The court accepted an appeal of this decision on September 16, 2011 for City of Manchester. Appeal still pending as March 13, 2012.

STATE OF NEW HAMPSHIRE

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Manchester Police Patrolman's Association

v.

City of Manchester Police Department

Case No. G-0103-2

Decision No. 2011-093

Appearances:

John S. Krupski, Esq., Molan, Milner & Krupski, PLLC, Concord, NH for the Manchester Police Patrolman's Association

Thomas I. Arnold, III, Esq., Deputy City Solicitor, Manchester, NH for the City of Manchester Police Department.

Background:

The Manchester Police Patrolman's Association (Union) filed an unfair labor practice complaint against the City of Manchester Police Department on August 30, 2010. The Union claims that the City committed an unfair labor practice in violation of RSA 273-A:5, I (a), (c), (e), (g) and (i) when it: 1) failed to negotiate polygraph examinations, a mandatory subject of bargaining according to the Union; 2) ordered Officer Kevin Covey to submit to an involuntary polygraph examination for an administrative disciplinary investigation and refused to allow a union representative to be present during the entire polygraph examination; and 3) violated Officer Covey's "Garrity" rights because the questions asked during the polygraph examination were not sufficiently specific, direct and narrowly related to Officer Covey's duty or fitness for

duty.[1] The Union requests that the PELRB: 1) find that the City committed an unfair labor practice; 2) determine that the use of required polygraph examinations in disciplinary investigatory hearings is a mandatory subject of bargaining; 3) find that the use of polygraph examination in this case violated Officer Covey's Garrity rights; 4) find that the City improperly deprived Officer Covey of Union representation during the polygraph examination; 5) order the City to cease and desist from such practices; and 6) order the City to negotiate any implementation of a polygraph examination and any policy or procedures regarding mandatory polygraph examinations in disciplinary investigatory hearings.

The City denies the charges. The City contends that polygraph examinations of Police Department personnel are within the management discretion of the City and are not a mandatory subject of bargaining. The City claims res judicata and collateral estoppel bar any Union claims based upon an alleged failure to negotiate given the decision in *Local 394, International Brotherhood of Police Officers and City of Manchester Police Department*, PELRB Decision No. 81-72 (1981), a prior case involving the same bargaining unit, same public employer, and same contract language. The City claims it did not violate Officer Covey's right to Union representation just because his Union representative was required to observe and listen to the actual administration of the examination on a monitor in a separate room. The City also denies that the disputed control questions asked during the polygraph examination violated Officer Covey's *Garrity* rights when those questions were necessary to the proper administration of the examination. The City requests that the PELRB dismiss the complaint.

The Board held a hearing on the complaint on November 4, 2010 at the offices of the PELRB in Concord. The parties had a full opportunity to be heard, to examine and cross-examine

[1] *Garrity v. New Jersey*, 385 U.S. 493 (1967).

witnesses, and to introduce evidence. Both parties filed post-hearing briefs and the Board's decision is as follows.

Findings of Fact

1. The City is a public employer within the meaning of RSA 273-A:1, IX.

2. The Union is an employee organization certified under RSA 273-A:8 and representing certain employees of the City of Manchester Police Department, including police officers.

3. Article 2 of the parties' July 1, 2010 through June 30, 2013 collective bargaining agreement (CBA), entitled Management's Rights, provides as follows:

> The Commission and the Police Chief will continue to have, whether exercised or not, all the rights, powers and authority heretofore existing, including, but not limited to the following: The Commission and/or the Police Chief will determine the standards of services to be offered by the Police Department, determine the standards of selection for employment, direct its employees; take disciplinary action, relieve its employees from duty because of lack of work or for other legitimate reasons; issue and enforce rules and regulations; maintain the efficiency of governmental operations; determine the methods, means and personnel by which the Police Department's operations are to be conducted, determine the content of job classifications; exercise compete control and discretion over its organization and the technology of performing its work; and fulfill all of its legal responsibilities. All of the rights, responsibilities and prerogatives that are inherent in the Commission or the Police Chief by virtue of statutory and charter provisions cannot be subject to any grievance or arbitration proceeding.

4. Article 3.1 of the CBA provides that "no disciplinary action shall be taken against an employee except for just cause."

5. Article 25 of the CBA, entitled Rules and Regulations, provides that

> The Rules and Regulations of the Manchester, New Hampshire, Police Department which are now in effect or as may be amended by the Police Commission shall be the prime governing factor in the conduct and actions of all police officers and every police officer shall be thoroughly conversant with them.

6. Manchester Police Department Standard Operating Procedure (SOP) concerning polygraph examinations provides for the use of polygraph examinations during the course of internal affairs investigations and sets forth the following requirements:

> a. Express authorization from the Chief of Police must be obtained prior to requiring a member or employee to submit to a polygraph examination.
>
> b. The scope of the demand for information or for submission of a person for examination must be directly and narrowly related to the particular investigation.
>
> c. Polygraph examinations may be ordered by the Chief or is designee, and their results may be utilized during administrative investigations and subsequent administrative disciplinary hearings.
>
> d. If the Chief or his designee so orders, a member or employee shall submit to polygraph examinations provided the examinations are conducted by an approved, professionally trained polygraph examiner.

7. Manchester Police Department SOP concerning rules and regulations provides in part:

> KK. Investigations: A member/employee may be discharged or otherwise disciplined for refusing to answer questions, if the questions are specifically, narrowly and directly related to the officer's/employee's performance of official duties. The questions do not have to be limited to on-duty conduct, but can inquire into an officer's/employee's private affairs and off-duty conduct if that inquiry is reasonably related to the officer's/employee's ability and fitness to perform his/her duties as a member/employee. The member/employee is not required to waive his/her immunity with respect to the use of his answers.
>
> As long as the answers or the fruits thereof cannot be used against him/her in any criminal proceedings, he/she will have to answer.
>
> LL. Use of the Polygraph: If the Chief or his designee so orders, a member/employee shall submit to polygraph examinations provided the examinations are conducted in accordance with Section KK.

8. SOP VIII Section G of the Department's Rules and Regulations, titled "Required Conduct," provides as follows:

> Truthfulness: A member or employee of the Department shall speak the truth at all times and under all circumstances. In cases where he/she is not allowed by regulations of the

Department to divulge facts within his knowledge, he/she shall decline to speak on the subject.

9. On August 25, 2010 Manchester Police Chief David Mara ordered Officer Kevin Covey to submit to an involuntary polygraph examination as part of an administrative disciplinary investigation concerning a "matter of Truthfulness concerning use of personal day(s)." The Chief had received information which led him to question whether Officer Covey had been truthful in circumstances relating to his use of a personal day. According to the Chief, a lack of truthfulness is grounds for termination.

10. The examination was conducted by Lieutenant Peter Favreau, who has received training in the administration of polygraph examinations at a seven week course at the Baxter School in California, at two separate week long update seminars in 2000 and 2007, and through other one day events. He has worked in law enforcement since 1987 and for the Manchester Police Department since 1996. He has administered approximately 250 polygraph examinations since 1996, mostly involving civilian employment applications.

11. The City provided Officer Covey with "Reverse Garrity" warnings before the polygraph examination, which included the following:

> This is to inform you that, as a member/employee of the Manchester Police Department, you are currently the subject of an internal investigation. . . . During the course of this questioning, even if you do disclose information which indicates that you may be guilty of criminal conduct, neither your self-incriminating statements nor the fruits of any self-incriminating statements you make will be used against you in any criminal legal proceedings.
>
> Since this is an administrative investigation and any self-incriminating information you may disclose will not be used against you in a court of law, you are required to answer my questions fully and truthfully. The questions will relate specifically and narrowly to the matter under investigation. If you refuse to answer my questions or if you attempt to provide false, untrue, or deliberately erroneous information, or attempt to hamper the investigation in any way, this, in itself, is a violation–of (sic) the rules and regulations of the

> Manchester Police Department and you will become subject to disciplinary penalties up to and including possible termination.
>
> You will be allowed union representation during this interview. Your union representative may act as your witness but, he/she may not represent you in a legal capacity or as counsel.

12. Before and during the polygraph examination Officer Covey requested Union President Officer David Connare's service as Union representative and Officer Connare was in fact present and available before, during, and after the polygraph examination. However, despite his objections, he was excused from the examination room during the actual examination, which he listened to and observed on a monitor in another room.

13. During the polygraph examination on August 25, 2010, Lieutenant Favreau asked several questions unrelated to Officer Covey's duties but which were in his judgment necessary for the proper administration of the polygraph examination, including the following:

> Not connected with this investigation, do you remember ever lying in a police report?
>
> Not connected with this investigation, do you remember ever fabricating evidence or a witness statement in a criminal investigation?
>
> Not connected with this investigation, do you remember ever blaming someone else for something that you did?
>
> Not connected with this investigation, do you remember ever making any kind of false report to a person of authority?
>
> Not connected with this investigation, do you remember ever lying about your own conduct while on duty?
>
> Not connected with this investigation, do you remember ever lying to get yourself out of serious trouble?

14. Following the disciplinary investigation, the City terminated Mr. Covey's employment. The Union filed a "just cause" grievance on behalf of Mr. Covey and the matter has proceeded to grievance arbitration, which was pending as of the date of the hearing in this case.

15. The City has conducted fewer than 4 polygraph examinations in the last 10 years, including one involving a non-bargaining unit employee.

Decision and Order

Decision Summary:

The use of polygraph examinations in connection with investigations of law enforcement personnel is a permissive subject of bargaining and therefore the City did not violate its obligation to bargain a term or condition of employment. Officer Covey's right to Union representation during the course of the polygraph examination was not unlawfully abridged when Officer Connare was excused from the examination room but allowed to listen and observe on a remote monitor and there is insufficient evidence that the City proceeded with a polygraph examination in order to frustrate or hinder Officer Covey's rights to Union representation. The Board lacks jurisdiction to address the alleged violation of Officer Covey's *Garrity* rights and the claim is dismissed on that basis.

Jurisdiction:

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

Discussion:

The Board will first address whether the City's use of polygraph examinations constitutes an improper unilateral change in the terms and conditions of employment and is matter that must be bargained. Pursuant to RSA 273-A:3, I the City is obligated to negotiate in good faith the terms of employment with the Union.

> "Terms and conditions of employment" means wages, hours and other conditions of employment *other than managerial policy within the exclusive prerogative of the public employer,* or confided exclusively to the public employer by statute or regulations adopted pursuant to statute. *The phrase "managerial policy within the exclusive prerogative of the*

> *public employer" shall be construed to include but shall not be limited to the functions, programs and methods of the public employer, including the use of technology, the public employer's organizational structure, and the selection, direction and number of its personnel, so as to continue public control of governmental functions.*

RSA 273-A:1, XI (emphasis added). The nature and extent of the City's obligation to bargain the use of polygraph examinations depends on whether the use of polygraph examinations is considered a mandatory, permissive, or prohibited subject of bargaining under RSA 273-A:1, XI. The City must bargain mandatory subjects, it may bargain permissive subjects, and it may not bargain prohibited subjects. To help identify the proper categorization of a particular subject the court has outlined a three part test:

> First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation.... Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy....Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI. A proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.

In re Appeal of Nashua Police Commission, 149 N.H. 688 (2003)(citations omitted). Examples of mandatory subjects of bargaining include wages and examples of permissive subjects of bargaining include discipline proposals and number of personnel. See *Education Association of Pembroke v. Pembroke School Board,* PELRB Decision No. 2010-241, citing *Appeal of City of Nashua Board of Education,* 141 N.H. 768, 772-73 (1997); *Appeal of State,* 138 N.H. 716, 724 (1994); and *Appeal of International Association of Firefighters,* 123 N.H. 404, 408 (1983).

The court has recognized the right of public employers to use polygraph examinations, at least with respect to law enforcement personnel. See *Appeal of Waterman,* 154 N.H. 437 (2006). In that case the polygraph examination was administered pursuant to the New Hampshire

Department of Safety, Division of State Police's professional conduct standards, and the case was appealed to the court from a decision of the State Personnel Appeals Board. The court did not specifically address whether the State had any obligation to bargain the use of polygraph examinations in the workplace, although the facts of the case are that the State conducted a polygraph examination pursuant to State Police professional conduct standards, and not pursuant to the negotiated provisions of a collective bargaining agreement.

Similar, if not identical, claims and issues concerning the use of polygraph examinations were before this Board in 1981 as reflected in *Local 394, International Brotherhood of Police Officers v. City of Manchester Police Department*, PELRB Decision No. 81-72. That case involved the same bargaining unit, the same public employer, and similar Management's Rights language as appears in the parties' current CBA. In that case the Board declined to find that "the adoption of the lie detector rule, if otherwise legal, was an unfair labor practice." The Board viewed the adoption of the polygraph examination rule "as an adjustment to a rule in an area of management discretion..."

After consideration of all these authorities we find that PELRB Decision No. 81-72 continues to represent the proper treatment of the City's use of polygraph examinations, and in particular that the City's use of polygraph examinations is a matter of "managerial policy within the exclusive prerogative of the public employer." It is a permissive, and not mandatory, subject of bargaining, and the City has not violated its obligation to negotiate mandatory subjects of bargaining in this case.

The next issue is whether the City violated Officer Covey's right to Union representation during the course of the polygraph examination process. The City does not dispute that Officer Covey has a general right to Union representation, and the right to such representation is

acknowledged in the "Reverse Garrity" warning. *See* Union Exhibit 1.[2] However, the City contends the exclusion of the Union representative from the room during portions of the polygraph examination process did not violate Officer Covey's Union representation rights when the Union representative was allowed to witness the examination on a monitor in another room.

The PELRB has previously recognized the right of public employees like Officer Covey to Union representation even during polygraph examinations. *See New Hampshire Troopers Association v. New Hampshire Department of Safety, Division of State Police,* PELRB Decision No. 95-02. In that case the Board identified RSA 273-A:11, I (a) and (b) as two statutory provisions that are violated by a deprivation of such representation. The Board also noted prior PELRB decisions citing *NLRB v. Weingarten, Inc*., 420 U.S. 251, 95 S. Ct. 959 (1975)[3]. The Board specifically determined that the State's "refusals to allow [a Union representative] to be present to observe the polygraph test, behind a mirror as is usual in such a case, and to assist the complainant at the disciplinary hearing…also constitute violations of RSA 273-A:11 (a) and (b).

Lieutenant Favreau was the only witness with specific training and experience in the use of polygraph examinations. His testimony established that the reliability of the procedure would be compromised by the continuous presence of Officer Covey's Union representative in the examination room. Although the Union challenged Lieutenant Favreau during cross-examination, we find Lieutenant Favreau's testimony to be both credible and informative as to the polygraph examination process. The record also reflects that the City has resorted to polygraph

[2] The City also does not contend that Officer Covey's Union representation claim should be resolved in the pending grievance arbitration as happened in an earlier case involving the Manchester Police Department. *See Appeal of City of Manchester,* 153 N.H. 289 (2006).

[3] "Under *Weingarten*, a union employee has the right to union representation at an investigatory interview he or she reasonably believes will result in discipline." *Appeal of Exeter Police Association*,154 N.H. 61, 62-63 (2006) (citations omitted). The Supreme Court expressed no opinion as to whether the New Hampshire law affords *Weingarten* protection. See *id*., at 64. See also *Appeal of City of Manchester*, 149 N.H. 283, 289, 821 A.2d 1019 (2003).

examinations of law enforcement personnel only sparingly, and there is no evidence to suggest that the City employs polygraph examinations for the purpose of frustrating or undermining Union representation in general, or in the specific case of Officer Covey. Accordingly, based on the foregoing authorities and the circumstances of this case, we find the City did not violate Officer Covey's right to Union representation when his Union representative was excluded during the actual polygraph examination but was allowed to witness and observe the examination on a monitor in another room.

The remaining issue in this case involves Officer Covey's *Garrity* rights. Under *Garrity v. New Jersey*, 385 U.S. 493 (1967) "statements given under threat of discharge from public employment are compelled and may not be used in subsequent criminal proceedings." *See In re Grand Jury Subpoena*, 155 N.H. 557, 559 (2007) (citations omitted).[4] This principle was explained further in *Gardner v. Broderick*, 392 U.S. 273, 278 (1968), when the court stated:

> If appellant, a policeman, had refused to answer *questions specifically, directly, and narrowly relating to the performance of his official duties*, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra*, the privilege against self-incrimination would not have been a bar to his dismissal (emphasis added).

The City's written "Reverse Garrity" warning is a notification to employees of these constitutional rights. The constitutional protections and rights discussed in *Garrity, Gardner, and In re Grand Jury Subponea*, and which are restated in the "Reverse Garrity" warning, are not part of, referenced by, or incorporated in, the provisions of RSA 273-A. Public employees like Officer Covey enjoy such rights under the State and Federal Constitutions, and such rights are

[4] *Garrity* rights have been addressed by courts in criminal proceedings in New Hampshire. *See In re Grand Jury Subpoena*, 155 N.H. 557 (2007)(involving a motion to quash a subpoena requiring a Union representative to testify in grand jury proceedings) and *State v. Litvin*, 147 N.H. 606 (2002)(involving former public employee's effort to suppress evidence in criminal proceedings obtained by City officials during an administrative investigation into the employee's conduct).

independent of and in addition to those rights secured to them under RSA 273-A. Therefore, the Union's claim that the City violated Officer Covey's *Garrity* rights because of the questions listed in Finding of Fact 13 requires the adjudication of constitutional issues which are beyond the purview of this Board and we decline to decide this claim on that basis.

In accordance with the foregoing the Union's claims against the City are denied and the complaint is dismissed.

So ordered.

Date: April 4, 2011.

/s/ Charles S. Temple
Charles S. Temple, Esq., Alternate Chair

By unanimous vote. Alternate Chair Charles S. Temple, Esq. presiding with Board Member Kevin E. Cash and Alternate Board Member Sanford Roberts, Esq. also voting.

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