it does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration. Id. In its order addressing the Town's motion for rehearing, the PELRB specifically stated: "The [PELRB's] decision does not decide the merits of the laundry allowance dispute, which is whether pooling of the laundry allowance is permissible under this or any other contract provision, and it was not the [PELRB's] intent to terminate any related arbitration proceedings." This statement is consistent with our case law.

The only remaining issue is whether the PELRB exceeded its authority in ordering the Town to permanently remove the results of the internal investigation concerning the laundry allowance issue from the affected officers' personnel files. We conclude that this order was premature and is more properly a decision to be made following arbitration. Whether the Union members violated the CBA will be determined during arbitration. Until the issue is finally resolved in accordance with the procedure set forth in the CBA, no determination can be made as to whether the letters of reprimand were properly issued. See Appeal of Prof. Firefighters of E. Derry, 138 N.H. 142, 144-45 (1993) (if PELRB finds that employer was unlawfully motivated to some degree, employer can still avoid being adjudicated violator of law by proving that regardless of unlawful motivation, employer would have taken same action for wholly permissible reasons). Accordingly, we vacate that portion of the PELRB order that ordered permanent removal of the letters and otherwise affirm its decision.

Affirmed in part and vacated in part.

Dalianis, Duggan and Conboy, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
New Hampshire Public Employee Labor Relations Board, P-0702-22 & 23
Thomas M. Closson, Esquire
Peter J. Perroni, Esquire
Attorney General
Irene Dalbec, Supreme Court
Lorrie Platt, Supreme Court
Marcia McCormack, Supreme Court
Michelle A. Caraway, Supreme Court
File