This order accepts the Appeal of the City of Manchester - appeal pending as of March 13, 2013

MANDATE
Certified and Issued as Mandate Under NH Sup. Ct. R. 24
Clerk/Deputy Clerk 10/25/12 Date

RECEIVED OCT 26 AM PELRB

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2011-0521, Appeal of City of Manchester, the clerk of court on October 12, 2012, issued the following order:

Having considered the briefs and oral arguments of the parties, the court concludes that a formal written opinion is unnecessary in this case. For the following reasons, we vacate the order of the New Hampshire Public Employee Labor Relations Board (PELRB) finding that the City of Manchester (City) committed an unfair labor practice by excluding a union representative from the "pretest phase" of a polygraph examination administered to Kevin Covey, a member of the Manchester Police Patrolman's Association (Union).

The record supports the following facts. On August 25, 2010, as part of an administrative disciplinary investigation, Manchester Police Chief David Mara ordered that Officer Covey undergo a polygraph examination administered by Lieutenant Peter Favreau. On the day of the examination, Favreau ordered Union President David Connare, who had accompanied Covey, to leave the examination room. Connare was permitted to listen to and observe the examination on a monitor in a separate room. Under protest, Connare complied with the order.

Once alone in the examination room, Favreau developed and reviewed with Covey control questions to be asked during the actual polygraph examination. Favreau then connected Covey to the polygraph machine and asked him both the control questions and questions relevant to the investigation. The City subsequently terminated Covey's employment.

On August 30, 2010, the Union filed an unfair labor practice complaint with the PELRB, alleging that the refusal to allow Connare's presence before and during the polygraph examination constituted an unfair labor practice. After an adjudicatory hearing, at which Covey and Favreau testified, the PELRB dismissed the Union's complaint. The PELRB concluded that "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 PELRB explained that although it had "previously recognized the right of public employees like Officer Covey to Union representation even during polygraph examinations," the usual practice did not allow the representative in the examination room.

The Union then moved for rehearing and reconsideration of the order, and the City objected. Without holding a hearing, the PELRB granted, in part, the Union's motion and reversed its earlier finding that the City had not committed an unfair labor practice. The PELRB explained that it had "misapprehended the point when [Connare] 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." It defined the phrase "actual polygraph examination" as the time when an examinee is "physically connected to the polygraph examination equipment, answering questions, and measurements, data or readings of . . . [his] responses [are] collected and recorded . . . ." The PELRB did not, however, explain why Covey was entitled to union representation before the actual polygraph examination, or address whether Connare's presence during this time may have affected the results of the examination. This appeal followed.

On appeal, the City advances three arguments. First, it argues that the PELRB's order granting, in part, the Union's motion for rehearing and reconsideration without holding a hearing was unlawful, unjust, or unreasonable. Second, it argues that the "pretest phase" before the actual polygraph examination is not part of an investigatory interview and, therefore, Covey was not entitled to union representation. Third, the City argues that union representation in the examination room during the pretest phase of the examination would have interfered with the administration of a valid and meaningful examination of Covey, and, therefore, the exclusion of Connare during this time was not an unfair labor practice.

"When reviewing a decision of the PELRB, we will 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 State Employees' Assoc. of N.H., 158 N.H. 258, 260 (2009) (quotation omitted); see RSA 541:13 (2007).

Initially, we reject the City's contention that the PELRB's order granting, in part, the Union's motion for rehearing and reconsideration without holding a hearing was unlawful. In Appeal of Briand, 138 N.H. 555, 557-58 (1994), we explained that upon a motion for rehearing under RSA 541:3 (2007), administrative agencies "may reconsider their decisions on the pleadings and evidence already before them without a hearing." Although Appeal of Briand involved the denial, rather than the grant, of a motion for rehearing, we do not find this distinction material. Additionally, RSA 541:5 (2007) and New Hampshire Administrative Rules, Pub 205.02, which provide that the PELRB may rule on a motion for rehearing by granting, denying, or suspending an order or decision pending further hearing, do not require that the PELRB actually hold a hearing. Accordingly, we will not add such a requirement.

Mbahaba v. Morgan, 163 N.H. 561, 564 (2012) ("We will neither consider what the legislature might have said nor add words that it did not see fit to include.").

We also reject the argument that the PELRB's order granting, in part, the Union's motion for rehearing and reconsideration was unjust or unreasonable because the City had only seven days to file its objection. The City waived this argument by failing to raise it in its motion for rehearing. See RSA 541:4 (2007). We also disagree with the City's argument that the PELRB's failure to hold a hearing was unjust or unreasonable because the Union cited in its motion a decision of the Oklahoma Public Employee Relations Board that it had not previously cited. The City was afforded and took advantage of the opportunity to distinguish this decision in its objection to the Union's motion.

However, we vacate the PELRB's conclusion that the City committed an unfair labor practice. The record before us is unclear as to the PELRB's rationale for concluding that Connare's exclusion from the examination room before the actual polygraph examination of Covey was an unfair labor practice. We note that the PELRB failed to address the City's arguments that Covey was not entitled to union representation before the actual polygraph examination under PELRB precedent, see International Brotherhood of Police Officers, Local 384 v. City of Manchester, PELRB Decision No. 92-73 (May 4, 1992) (explaining when police officers are entitled to union representation), and that Connare's presence during the pretest phase would have interfered with the valid administration of the polygraph examination, cf. Appeal of Waterman, 154 N.H. 437, 442 (2006) (holding it is lawful to require a police officer to submit to a polygraph examination).

Accordingly, we remand the case to the PELRB for such further proceedings as it deems necessary to clarify its rationale for concluding that the City committed an unfair labor practice. Cf. Kalil v. Town of Dummer Zoning Bd. of Adjustment, 155 N.H. 307, 311 (2007) (upholding authority of the superior court to remand to a ZBA to clarify its decision). In its discretion, the PELRB may, but need not, hold a hearing or accept submissions from the parties.

Vacated and remanded.

Dalianis, C.J., and Hicks, Conboy, Lynn, and Bassett, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
NH Public Employee Labor Relations Board, G-0103-2
Thomas I. Arnold, III, Esquire
John S. Krupski, Esquire
Attorney General
Timothy Gudas, Supreme Court
Allison Cook, Supreme Court
Lorrie Platt, Supreme Court
Irene Dalbec, Supreme Court
File