Affirms PELRB Decision No. 2005-107

THE SUPREME COURT OF NEW HAMPSHIRE

Public Employee Labor Relations Board
No. 2005-718

APPEAL OF EXETER POLICE ASSOCIATION
(New Hampshire Public Employee Labor Relations Board)

Argued: June 7, 2006
Opinion Issued: August 15, 2006

McKittrick Law Offices, of North Hampton (J. Joseph McKittrick on the brief and orally), for the petitioner.

Flygare, Schwarz & Closson, of Exeter (Thomas J. Flygare and Daniel P. Schwarz on the brief, and Mr. Schwarz orally), for the respondent.

HICKS, J. The petitioner, Exeter Police Association (Association), appeals the decision of the New Hampshire Public Employee Labor Relations Board (PELRB) that the respondent, Town of Exeter (Town), did not commit an unfair labor practice under RSA 273-A:5 (1999) when it denied a union employee the presence of an attorney during an investigatory interview. We affirm.

The record supports the following facts. The Town is a public employer as defined in RSA 273-A:1, X (Supp. 2005). The Association is the exclusive representative of all full-time police officers employed by the Town. The Town and the Association entered into a collective bargaining agreement (CBA) commencing on January 1, 2003, and expiring December 31, 2007. The CBA is silent regarding a union employee's right to have representation at an investigatory interview.

John Faulkner was hired as a full-time police officer for the Town in 1992. He was discharged after an investigation revealed that he had improperly used the State Police On-Line Technology Systems to issue a traffic ticket. The investigation began after the recipient of that ticket filed a complaint with the chief of police stating that Faulkner had been harassing him and his family. The chief revoked the traffic ticket and assigned Lt. Stephen Dockery to investigate the matter.

When Faulkner arrived at work on March 31, 2004, he found a memo stating that Dockery wanted to interview him around 6:00 p.m. Faulkner called Joseph McKittrick, a local attorney with experience in labor matters, to represent him at the interview. McKittrick arrived in time for the interview, but was forced to wait in the lobby while Dockery interviewed Faulkner. After denying McKittrick access to the interview, Dockery asked Faulkner if he wished to have a union representative present and Faulkner declined.

The parties dispute whether Faulkner described McKittrick to Dockery as his "union representative" or simply his attorney. Regardless, it is undisputed that McKittrick was not the Association's legal counsel on March 31, 2004. In fact, the Association was without legal representation at that time. The Association, however, subsequently informed the Town on April 4, 2004, that it had retained McKittrick as its counsel.

The Town terminated Faulkner's employment on April 9, 2004. The Association and the Town entered into advisory arbitration pursuant to the grievance procedure in the parties' CBA and an award was issued in favor of the Association. The Town rejected the arbitration award pursuant to the CBA. The Association then filed an unfair labor practice charge against the Town with the PELRB.

After a hearing, the PELRB concluded: (1) the Town had sufficient "just cause" to terminate Faulkner; and (2) the Town did not violate Faulkner's Weingarten rights by denying McKittrick's presence at the March 31st interview. See International Brotherhood of Police Officers, Local 394 v. City of Manchester, PELRB Decision No. 92-73 (May 4, 1992) (adopting holding in N.L.R.B. v. Weingarten, Inc., 420 U.S. 251, 267 (1975), that union employee has right to union representation at an investigatory interview he or she reasonably believes will result in discipline). The Association appeals the latter finding.

On appeal, the Association raises several challenges to the PELRB's finding. First, it argues that its retroactive ratification of McKittrick's services on March 31 qualifies McKittrick as union representation on the evening of the interview. Second, it contends that Faulkner's Weingarten rights were violated because he was denied the union representative of his choice at an

investigatory interview. Third, it argues that denying McKittrick's presence and failing to postpone the interview was tantamount to inquiring into his status and thus interfering with the union and the representation of its members. Finally, it contends that previous PELRB decisions recognize an employee's right to pick any representative of his choice for an investigatory interview.

When reviewing 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 the State of N.H., 147 N.H. 106, 108 (2001).

The Association argues that McKittrick qualifies as union representation because he was retroactively ratified by the union. In support of its position, the Association cites several New Hampshire statutes where this practice is expressly authorized in the corporate context. See RSA 293-A:7.04, I(a) (1999); see RSA 293-A:8.21 (1999). The Association urges that retroactively approved actions have the same legal status as contemporaneously approved ones and the Association's retroactive ratification of McKittrick's representation has the same legal effect as if McKittrick had been retained by the Association on the evening of the interview.

By their terms, the statutes cited by the Association do not apply. The evidence presented before the PELRB establishes that McKittrick was not a union representative on the evening of March 31, 2004. The Association did not appoint McKittrick as a union representative until five days later. Faulkner had no authority to confer the status of union representative on McKittrick. Thus, on the evening of the interview, McKittrick could not have acted as a union representative. Even if the Association retroactively ratified McKittrick's actions, this does not alter the facts as they existed on the evening of March 31. We cannot ignore the practical problems that sanctioning such a ratification would have. Under the Association's rationale, public management officials would have to allow all purported employee representatives into investigatory interviews because they would have no idea whether the employee's desired representative would become, retroactively, a union representative.

We reject the Association's next argument that the police department violated Faulkner's Weingarten rights by denying him the union representative of his choice because McKittrick was not a union representative on the evening of March 31, 2004. The protected rights in Weingarten flow from an employee's request for union representation. Weingarten, 420 U.S. at 256-57; see also Defense Criminal Investigative Service v. F.L.R.A., 855 F.2d 93, 96 (3d Cir. 1988) (explaining Weingarten rights attach when employee makes valid request for union representation); Spartan Stores, Inc. v. N.L.R.B., 628 F.2d 953, 958

(6th Cir. 1980) (stating Weingarten rights ripen only if employee requests union representation); Pacific Tel. & Tel. Co. v. N.L.R.B., 711 F.2d 134, 137 (9th Cir. 1983) (explaining Weingarten right to union representation is a right which must be requested by employee). Here, Faulkner failed to request a union representative, and thus no Weingarten rights could have been violated. Accordingly, we need not decide today what, if any, Weingarten rights attach in New Hampshire under RSA chapter 273-A. We express no opinion on whether New Hampshire law affords such protection. Appeal of City of Manchester, 149 N.H. 283, 289 (2003).

Similarly, the police department's actions do not amount to an inquiry into McKittrick's status and a resulting interference with union operations. The Association concedes in its brief that Dockery never inquired into McKittrick's status. Moreover, the record reveals that Dockery offered Faulkner the opportunity to have a union representative and Faulkner rejected this offer.

The Association finally argues that the PELRB's previous decisions establish an employee's right to have any representative he or she chooses at an investigatory interview. In support of its position, the Association relies upon Laconia Education Association v. Laconia School Board, PELRB Decision No. 79-20 (August 23, 1979) (stating union teachers are entitled to representative of their choice in meeting with management to discuss grievances), and International Brotherhood of Police Officers, Local 464 v. Nashua Police Commission, PELRB Decision No. 85-74 (September 26, 1985) (stating chief's denial of representative of officer's choice in disciplinary hearing is violation of RSA chapter 273-A). The Association argues that these two decisions recognize a right to have any representative present at an investigatory interview and that this right was violated when the police department excluded McKittrick from the investigatory interview.

We first note that previous PELRB rulings are not binding on us because we are the final arbiter of the meaning of a statute. Appeal of Campton School Dist., 138 N.H. 267, 269 (1994). We construe all parts of a statute together to effectuate its overall purpose and to avoid an absurd or unjust result. Monahan-Fortin Properties v. Town of Hudson, 148 N.H. 769, 771 (2002).

RSA 273-A:5, I, provides:

I. 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;

(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.

We find in RSA 273-A:5 no right of a union employee to have a non-union representative of his or her choice at an investigatory interview. See Weingarten, 420 U.S. at 259 (explaining representative's presence safeguards interests of the union and assures other employees in the bargaining unit that they can also obtain representative's aid if called to a like interview).

Regardless, we reject the petitioner's assertion that the PELRB's ruling here deviated from its prior decisions. While the Laconia and Nashua rulings might be read to recognize a right to any representative, the PELRB subsequently ruled that the right extends only to union representatives. See International Brotherhood of Police Officers, Local 394 v. City of Manchester, Police Department, PELRB Decision No. 92-73 (May 4, 1992) (adopting Weingarten's requirement of union representation and specifically affirming only the "general principle" of Laconia); New Hampshire Troopers Association v.

New Hampshire Department of Public Safety, Division of State Police, PELRB Decision No. 95-2 (March 20, 1995) (stating denial of Trooper's request for union representative was unfair labor practice); Portsmouth Police Officers, IBPO Local 402 v. City of Portsmouth Police Commission, PELRB Decision No. 97-17 (February 14, 1997) (stating right to union representative cannot be abridged and explaining PELRB has subscribed to Weingarten since Manchester); International Brotherhood of Police Officers, Local 580 v. Rochester Police Commission, PELRB Decision No. 97-85 (October 24, 1997) (stating PELRB has recognized right of union officer to be present when union members adjust grievances); Marc Desilets v. City of Manchester, Manchester Police Dept., PELRB Decision No. 2004-168 (October 20, 2004) (stating employee has right to union representative during interview when he or she reasonably believes discipline may result), rev'd on other grounds by Appeal of City of Manchester, 153 N.H. __, 893 A.2d 695 (2006).

Accordingly, the PELRB's decision was sufficiently supported by the evidence and was neither unjust nor unreasonable.

Affirmed.

BRODERICK, C.J., and DALIANIS, DUGGAN and GALWAY, JJ., concurred.

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Exeter Police Association	*	
Complainant	*	Case No: P-0753-13
v.	*	and
Town of Exeter	*	Case No: P-0753-14
Respondent	*	Decision No. 2005-107

APPEARANCES

Representing the Union: J. Joseph McKittrick, Esq.,
McKittrick Law Offices, North Hampton

Representing the Town: Thomas J. Flygare, Esq.,
Flygare, Schwarz & Closson, Exeter

BACKGROUND

The Exeter Police Association (hereinafter "the Association") filed an unfair labor practice complaint on September 21, 2004 alleging that the Town of Exeter (hereinafter "the Town") committed an unfair labor practice in violation of RSA 273-A:5 I (a), (c), (e) and (g), when it failed to allow Officer Faulkner to have Attorney Mckittrick present during an internal investigative interview of Officer Faulkner and when the Town subsequently terminated Officer Faulkner on April 6, 2004 for reasons that were the subject of the interview. The Association exercised its administrative option under the terms of the parties' collective bargaining agreement (CBA) to take the matter to advisory arbitration. Following an arbitration hearing and

decision, the Town elected to reject the arbitrator's advisory award and, as the parties had previously agreed in their CBA that arbitration would be advisory only and not binding, the arbitrator's decision is of no consequence for purposes of our consideration of this matter other than to acknowledge that the parties have previously presented their respective cases in a contested hearing.

The Town filed its' answer to the Association's complaint on October 4, 2004 denying the Association's complaint, Case No: P-0753-13. The Town states that the actions it undertook in conducting the interview of Officer Faulkner and then terminating him did not violate the statutory prohibitions alleged by the Association.

A pre-hearing conference was conducted on October 15, 2004. Both parties were present and represented by counsel. At the outset of the pre-hearing conference, the hearing officer disclosed to the parties that for a period of time prior to August 2003 he served as counsel to the Association. The hearing officer expressed that he had no personal knowledge as to the facts giving rise to the complaint, and expressed that it was his belief that he could conduct the pre-hearing conference in a fair and impartial manner. The parties' counsel expressly stated that they had no objection to him continuing the pre-hearing proceedings. In light of his relatively recent relationship with the Association, the hearing officer did recuse himself from any further decision-making or other participation in the Board's consideration of the instant matter.

On October 25, 2004 the Association filed a "Motion to Clarify/Modify" its initial complaint with the express intent to include consideration of the issue of "just cause" for termination in its complaint against the Town following discussion at the pre-hearing conference wherein confusion arose regarding whether or not the Association was alleging that the Town's actions related both to procedural defects in the interview process and the merits of the termination were at issue before the Board. On November 8, 2004, the Town filed an objection to this Association motion and incorporated a "Motion to Dismiss" into the same pleading.[1] The Town also filed a second and separate "Motion to Dismiss Unfair Labor Practice" on November 9, 2004 based upon different grounds. The Association responded to the first Town request for dismissal with an "Answer to Motion to Dismiss" on November 17, 2004.

The Association then filed a second complaint of unfair labor practice, Case No: P-0753-14 against the Town on November 17, 2004, this time alleging violations of RSA 273-A:5,I (a), (b), (c), (d), (g) and (h) by the Town. This second complaint alleges many of the same facts and circumstances present in the first complaint with additional detail and express references to the lack of "just cause" required of the parties' CBA for the termination of Officer Faulkner. On November 22, 2004 the Association answered the Town's second Motion to Dismiss that had been filed on November 9, 2004. The Town filed its answer to the Association's second complaint on December 1, 2004. The Town also filed a "Motion to Dismiss" this second complaint on January 31, 2005. On February 7, 2005 the Association filed a replication by "Answer and Objection" to the Town's motion to dismiss the second complaint.

[1] A practice, while not specifically prohibited by administrative rule, that is not favored by this Board. Combined motions contribute to confusion between the parties, obfuscate issues pending, and complicate responsive pleadings.

By interim order and pursuant to Admin. Rule Pub 201.07(i), the Board consolidated the two complaints for purposes of hearing and requested that the parties provide the Board with pre-hearing legal memoranda on the issue of "representation" as contemplated under our statute and application of the "Weingarten Rights doctrine" in New Hampshire. Additionally, as a result of an additional pre-hearing conference with counsel, the Town withdrew its request to call the Association's attorney of record as a witness in the proceedings. Both parties later complied with the Board's request for the legal memoranda and filed the same with the Board on February 14, 2005.

An evidentiary hearing was conducted on the consolidated matters, Case No. P-0753-13 and Case No.P-0753-14, before the Board at its offices in Concord, N. H. on February 17, 2005 and, as counsel were unable to present completed cases over the course of one day, a second day of hearing was completed on March 31, 2005 following a joint request of the parties to continue the scheduling of the second day.

At the outset of the first day, the Association moved to sequester witnesses and the Board granted the motion with a limitation allowing Officer Faulkner and Chief Kane to remain within the hearing room throughout the proceedings. On each day of hearing, both parties were represented by counsel, who made brief openings, presented documentary evidence and witness testimony and had the opportunity to cross-examine witnesses. Following the completion of testimony on the second day of hearing, the record was held open, first for the purpose of allowing the Town to produce any additional performance evaluations of Officer Faulkner, and second, for the purpose of allowing the parties to submit post hearing legal memoranda, and upon receipt of the same from both counsel on April 20, 2005, the record was closed. No additional performance evaluations were submitted. The Board therefore regards this non-submission as a representation that none exist. The parties also submitted "Stipulations of the Parties" into the record and they appear below as Findings of Fact #1 through #16. All other factual findings appearing below were made by the Board upon consideration of the pleadings, the evidence presented by the parties and weighing the credibility of witness testimony. (See Findings of Fact #17- # 57). It finds as follows:

FINDINGS OF FACT

1. The Town of Exeter ("Town") is a public employer as defined in RSA 273-A:1, X.

2. The Exeter Police Association ("Association") is the exclusive representative of all full-time police officers and sergeants employed by the Town.

3. The Town and the Association are parties to a collective bargaining agreement ("CBA") with a commencement date of January 1, 2003 and an expiration date of December 31, 2007.

4. John Faulkner was a full-time police officer within the Association's bargaining unit until the termination of his employment by the Town on or about April 9, 2004.

5. On March 31, 2004, Lieutenant Stephen Dockery sent the following memo to Faulkner:

> "This memo is to inform you that I have been assigned by Chief Kane to conduct the internal complaint investigation involving you. I would like to meet you tonight, March 31, 2004 at 1800 hours in my office to discuss this investigation. If you have a conflict with this time please let me know immediately."

6. Faulkner received the aforementioned notice from Dockery when he started his shift at 1700 hours on March 31, 2004.

7. Immediately upon receiving the notice from Dockery, Faulkner contacted Attorney Joseph McKittrick to represent him at the meeting with Dockery scheduled for 1800 hours.

8. The Association had no arrangement for legal representation with an attorney or law firm at the time of the interview.

9. Prior to the Internal Investigation interview on March 31, 2004, Faulkner had not addressed the issue of representation with the Association.

10. Prior to the Internal Investigation interview on March 31, 2004, the Association had not authorized J. Joseph McKittrick, Esquire, to represent its and/or its member Faulkner's interest at the Internal Investigation interview.

11. Attorney McKittrick arrived at the Department between 1800 and 1810 hours.

12. Dockery was notified that Attorney McKittrick had arrived and was waiting in the Department's reception area to be admitted to the meeting with Faulkner.

13. Attorney McKittrick was not admitted to the meeting between Dockery and Faulkner.

14. Faulkner was discharged by the Town Manager on April 9, 2005 [sic].

15. An advisory arbitration award was issued on or about August 18, 2004.

16. On or about August 21, 2004, the Board of Selectmen rejected the arbitration award.

17. The parties' CBA contains a grievance procedure the final step of which is advisory arbitration. (See Joint Exhibit #1 – CBA)

18. Faulkner has pursued his Administrative remedies that included a hearing before the Town Manager who upheld the Police Chief's decision to terminate and then proceeded to advisory arbitration.

19. The parties' current collective bargaining agreement (CBA), with a commencement date of January 1, 2003 and an expiration date of December 31, 2007, was not on file with the PELRB on the date the first Association ULP was filed on October 4, 2004.

20. Each party was in possession of the 2003-2007 CBA from the date of its execution and continuing throughout all times relevant to these proceedings and it had been subject to their use and reference during an arbitration hearing in July 2004, prior to the filing of the instant complaints with the PELRB.

21. The Town of Exeter employed Officer Faulkner for 12 years prior to his termination on April 4, 2004.

22. Prior to speaking to Officer Faulkner on March 17, 2004, Chief Kane had revoked a ticket issued by Officer Faulkner to David Archambault for operating a motor vehicle on a expired operator's license on March 5, 2004.

23. Police Chief Kane informed Officer Faulkner on March 17, 2004 that he had received a complaint from David Archambault, a citizen who worked at the middle school, that Officer Faulkner had been harassing him and his family. (See Town Exhibit #3)

24. David Archambault, employed at the middle school at the time, had previously had an affair with Officer Faulkner's wife who was also employed at the middle school. Officer Faulkner was also employed within the school system as a school resource officer, albeit at the high school.

25. On or about March 17, 2004, Chief Kane advised Officer Faulkner that his actions in ticketing David Archambault could lead to nothing or could lead to criminal charges and then the Chief went out of Town, returning to duty on or about March 29, 2004, and assigned Lt. Stephen Dockery to undertake an internal investigation into the matter. (See Town Exhibit #2).

26. Lt. Dockery has received substantial training in police issues and management over the course of his career, has been a lieutenant for over 10 years and has conducted half of a dozen internal investigations. He did not recall any training in connection with taping procedures for interviews. He did not recall any discussion of so-called "Weingarten" cases relating to interview subjects being accompanied by a representative. He testified that he had never heard the word "Weingarten" in his career prior to an earlier arbitration proceedings between these parties.

27. Officer Faulkner embarked on a scheduled vacation in Florida that commenced immediately after Chief Kane had brought the Archambault issue to his attention on March 17, 2004. He returned to the state on approximately March 21, 2004 and remained on annual leave until approximately March 30, 2004

28. Upon returning to his shift rotation of 5:00 PM to 3:00AM, Officer Faulkner reported to the station and was presented a memo from Lt. Dockery (See Joint Exhibit #2) at or about 4:30 PM on March 31, 2004 stating that he wanted to conduct an interview with him at or about 6:00 PM. The memo contained a statement informing Officer Faulkner to make the lieutenant aware if the scheduled time for the interview would cause a conflict for him.

29. While Officer Faulkner knew that Officer Gagnon was the Association president, he was under the belief that he would not be able to reach him in connection with representation at the interview scheduled for March 31, 2004.

30. Officer Faulkner contacted Attorney McKittrick on the day of his interview as he knew of the attorney's reputation in labor matters and informed him that he was subject to an internal investigation. He further informed him that he was to be interviewed on March 31, 2004 at 6:00 PM and requested Attorney McKittrick to attend.

31. At the time he contacted Attorney McKittrick, Officer Faulkner was a member of the union and testified that he believed he held the position of Sergeant-at-Arms.

32. At the outset of Lt. Dockery's interview with Officer Faulkner, Officer Faulkner was unaccompanied by any representative at the time, but informed Lt. Dockery that he had contacted Attorney McKittrick and he was going to be his "union representative" and attend the interview as his representative, and further, that "McKittrick would be here." Lt. Dockery contradicts that Officer Faulkner characterized Attorney McKittrick as his "union representative" but rather only as "his representative."

33. Lt. Dockery responded that [Faulkner] "wasn't going to be allowed to have McKittrick." Faulkner again asked that he be allowed this representative and again he was denied. Lt. Dockery suggested to Officer Faulkner that he could get another officer who was in the station and a member of the association to represent him. Officer Faulkner testified that it is his belief that he has "the authority to decide who he wants [as his representative] and not have management assign a choice." He also declined to find a union representative before agreeing to proceed with his interview.

34. No significant evidence was provided by either party to explain why the investigative interview could not have been rescheduled to allow further exploration or clarification of the issue of Officer Faulkner's representation.

35. It is unclear whether or not Officer Faulkner characterized Attorney McKittrick as "his representative" or "his union representative" during his interview because that portion of the interview was not taped by Lt. Dockery.

36. While he was later retained by the Association President on or about April 4, 2004, Attorney McKittrick was not a member, counsel or representative of the union on March 31, 2004.

37. After the discussion about Attorney McKittrick, Lt. Dockery turned on a tape recorder, advised Officer Faulkner of his so-called "Garrity Rights" (Association Exhibit C) and began questioning Officer Faulkner.

38. During the approximately 1.5 hour interview, Attorney McKittrick was in the building and requested that a call be placed to Lt. Dockery on his behalf as he was in the police building and wanted to be present during the interview. On two occasions the call was placed and on two occasions access was refused by Lt. Dockery.

39. Officer Faulkner testified that after the tape recorder was turned off, Lt. Dockery continued to ask questions of him regarding matters subject of the investigation. Eventually, however, he was released by Lt. Dockery and left the interview room.

40. After the day of the interview, Officer Faulkner contacted the Association in connection with representation by Attorney McKittrick who was compensated for his time expended on March 31, 2004 and employed to represent Officer Faulkner at a meeting on April 8, 2004 with the Town Manager.

41. Association president Maurice Gagnon testified that the Association was without legal representation on March 31, 2004 and had had no prior contract with Attorney McKittrick. He further testified that on or about April 4, 2004 he wrote and informed the Town that Attorney Mckittrick was their legal counsel.

42. The investigation was initiated by Chief Kane following a complaint of a citizen, David Archambault, stating that he had been issued a ticket by Officer Faulkner for operating vehicle with an expired license on March 5, 2004. David Archambault also allegedly complained that he and his family were being harassed by Officer Faulkner.

43. There is no dispute that Officer Faulkner had first obtained information, through the use of the State Police On-Line Technology System (SPOTS), of David Archambault's unlicensed status on February 14, 2004 and did not act on that information immediately. There is also no dispute that since returning to patrol duty on January 6, 2003 Officer Faulkner used the SPOTS on at least nine occasions to "run" David Archambault or his wife.

44. There is no dispute that David Archambault was operating a vehicle with an expired driving license when he was stopped and issued a ticket for the offense by Officer Faulkner.

45. Chief Kane used his superior authority to dispose of the ticket issued by Officer Faulkner following the complaint of David Archambault and prior to the investigative interview and completion of the investigation of Officer Faulkner's actions.

46. At the time of the stop by Officer Faulkner on March 5, 2004, he was aware that David Archambault had had an affair with his wife over a period of time extending at

least until the Summer of 2002. Officer Faulkner had previously confronted David Archambault with his suspicion of the affair at the school where he served as the school resource officer at the time and when David Archambault was also employed by the school system in the same middle school as Mrs. Faulkner.

47. Back in 2002 Officer Faulkner was assigned as a school resource officer at the Exeter High School. Following the discovery of the affair between Archambault and his wife, who was also employed within the school system, Officer Faulkner's performance waned from his earlier good performance and his personal spirit waned as well. At the request of the high school principal and superintendent Officer Faulkner was transferred from school resource officer and was re-assigned by the Chief to patrol duty.

48. Following discovery of the affair and his confronting David Archambault and Mrs. Archambault, Officer Faulkner's performance decreased. During discussions with management regarding his declining performance, Officer Faulkner was admonished that he must keep his personal and private life separate from his official duties. During that same period of the summer and fall of 2002 Officer Faulkner requested use of personal and vacation leave to attend to personal matters. His request for personal leave was granted, his request to use vacation time was denied by Chief Kane because he hadn't been provided two week's notice consistent with the parties' practice. During an obvious period of personal difficulty at no time was it suggested by his supervisors that he might avail himself of the employee assistance plan in place for troubled officers, nor did he request such assistance.

49. He was transferred back to police patrol, a responsibility at which he performed well and had a reputation as a prolific motor vehicle violation enforcer.

50. While performing his patrol duties, Officer Faulkner frequently used SPOTS, a computer program that allows police to "run" vehicle registrations and individuals for any violations. Over a period of time from January 2003 through March 5, 2004, he used the system to "run" David Archambault's vehicle registration or license on six occasions and the registration of Archambault's wife on two occasions. These occasions did not involve actual stops except on March 5, 2004. Officer Faulkner testified that on previous occasions since knowledge of the affair with his wife he had observed David Archambault traveling at excessive speed twice over the limit, committing a "rolling stop" and failing to give a directional signal prior to a turn. He did not make a stop for any of these perceived violations.

51. When running David Archambault's registration a month earlier, on February 14, 2004, Officer Faulkner learned that David Archambault's license had expired. He thereafter ran the license again on February 20, 2004 and learned that it still had an expired status. As soon as he started his shift on March 4, 2004, again using the SPOTS on March 4, 2004, he determined that Archambault license was still in an "expired" status. As soon as he started his shift on March 5, 2004, again using the SPOTS, he determined license to be in the same status. Later that evening while on

patrol, he saw David Archambault operating a vehicle, "ran" a check on the system to determine the present status and, being informed his license was still expired, made a stop and issued a ticket for that cause.

52. On March 17, 2004, Chief Kane informed Officer Faulkner that he had been approached by David Archambault who discussed the issuance of the ticket and indicated that he had previously been harassed by Officer Faulkner on other occasions including trailing his vehicle, parking near his residence and engaging in prolonged staring on other occasions.

53. Chief Kane also informed Officer Faulkner that he had previously invalidated the ticket because he believed it was an "illegal ticket" because Officer Faulkner had used the SPOTS, without probable cause. Further, Chief Kane stated that Officer Faulkner's actions could lead to criminal charges or nothing, but that in any case Officer Faulkner was not to have any contact with David Archambault or Archambault's wife.

54. Officer Faulkner had been trained in the use of SPOTS and was unaware of any limitation on the frequency of use but was aware that personal use of the system was prohibited (See Town Exhibit #11).

55. Officer Faulkner, as a member of the Exeter Police Department, is subject to the rules and regulations of the police department not inconsistent with the parties' collective bargaining agreement.

56. The parties' collective bargaining agreement provides in ARTICLE XVII, § 17.1 that "The Town shall not discharge or take other disciplinary action without just cause." (See Joint Exhibit #1).

57. Officer Faulkner has been employed as a police officer with the Town of Exeter since 1992 until his termination in 2004. Throughout that period he has performed his responsibilities well. He has had good performance evaluations both as an officer and for having a high incidence rate of motor vehicle stops. He first earned a coveted assignment as a school resource officer and lost the same after he learned of the affair involving his wife and David Archambault and his attention to his responsibilities at the school were complained of by school officials. With the exception of his reassignment from school resource officer to patrol in 2002, the termination of his employment by the Town was the first disciplinary action to which Officer Faulkner has been subjected.

DECISION AND ORDER

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate violations of RSA 273-A:5,I between the duly elected "exclusive representative" of a certified bargaining unit comprised of public employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I).

In these consolidated cases, the Association has complained that actions of the Town constitute violations of RSA 273-A:5,I generally and specifically those provision that prohibit: (a) constraining, coercing or interfering with employees exercising their rights; (b) dominating or interfering in the formation of an employee organization; (c) discriminating against employees in the hiring and tenure; (d) discharging or discriminating against an employee because he has filed a complaint, affidavit or petition or provided information or testimony pursuant to RSA 273-A; (e) refusing to negotiate in good faith with the exclusive representative of a bargaining unit; (g) failing to comply with RSA 273-A and any rule adopted under it; and (h) breaching the parties' collective bargaining agreement. Further, in the context of these charges of unfair labor practice and the fact that the parties' collective bargaining agreement does not provide for final and binding arbitration, the Board has jurisdiction as a matter of law to interpret the parties' collective bargaining agreement. Appeal of Hooksett School District, 126 NH 202, (1985).

PROCEDURAL MOTIONS

Several preliminary motions were considered by the board before determining whether or not it was to consider the merits of the Association's complaints.

First, the Board considered the Association's "Motion to Clarify/Modify" its initial complaint, the Town's objections thereto and its "Motion to Dismiss" the Association's initial complaint, Case No.: P-0753-13. The Board also reviewed the Association's Answer to the responsive pleadings of the Town. In doing so, it reviewed all pleadings and the pre-hearing order issued by its hearing officer connected with Case No.: P-0753-13. In what shall hereinafter be referred to as the Association's first complaint, the Association's declarations focus primarily on relating a sequence of events regarding the manner and procedures utilized by the Town in commencing an internal investigative interview of Officer Faulkner. The importance of the descriptive detail of the Association's declarations in the area of labor relations law is the issue of what representation an employee, subject to an internal investigation, is entitled to during an interview not involving criminal charges. Relevant rights that attach, in a labor law context to a police officer who is the subject of an investigative interview are referred to in the vernacular as "Garrity Rights" and "Weingarten Rights". The Association's first complaint is more vague on its general invocation of other general rights afforded both public employers and their employees under the provisions of RSA 273-A. At a preliminary hearing conducted before a hearing officer, the parties and the officer engaged in discussion of several procedural aspects of this case, including the request of the Town to dismiss any consideration of a claim against the Town for

terminating Officer Faulkner for lack of "just cause" based upon the Association's failure to express sufficient allegations, *i.e.* a case based upon the "just cause" issue and its inability to do so at that time because a period of six months had elapsed since the termination. The hearing officer granted leave to Association's counsel to file an amendment to the first complaint to which Association counsel indicated that he would assess his options and if he elected to do so would file the supplementary document with the PELRB on or before Friday, October 22, 2004.

On Monday, October 25, 2004 a document was filed by the Association entitled "Motion to Clarify/Modify" that served to add more detail to the issues being raised through the complaint of the Association. A fair reading of the initial complaint and the additional particulars included in the subsequent amending pleading would put a party on reasonable notice of the actions it would be called upon to defend in the underlying action. It has been long a tradition in New Hampshire jurisprudence that parties are entitled to liberal amendment of pleadings unless the pleadings surprise the opposing party, introduce an entirely new cause of action, or call for substantially new evidence. A credible case to support any of these exceptions has not been established by the Town. Our view is simple. We find that while the first complaint may have been inarticulately drafted, the complaint contains sufficient reference to the right of management to terminate employees for "just cause"; sufficient reference to a provision agreed to by the parties in their collective bargaining agreement that discharge of an employee shall not occur without "just cause"; and sufficient reference to the officer's termination, as well as the separation of so-called "Weingarten Rights" from a separate averment that the town had violated other rights "under the provisions of New Hampshire RSA 273-A in general.." to have put the Town on notice as to what it had to defend itself against.

The Association's Motion to Clarify/Modify is viewed by us more as adding particulars to a complaint of unfair labor practice and not creating any new causes of action. Prior to availing itself of proceedings before this Board, these parties had conversed on several occasions regarding the dispute, exhausted the complainant's administrative remedies, and participated in contested advisory arbitration. For either party to these proceedings to assert that they did not know what these proceedings were about when they had been involved in joint actions designed to resolve the dispute for five months prior to the filing of the first complaint is characteristic of the protracted litigious expanse some legal counsel employ at what we can only conjecture is significant cost to their client. We, as most adjudicative forums in New Hampshire discourage undue reliance on what is commonly known within legal circles as "form over substance". A tactic that, while having some basis in early law as applied in the nascent stages of a growing nation, strains at the obligation both parties in labor law have to good faith conduct. Having suggested how this Board will view the increasing use of "motion practice" in the context of its administrative and adjudicative responsibilities, we find specifically in the matter of this first complaint, as clarified, and docketed as Case No.: P-0753-13, a valid complaint deserving of our consideration and hereby dismiss the Town's motion's to dismiss both the complaint and the complaint, as amended, on all grounds, including the fact that the more detailed amendment arrived at the PELRB offices one business day beyond that stated in the Hearing Officer's preliminary order, dated October 19, 2004. No prejudice is shown that the Town was disadvantaged over that weekend and in particular light that the parties did not participate in an evidentiary hearing before this Board for another four months.

Second, the Board considered similar responsive pleadings filed by the parties in connection with what shall hereafter be referred to as the Association's second complaint, Case No.: P-0753-14. This complaint was filed with the PELRB on November 17, 2004. While differing somewhat in form, it restates much of what was alleged in the Association's first complaint, provides sufficient detail as to not require amendment and details the relief requested of this Board in the event that the Board should find that the Town's actions amount to an unfair labor practice. On January 31, 2005, the Town filed a separate "Motion to Dismiss" this second Association complaint on several grounds. Among those expressed by the Town in its motion to the Association's second complaint is that it was filed on November 17, 2004 and therefore violates the limitation on actions delineated in RSA 273:6, VII. That statute limits any complainant to file its complaint with the Board no later than six months from the date the cause of action arose. The other grounds for dismissal urged upon us by the Town are denied because it is our belief that the protracted period over which these parties actively disputed the actions taken by the other sufficiently provided each with sufficient notice of what was being contested.

We deny the Town's attempt to have the second complaint dismissed for violating the limitation on actions applied to unfair labor practice complaints. We find that unlike cases where the initial dismissal is a triggering event and arbitration is binding upon the parties, the date of the arbitration award is not the triggering event. This is so because the Town, in this instance, has retained control over the final action and not yielded it up to a third party arbitrator. It has reserved to itself the discretion to follow or to reject the award. (See Joint Exhibit XVIII, "Grievance Procedure", § 18.8). The Board of Selectmen's action on August 21, 2004 is the final action of the Town, not the Manager's notice of termination. Since the Board of Selectmen had reserved to itself the final action on Officer Faulkner's status, it was their action that constitutes the "triggering" event from which the six month filing limitation starts. Therefore, the Association was within the statute of limitation on actions when it filed the second complaint on November 17, 2004.

The matters, having been consolidated for treatment by the Board and having survived the motions of the Town to dismiss, are now considered on their merits.

DISCUSSION

The Association claims that certain actions of agents of the Town constitute unfair labor practices as defined in RSA 273-A:5,I. First, the Association complains of actions of the Town in conducting an internal investigation of Officer Faulkner that contributed to his later termination. In the area of labor law, among the rights attaching to employees who are subject to investigative interviews are those commonly referred to as "Weingarten Rights." See NLRB v. Weingarten, 420 US 251(1975). The rights can be summarized as follows, "employees have the right to union representation at an investigative interview if they reasonably believe the investigation will result in disciplinary action." Roberts Dictionary of Industrial Relations, Fourth Edition, p.840, Bureau of National Affairs (1994). These protective rights providing for a union representative to be in attendance during an investigative interview flow from the rights of employees to act in concert for mutual aid and protection. While they were first applied to individuals employed in the private sector, they have come to be commonly recognized in the public sector and the PELRB has consistently recognized the legitimate existence of "Weingarten Rights" for public

employees in New Hampshire (See Laconia Educationn Association v. Laconia School Board, PELRB Decision No 70020 (1979);[2] IBPO Local 464 v. Nashua Police Commission, PELRB Decision No: 1985-74;[3] International Brotherhood of Police v. City of Manchester, PELRB Decision No. 92-73 (1992); New Hampshire Troopers Association v. New Hampshire Department of Public Safety, PELRB Decision No. 95-02 (1995); Portsmouth Police Officers, I.B.P.O., Local 402 v. City of Portsmouth Police Commission, PELRB Decision No. 97-017 (1997); Rochester Brotherhood of Police Officers, Local 580 v. Rochester Police Commission, PELRB Decision No. 97-085 (1997) and Desilets v. City of Manchester along with Desilets v. Manchester Patrolmen's Association, PELRB Decision #2004-168 (2004). It can be said then that at least as far as this Board is concerned, so-called "Weingarten Rights" are among the rights implicit in the Public Employee Labor Relations Act (RSA 273-A) allowing public employees to act in concert for mutual aid and protection.

In the case before us, the facts present a situation where the employee subject to the interview, Officer Faulkner, was provided an option by Lt. Dockery that the interview could be rescheduled if the scheduling presented a conflict. Officer Faulkner did not exercise this option to reschedule the interview to allow him to arrange for union representation during the interview. Instead, Officer Faulkner requested that Attorney McKittrick be admitted to the interview to represent him. On March 31, 2004 Attorney McKittrick was a licensed attorney without connection to the Exeter Police Association, the recognized exclusive representative of the bargaining unit. Officer Faulkner did not have the authority at that time to confer upon Attorney McKittrick the status of union or Association member or representative. The right of public employees to act in concert for mutual aid and protection is an important right, but it comes into existence in the disciplinary interview circumstance only if certain requirements are met. Here the requirement that was not met was that Attorney McKittrick was not an agent or representative of the union. While it might be argued that an employer cannot prohibit an employee from reasonably selecting the union representative that will accompany him or her during the interview, the employee must select from among a pool of union members or representatives, not from among the universe of anyone, be that representative an attorney or not. It is paramount that the genesis for any such right of accompaniment, be it labeled "Weingarten" or otherwise, lies in the principles of concerted action and mutual aid. The reason the interviewee's representative must be a union member or representative is that that representative is "safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly. The representative's presence is an assurance to other employees in the bargaining unit that they, too, can obtain his aid and protection if called upon to attend a like interview." NLRB v. Weingarten, 420 US 251, 260-261(1975). It was not the Town barring Attorney McKittrick from the interview room on the evening of March 31, 2004, it was Officer Faulkner's decision not to request a rescheduled interview and not to request a union member or representative to be present during his interview. No guarantee of later retention or ratification of Attorney Mckittrick's employment could be offered at that time by Officer Faulkner and therefore no union representative to interviewee link existed. To ignore the emphasis on the "union representative link" that embodies the concerted

[2] Context of informal grievance meeting where union president's attendance denied by principal
[3] The identification "representative" was not made with this request. See Findings of Facts in Decision "1985-74.

effort and mutual aid principles that support the continued recognition of "Weingarten Rights" in the workplace ignores the purpose that is the foundation of collective action among employees.

We therefore do not find sufficient evidence that the actions of the Town's agents complained of in denying the participation of Attorney McKittrick at the March 31, 2004 interview constitute an unfair labor practice. If Attorney McKittrick was a union member or representative at that date and time, it was not sufficiently proven and if there was an impediment put in place by management to Officer Faulkner rescheduling his interview until representation of his choice from among union members or Association representatives were available, including a later official retention of Attorney McKittrick by the Association, that impediment was likewise not sufficiently proven.

The next issue that the parties have presented to us is whether the Town committed an unfair labor practice in terminating Officer Faulkner without sufficient cause. We have dealt above with the issue that the Board's consideration of the second Association complaint is not barred by the limitation on actions as found in RSA 273-A:6, VII. For convenience, we reiterate our finding that because the parties had negotiated to allow the Board of Selectmen to retain the discretion and authority to reinstate and "make whole" Officer Faulkner, it was their action on August 21, 2004 in rejecting the arbitrator's award that constitutes the "triggering" event from which the six month filing limitation is launched. Therefore, the Association was within the statute of limitation on actions when, approximately three months later, it filed the second complaint on November 17, 2004.

Our consideration then moves to a consideration of whether the Town had sufficient cause to terminate Officer Faulkner. The term of "just cause" is not defined in our governing statute, the Public Employee Labor Relations Act (RSA 273-A). In fact, there is relatively little statutory treatment of the term in labor law because it more often arises in the context of arbitration between employer and employee than in the context of statutory unfair labor practice claims. Often parties to a collective bargaining agreement will provide within the provisions of that agreement a definition of "just cause" for purposes of weighing the termination of an employee or indicate in context a progressive scheme of discipline. The parties presently before us have not done so.

The parties' collective bargaining agreement provides that "The Town shall not discharge or take other disciplinary action without just cause." (See Joint Exhibit #1, ARTICLE XVII, "Discipline and Involuntary Separation", § 17.1). In the context of arbitration, the burden of proof is generally held to be on the employer and "probably always so where the agreement requires just cause for discipline." (See generally Elkouri & Elkori, "How Arbitration Works" ABA Section on Labor and Employment, Sixth Edition, p.949). In the context of statutorily claimed unfair labor practices, the burden is upon the moving party, here the Association, to prove that the Town's action in terminating Officer Faulkner for conduct undertaken by him violated the law, including a breach of the parties agreement. (Admin. Rules Pub. 201.06).

Officer Faulkner performed well as a patrol officer since his employment by the Town in 1992. In part, based upon this performance, he was assigned to be the school resource officer in

2000. This is a desirable assignment as the individual holding this position performs his or her work during the normal business week of Monday-Friday and, for the most part, during school hours. In January of 2003, as a result of reports from school officials that Officer Faulkner was not fulfilling his role as school resource officer he was reassigned from the school. In the months preceding his reassignment, school officials reported that, "His work product diminished considerably and Dr. Hanson, the SAU Superintendent, and Gary Heald, the high school Principal, had concerns regarding his work product. School administrators and staff also noticed his ineffectiveness and a noticeable change in his demeanor." (See Town Exhibit #17 – Performance Evaluation 6-29-02 to 6-29-03). As a result of school dissatisfaction with his performance, poor investigative and arrest processing work, failing to issue Miranda warnings in a custodial situation involving students regarding a criminal threatening incident, failing to complete arrests after swearing out warrants and failing to comply with an order to keep a time log of his comings and goings to and from the school as ordered as part of his previous performance evaluation (Town Exhibit #16 – Performance Evaluation 6-2901 to 6-29-02) he was reassigned after final discussions with school officials took place in November 2002.

Officer Faulkner's overall performance rating dropped from "Thoroughly Competent" to "Competent" between the two written annual performance evaluations that preceded his termination in April of 2004. His new assignment in January 2003 was to a patrol unit where his superiors felt he could be more closely supervised. He was also removed from his status as a member of the Seacoast Emergency Response Team (SERT). At the time of his initial behavior leading to his reassignment, he was involved in a period of personal stress and was cautioned that he was letting his personal life affect his professional responsibilities and that he had to minimize the effect of this circumstance. While the exact nature of his personal stress was not known at the time in 2002 complained of, the circumstances later became known to the Town. The circumstances also led to a series of actions by Officer Faulkner that, following his removal as school resource officer, had him re-embark upon a course of conduct that caused him to be driven by personal conflict in the pursuit of his professional duty as it related to a resident of Exeter and member of the public.

In short, the circumstances bringing personal stress to bear on Officer Faulkner was discovering that his wife, employed within the same school system as he had been assigned as a school resource officer, was involved in an extra-marital affair with another school employee, David Archambault. Prior to his first knowledge of this affair in 2002, Officer Faulkner had not known of David Archambault. Approximately a week after his reassignment to patrol in 2003, Officer Faulkner initiated a series of electronic investigative actions on David Archambault undertaken with the use of the State Police On-Line Technology System (SPOTS). This is a mobile system operated through a laptop computer mounted in the patrol vehicle that allows the inquiring police officer to discover personal information about an individual from searching a vehicular registration number or using an individual's name and birth date in combination. He continued to use this device, to check on both David Archambault and Mrs. Archambault to the extent the SPOTS would provide motor vehicle or operator information until he did so on David Archambault on March 5, 2004. This last "run" led him to issue a ticket to David Archambault at 10:15PM on that Friday night for operating a motor vehicle with an expired license. (See Association Exhibit B – SPOTS Inquiries). In total, Officer Faulkner used the SPOTS system to check the status of David Archambault seven times since returning to patrol and the status of

Donna Archambault twice prior to his stopping David Archambault on March 5, 2005. In addition, Officer Faulkner testified that he also observed David on other occasions speeding twice, failing to come to a complete stop once and failing to give a directional signal once. None of these other alleged violations resulted in a physical stop by Officer Faulkner but are evidence of a high degree of proximate conduct with a single member of a community.

We believe that Officer Faulkner purposely chose that Friday night to stop David Archambault as he testified that he had known of the expiration of operator's license since his February 14, 2004 "run" of David Archambault. He had also "run" him four times prior to the stop. The two most recent "runs" had occurred at the start of his shift, at 5:00PM, on the day before and the day of the stop. Indeed, he used the SPOTS system on those two nights within six minutes of the start of his shift. Officer Archambault issued the ticket that evening to David Archambault for operating a vehicle on a valid, though expired, operator's license.

David Archambault came to Police Chief Kane on or about March 17, 2004 and complained to him about what he perceived to be harassment of he and his wife by Officer Faulkner. He informed the Chief about the extra-marital affair with Officer Archambault's wife and characterized actions undertaken by Officer Faulkner that he felt were intimidating. He requested that the Chief get Officer Faulkner to cease certain actions that he said involved following him and his wife in a patrol car, staking out the area of their residence, observing their residence and what he believed was a general focus on him. On March 17, 2004 Police Chief Kane brought this complaint to Officer Faulkner's attention and later relied upon it to initiate an internal investigation including an interview that we have addressed above when we considered so-called "Weingarten Rights".

In his testimony, Officer Faulkner admitted that since he learned of the affair of David Archambault and his wife, he used his police vehicle unit's SPOTS to run David Archambault on nine occasions; he had observed David Archambault on at least four other occasions on which he did not issue him a ticket; he had stationed his police vehicle in proximity to the Archambault residence; and he had run the vehicle registration of an automobile parked in the driveway of the Archambault residence. These actions followed his earlier conduct that had lead to his reassignment from his resource officer position at the high school as described above.

During his tenure as an officer in the Exeter Police Department, Officer Faulkner was subject to certain rules or general orders. These obligations included, in General Order 01-01, the duty to "be exemplary in obeying the laws of the land and regulations of my department", "never act officiously or permit personal feelings, prejudices or friendships to influence my decisions"; "enforce the law courteously and appropriately without fear or favor, malice or ill will"; and "recognize the badge of my office as a symbol of public faith, and [he will] accept it as a public trust to be held so long as I am true to the ethics of the police service." (See Town Exhibit #9). Also, his obligations included, in General Order 05-10, his duty to conduct his private and professional life "in such a manner as to avoid adverse reflection upon themselves or this agency" and avoid areas of misconduct such as that unbecoming of an officer. (See Town Exhibit #8). This General Order defines Conduct unbecoming an officer as:

> "Any violation of the rules and regulations, General Orders, ...any specific act(s) of immoral, improper, or intemperate personal conduct which is detrimental to the officer himself, upon his/her fellow officers or upon the Exeter Police Department,"

It also orders that officers shall maintain objective attitudes towards the public regardless of provocation and admonishes against officers using their departmental position to settle personal matters or disputes. (Id. IV. (i)). The Mission Statement of the Exeter Police Department, (See Town Exhibit #7) also expresses the policy that police officers shall promote individual self-discipline and calls upon members of the department to be "honest and truthful and [to] hold ourselves to a higher standard of moral and ethical conduct" valuing the reputation of the police department.

In addition to the delineations contained in these rules, Officer Faulkner, on February 7, 2001, signed an employee agreement entitled "Computer Usage Policy' (See Town Exhibit #11) prior to his return to patrol duties wherein he commits to a policy, a violation of which he understood "may result in disciplinary action, including possible termination and/or legal action." The policy specifically states that using SPOTS "for private purposes is forbidden" (Id. Section J).

It is clear to us that there are several relevant policy statements in use within the Town of Exeter that embody policies that are to be adhered to by its police officers. We have listened to Officer Faulkner's testimony and have found it not wholly credible to the extent that he would have us believe that his pursuit, for that is what we believe it was, of David Archambault was to enforce the law without "malice" or "ill-will", notwithstanding that at the time of the stop on Friday evening of March 5, 2004, David Archambault was driving on an expired license. We believe that Officer Faulkner used the SPOTS for a private purpose. We believe that his contact with the Archambaults demonstrates the lack of that necessary self-discipline required of a police officer. We believe that his conduct violated a number of substantial and necessary policies required for the operation of a professional police department. If we were to allow a public duty patina to coat what we otherwise believe was conduct legally subject to discipline we would have to abandon our own statute governing the working relationship between the parties and the right of this public employer to terminate an individual from what we recognize as a particularly sensitive position of public trust. We find that the Town did have just cause to terminate Officer Faulkner. The fact that David Archambault was in violation of a law generally designed to raise revenue may make the issuance of a ticket legal; however, that is not within our jurisdiction. The fact that there is insufficient evidence before us to constitute a violation of RSA 273-A is within our jurisdiction and we therefore dismiss the complaints of the Association against the Town.

We add to our decision our opinion that while we find the Town was within its statutory and contractual rights to terminate Officer Faulkner, we also feel that opportunities to apply resources available to promote harmonious relations with its employees were missed. First, police administrators who manage within a working environment of a department peopled by a certified bargaining unit should at least be familiar with the proper manner by which all taped interviews are to be conducted. Second, that the acknowledgment of "Garrity Rights" to induce an interview and then abdicating its responsibility under those rights by attempting to have

criminal complaints issue against an interview subject does little to maintain the trust between employer and employee necessary to viable collective bargaining in good faith or employee performance. Third, an employee assistance program (EAP) to assist employees who develop personal issues that may affect performance is not one to which unnecessary obstacles should be erected out of the personal curiosity of superior officers as to particulars of that employee's personal issue but rather utilization of such a program should be quickly and actively encouraged. Lastly, if consistency is an ingredient of justice, which we believe it to be, then it may be advisable that every inquiry, using SPOTS, to obtain personal information regarding an individual made by any police officer from probationary patrol to the chief of the department should be reviewed periodically for its content and purpose.

So ordered.

Signed this 19th day of August, 2005.

Jack Buckley, Chairman

By unanimous vote. Chairman Jack Buckley presiding with Board Members Seymour Osman and E. Vincent Hall also voting.

Distribution:

J. Joseph McKittrick, Esq.
Thomas J. Flygare, Esq.

NH Supreme Court affirmed Decision No. 2005-107 on 8-15-2006, Slip Op. No. 2005-718. (NH Supreme Court Case No. 2005-718)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Exeter Police Association Complainant v. Town of Exeter Respondent	Case No. P-0753-13 Decision No. 2005-119

ORDER ON MOTION FOR RECONSIDERATION

The Board conferred for the purpose of considering the Petitioner's Motion for Reconsideration took the following actions:

1. It reviewed the Exeter Police Association's Motion for Reconsideration filed on August 31, 2005 pursuant to RSA 541 and N.H. Admin R. Pub 205.02.
2. It examined the previous Decision #2005-107 issued on August 19, 2005.
3. It reviewed the previous filings of the parties in this matter.
4. It DENIED the Association's Motion for Reconsideration.

So ordered.

Signed this 12th day of September, 2005.

JACK BUCKLEY
Chairman

By unanimous decision. Chairman Jack Buckley presiding. Members E. Vincent Hall and Seymour Osman voting.

Distribution:
J. Joseph McKittrick, Esq.
Thomas J. Flygare, Esq.

NH Supreme Court affirmed Decision No. 2005-107 on 8-15-2006, Slip Op. No. 2005-718. (NH Supreme Court Case No. 2005-718)

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Exeter Police Association Complainant v. Town of Exeter Respondent	*	Case No. P-0753-13 Decision No. 2005-127

ORDER ON MOTION FOR RECONSIDERATION

The Board conferred for the purpose of considering the Respondent's Motion for Reconsideration and took the following actions:

1. It reviewed the Town of Exeter's Motion for Reconsideration filed on September 12, 2005 pursuant to RSA 541 and N.H. Admin R. Pub 205.02.

2. It examined the previous Decision #2005-107 issued on August 19, 2005.

3. It reviewed the previous filings of the parties in this matter.

4. It DENIED the Town's Motion for Reconsideration.

So ordered.

Signed this 22nd day of September, 2005.

JACK BUCKLEY
Chairman

By unanimous decision. Chairman Jack Buckley presiding. Members E. Vincent Hall and Seymour Osman voting.

Distribution:
J. Joseph McKittrick, Esq.
Thomas J. Flygare, Esq.