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. 2011-151

Order on Motion for Rehearing

On May 4, 2011 the Union filed a motion for rehearing of PELRB Decision No. 2011-093. Motions for rehearing are governed by RSA 541:3 and Pub 205.02, which provides in part as follows:

> **Pub 205.02 Motion for Rehearing.**
>
> (a) Any party to a proceeding before the board may move for rehearing with respect to any matter determined in that proceeding or included in that decision and order within 30 days after the board has rendered its decision and order by filing a motion for rehearing under RSA 541:3. The motion for rehearing shall set out a clear and concise statement of the grounds for the motion. Any other party to the proceeding may file a response or objection to the motion for rehearing provided that within 10 days of the date the motion was filed, the board shall grant or deny a motion for rehearing, or suspend the order or decision complained of pending further consideration, in accordance with RSA 541:5.

Upon review the Union's Motion for Rehearing is granted in part to clarify the Board's prior decision but otherwise denied.

In its motion the Union argues in substance that Officer Covey was entitled to union representation in the polygraph examination process up to the point when he was actually connected to the polygraph testing equipment and Lieutenant Favreau began obtaining testing

results. Relevant portions of Board's prior Decision 2011-093 included the following:

> 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. (Finding of Fact 12)(emphasis added).
>
> .....
>
> 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. (Decision 2011-093 at p. 11)

By "actual polygraph examination" we mean the time period during which Officer Covey was physically connected to the polygraph examination equipment, answering questions, and measurements, data or readings of his responses were being collected and recorded by Lieutenant Favreau. Our review of the record reflects that we have misapprehended the point when the Union representative was excused from the polygraph examination room, as he was in fact excused from the room for an interval of time prior to the actual polygraph examination. As a result, the City did improperly restrict Officer Covey's right to Union representation[1] and commit an unfair labor practice in violation of RSA 273-A:5, I (a) and (g).

Accordingly, the City is ordered to cease and desist and refrain from such action in the event of any subsequent polygraph examinations conducted as part of investigatory interviews that bargaining unit employees reasonably believe will result in discipline. Whether Officer Covey would not have been discharged from his employment but for this violation of his right to union representation has not been adequately addressed in the record submitted for decision in this case, and in any event is a matter more properly considered and addressed in the related

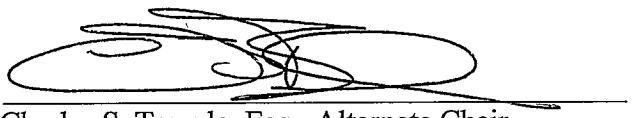
[1] The right to union representation is discussed in some detail in Decision 2011-093 and is not restated in this order.

discharge arbitration. Accordingly, the Union may raise the Board's finding in this case in the pending discharge arbitration proceedings to the extent such proceedings have not yet concluded. If a decision in those proceedings has issued, the Union may request to the extent necessary and appropriate, that the arbitrator in his/her discretion reconsider the award or decision after taking into account the decisions made in these PELRB proceedings. The City shall also post the decisions in this case for thirty days in workplace locations where they can be reviewed by bargaining unit employees and complete and return a certificate of posting.

The Union's motion for rehearing with respect to all other portions of the Board prior decision is denied.[2]

So ordered.

Date: May 24, 2011.



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.

Distribution:
Thomas I. Arnold, III, Esq.
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[2] In this regard, the Board concluded in Decision 2011-093 that the City's use of polygraph examinations is a permissive subject of bargaining. The Board did not find that it is a prohibited subject of bargaining as suggested by the Union in its rehearing motion.