The appeal of this decision was declined per May 18, 2011 Supreme Court order in *Appeal of Raymond Porelle, Jr.*, NH Supreme Court Case No. 2011-0213.

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Raymond Porelle, Jr.

v.

New England Police Benevolent Association, Inc.

Case No. G-0142-1
Decision No. 2010-206

Appearances:

Raymond Porelle, Jr. of Rochester, New Hampshire appeared pro se.

Diane Byrnes of Chelmsford, Massachusetts appeared for NEPBA, Inc.

Background:

Raymond Porelle is a former employee of the Rochester Police Department. He filed an unfair labor practice complaint on May 7, 2010 in which he complains that the New England Police Benevolent Association, Inc. ("NEPBA") did not fulfill its obligation and duty to represent him in an arbitration matter with the City of Rochester. The NEPBA denies the charge and contends that it has acted in accordance with its duty of fair representation. Among other things the NEPBA asserts the complaint is untimely, is barred by a prior settlement agreement, and is barred by Mr. Porelle's failure to cooperate with NEPBA representatives.

This matter was scheduled for hearing on June 21, 2010 but was rescheduled upon Mr. Porelle's motion. A hearing was held on September 15, 2010 at the offices of the PELRB in Concord at which time the parties had a full opportunity to be heard, to examine and cross-

examine witnesses, and to introduce evidence. This decision is based upon the evidence submitted into the record at the September 15, 2010 hearing and the exhibits accepted into the record during the hearing in *Raymond Porelle, Jr. v. NEPBA, Inc.,* PELRB Case P-0749-34 as determined during the course of the hearing. The record was held open until November 5, 2010 to allow for the submission of post hearing briefs.

Findings of Fact

1. The Rochester NH Police Union, NEPBA Local 23, ("NEPBA") is the certified exclusive representative of certain employees of the Rochester Police department pursuant to PELRB Decision No. 2006-118, issued August 9, 2006. The NEPBA obtained this status after prevailing in a representation election involving the NEPBA and the incumbent certified representative, IBPO Local 580. Mr. Porelle is a former Rochester police officer.

2. Mr. Porelle has filed three unfair labor practice complaints since 2007: *Raymond Porelle, Jr. v. NEPBA Local 23, Rochester Police Union*, PELRB Case No. P-0749-32, filed in June of 2007 (ULP No. 1)(PELRB Decision No. 2007-161); *Raymond Porelle, Jr. v. NEPBA, Inc.,* Case No. P-0749-34, filed in December of 2009 (ULP No. 2)(PELRB Decision No. 2010-095); and the current case, filed on May 7, 2010 (ULP No. 3).

3. In 2005, 2006 and in the first half of 2007 Mr. Porelle contacted the NEPBA about an unresolved grievance arbitration heard by Attorney Dorr in March of 2003. Mr. Porelle filed ULP No. 1 because he was not satisfied with the NEPBA's response to his inquiry. He withdrew ULP No. 1 when he and the NEPBA entered into a November 19, 2007 Settlement Agreement and Release (the "Settlement Agreement").

4. ULP No. 2 involved whether the NEPBA had any obligation under the Settlement Agreement to represent Mr. Porelle in proceedings before the New Hampshire Retirement

System. The complaint was dismissed as set forth in PELRB Decision No. 2010-095 (May 11, 2010), *Raymond Porelle, Jr. v. NEPBA, Inc.,* Case No. P-0749-34. The findings of fact in the decision provide a history of Mr. Porelle's employment as a police officer with the City of Rochester and the background and genesis of the grievance arbitration at issue in this case, and they are incorporated by reference, as are the exhibits submitted into the record at the hearing on ULP No. 2.

5. The Settlement Agreement includes the following provisions:

> The NEPBA agrees to represent Porelle in a grievance arbitration matter previously captioned IBPO Local 580 & Rochester Police Commission – Case No. P-0749-27 ("the arbitration"). The NEPBA will represent Porelle consistent with its duty of fair representation.
>
> In consideration of this agreement and other valuable and sufficient consideration, Porelle hereby releases, remises and forever discharges the NEPBA, its officers, employees, agents, attorneys and affiliates (the "Releasees") from all debts, demands, actions, unfair labor practice claims, duty of fair representation claims or the like, claims, causes of action, suits, dues, sums, accounts, covenants, contracts, controversies, agreements, promises, omissions, damages, and any and all other claims of every kind, nature and description whatsoever, both in LAW and EQUITY, which against the Releasees, Porelle now has, ever had, or ever will have on account of any loss, cost, expense, damages, fees, suffering, illnesses, emotional distress or injuries allegedly sustained or incurred, or which yet to be sustained or incurred, by Porelle by reason of or as a result of any events, incidents, acts or omissions that allegedly occurred at any time form (sic) the beginning of the world to the present.
>
> Porelle acknowledges that because of previous events, including but not limited to, the passing of time since the last action in the arbitration, it may not be possible to obtain a favorable result (or any result) on his behalf in the arbitration. Porelle understands that it may now not be possible to obtain relevant documentary and testimonial evidence. Porelle further acknowledges that the NEPBA is not responsible for the consequences previous events (sic) including, but not limited to, any delay or failure to act. Nevertheless, the NEPBA agrees to use its best efforts, consistent with its duty of fair representation, to obtain a favorable result in the arbitration on behalf of Porelle.

6. Attorney Peter Perroni has acted as counsel for NEPBA in connection with the arbitration referenced in the Settlement Agreement.

7. There were numerous contacts between Mr. Porelle and NEPBA about the arbitration between December, 2007 and April, 2010 concerning matters such as the date for the arbitration, the NEPBA's role and responsibility in arbitration proceedings, the scope of the arbitration, the passage of time since the 2003 arbitration, the basis for the issues Mr. Porelle wanted to present at arbitration, and the issues the NEPBA would be willing to present in arbitration.

8. The arbitration was initially scheduled for April 22, 2008 in Rochester.

9. On March 11, 2008 attorney Perroni sent Mr. Porelle an email outlining a proposal to the City which included describing the issue for arbitration as "what amounts are owed to Mr. Porelle by the City as a result of the workers compensation award of 4/11/01. More specifically, what amounts are owed to him pursuant to Article 14 of the CBA following his receipt of the Primex checks." See NEPBA Exhibit 6.

10. On March 12, 2008 Mr. Porelle sent a reply email, stating that "I agree with your proposal." He provided some additional comment as well, and included references to a pending matter at the New Hampshire Retirement System. See NEPBA Exhibit 7.

11. The planned April 22, 2008 arbitration did not take place as schedule. The record does not adequately reflect why.

12. On July 18, 2008 Mr. Porelle emailed attorney Perroni as follows:

> You asked for information which I provided in my previous e-mail. You said that the Union wants to decide how to proceed with my case. I get this uncomfortable feeling that the union is about to determine that my case has no merit. This was the situation last year when they initially denied my claim and this is the case with the most recent ULP. I also feel uncomfortable discussing the case with you because I lack support from the Union which is paying your bill. How can we resolve this issue.

13. Mr. Porelle's chronology reflects that he received an email from attorney Perroni on December 3, 2008 setting a new arbitration date of March 30, 2009. See Porelle Exhibit

37. The record otherwise fails to address any communications or lack thereof between the parties concerning arbitration during the period from August, 2008 to February, 2009.

14. On March 6, 2009 attorney Perroni emailed Mr. Porelle about the pending arbitration noting that Mr. Porelle had failed without explanation to appear for an earlier appointment and asking for dates to meet to prepare for the arbitration. In this email attorney Perroni also explained his view about the NEPBA's role in the arbitration as follows:

> As you know, the grievance is the Union's once it goes to arbitration and it is the union's decision whether to proceed to arbitration – the Union is my client because it is the Union that is bringing the demand for arbitration and is the "party" at the arbitration – the union is prosecuting and supporting the grievance on your behalf and to your ultimate benefit.

See Porelle Exhibit 11.

15. Attorney Perroni and Mr. Porelle met on March 16, 2009. During this meeting Mr. Porelle produced his exhibit book from the New Hampshire Retirement System proceedings because he felt there were overlapping issues. Attorney Perroni declined to review those materials with Mr. Porelle. See Porelle Exhibit 37. PELRB Decision No. 2010-095 reflects that the NEPBA was not obligated to represent Mr. Porelle in the New Hampshire Retirement System proceedings.

16. Attorney Perroni and Mr. Porelle met with the City's attorney on March 20, 2009. The March 30, 2009 arbitration was subsequently continued, apparently as a result of the March 20, 2009 meeting.

17. On March 30, 2009 attorney Perroni emailed Mr. Porelle and responded to what were apparently Mr. Porelle's concerns about his continued service as counsel in the arbitration matter, although the record does not reflect the exact communication from Mr. Porelle on the subject. See Porelle Exhibit 12. Attorney Perroni's email provided as follows:

With regard to my representation. As I have explained previously – I represent the union in the union's grievance against the City in which you are the grievant. The grievance is the Union's once it goes to arbitration and it is the union's decision whether to proceed to arbitration – the Union is my client because it is the Union that is bringing the demand for arbitration and is the "party" at the arbitration – the union is prosecuting and supporting the grievance on your behalf and to your ultimate benefit. I want to do the best job possible in that regard...If you would like the union to consider appointing someone else to represent it in this grievance you can make that request directly to the NEPBA.

18. On April 3, 2009 attorney Perroni provided Mr. Porelle with a written settlement agreement prepared by the City and which apparently reflects discussions that took place at the March 20, 2009 meeting. The agreement provides for a $4,500 payment to Mr. Porelle, a vote by the City's Police Commission to rescind the prior termination of Mr. Porelle's employment and accept his resignation effective December 31, 2000, and communication of this action to the New Hampshire Retirement System. The agreement also includes comprehensive release language. See Porelle Exhibit 14.

19. On May 1, 2009 emailed attorney Perroni, see Porelle Exhibit 15, and asked:

1) Do you agree that this is in my best interest?
2) When the New Hampshire Retirement System denies my appeal, doesn't this settlement agreement stop my appeal to the NH Superior Court?
3) Where is the part where my personal filed is destroyed?
I have more questions but can't forward them now. I also haven't been able to call.

20. On May 1, 2009 attorney Perroni responded, see Porelle Exhibit 16:

1. From the point of view of the Union – the settlement is fair – I have discussed with you the weaknesses in the grievance – the single claim that I believe we can – in good faith – argue is open, not time-barred and has merit, is the section 14 claim that the City has provided us with the spreadsheets on – at best it shows that if an arbitrator agreed with our claim you should have been compensated under that claim to about 2000 (1900?) – they are offering you 4500.

2. With regard to your claim at the Retirement Board – I know you have counsel there who you indicated (sic) that the settlement could be advantageous – I don't know details of the proceedings there and I would defer to him in this regard – we can request language in the release which makes clear that the release should not act as a release of any pending claim at the retirement board etc. – your personnel (sic) counsel at the retirement board could then review it if you would like.

3. I was thinking about how to add that provision regarding the removal of the documents – I suggest that once we come to an agreement on the other language – before we sign we sit down with the file and the lawyer and go through it and simply document what stays in and what must be destroyed etc. and add that to the agreement – I am also going to add the language we talked about regarding non-disparagement and the agreed-upon response to any inquiry from a third party – simply the dates you were employed and that it is the policy of the City not to comment further regarding past employees.

21. Mr. Porelle met with attorney Perroni and Brian McMahon of the NEPBA on May 29, 2009 and discussed the resolution of the arbitration matter without reaching any conclusion.

22. On June 24, 2009 attorney Perroni emailed Mr. Porelle about unresolved settlement matters. See NEPBA Exhibit 1. The email included the following content:

Ray – the Union asks – once again – that you address the issues that Bryan and I raised at the meeting in my office on May 29th. Are you willing to attempt to resolve this case on the basic structure we discussed and generally agreed to after hours of meeting both at my office and at counsel's office in Exeter in March – this included:

1. Payment of $4,500.00;
2. Letter to retirement Board from City;
3. Release of the City;
4. Purging of personnel file; and,
5. Agreed response to inquiry by third parties.

As you were informed both by email and in person at the meeting in my office on May 29th – the collateral matters such as the wording of the release not to effect the retirement board claim and the confidentiality provision can be tweaked and reviewed by your personal counsel. If, however, you no longer agree with the basic structure (1-3 – really 1 and 3) above there will be no agreement and no sense trying to negotiate the other issues.

Here is what the Union requests and requires. Inform the Union immediately – through President McMahon and myself – if you wish to pursue settlement within the general structure that we reached – at that point we can address the finer points of the release and other provisions with both the City's counsel and your personal counsel. If not, provide the Union – in writing – with the factual and contractual basis for asserting any claim in this grievance arbitration including in your response the specific contractual provision violated, the date of said violation and how said violation has been procedurally preserved within this grievance. The Union will then evaluate the potential claim and proceed consistent with the duty of fair representation. The Union will not pursue frivolous claims.

If there is a good faith basis for an argument or claim – other than a Sec. 14 claim – this is your last opportunity to articulate it. If you believe you can assert damages of more than $2000.00 under the Sec. 14 claim – explain to the Union why specifically in light of the spreadsheets and other documentation the City has provided.
The Union urges you once again to act sooner rather than later as the City will in all likelihood eventually withdraw this offer and also probably attempt to claim that it has somehow been prejudiced by any delay.

23. Having not heard any response from Mr. Porelle to his June 24, 2009, Mr. Perroni followed up with a letter delivered to Mr. Porelle by certified mail on August 21, 2009. See NEPBA Ex. 8.

24. Mr. Porelle finally responded on September 23, 2009 providing no explanation for his delay but raising numerous questions, concerns and complaints.

25. The NEPBA responded to Mr. Porelle in a detailed letter dated October 9, 2009. See NEPBA Exhibit 2. The first two paragraphs of this letter provide as follows:

Without agreeing that it was in any way obligated to do so, the NEPBA agreed to represent you in a grievance captioned IBPO Local 580 and Rochester Police Commission. You had been not (sic) a member of the bargaining unit for years before NEPBA became the agent of the patrolmen's union in Rochester. Nevertheless, the NEPBA agreed to represent you consistent with the parameters of its duty of fair representation. The grievance, for various reasons (including the abdication by a prior arbitrator, no movement by a prior union and your own apparent acquiescence) had sat idle for many years. The Union appointed Attorney Peter Perroni to represent NEPBA Local 28 (the party to the grievance) in this matter and it was eventually scheduled for arbitration in March 2009.

Prior to the arbitration, a meeting was held between the representatives of the City at the office of the City's lawyer in Exeter. You attended that meeting with Attorney Perroni and an agreement was reached regarding the terms under which the Union would settle the grievance with the City. Since that time, you have deliberately acted to sabotage the settlement reached that day and have refused to enter into good faith discussions on material portions of the agreement and thereby precluded our ability to attempt to negotiate reasonable modifications which could be made to the draft document in order to conclude this case.

We believe we have every right to withdraw the grievance and not support any further efforts on your behalf. At this point, however, we are not exercising that option. The Union will seek to have the arbitration rescheduled. Given the time that has passed, I

anticipate that the City will object but we will in any case use reasonable efforts consistent with our duty to seek to force the City back to the arbitration.

Be advised, however, the Union will not present frivolous arguments, time-barred or "kitchen sink" claims at the arbitration or in any forum. Issues that are not meritorious, are time barred or not related to the collective bargaining relationship or otherwise not within the duty of fair representation as set forth in our agreement will not be presented to the arbitrator. To the extent you disagree with our position, demand is made again that you provide the Union – in writing – with the factual and contractual basis for any claim outside of the Sec. 14 claim (emphasis omitted).

26. On December 21, 2009 Bryan McMahon of the NEPBA wrote to Mr. Porelle and provided him with a copy of the City's December 8, 2009 letter containing the City's position that after ten years the only arbitrable matter is the so-called Sec. 14 claim and effectively communicating the City's unwillingness to proceed with arbitration unless the scope of the arbitration was not properly limited. See NEPBA Exhibit 3. By April 2010 Mr. McMahon had not heard from Mr. Porelle in response to the December 21, 2009 letter, and he forwarded a follow up letter on April 28, 2010 asking for Mr. Porelle's response. See Porelle Exhibit 28.

27. On May 7, 2010 Mr. Porelle filed the unfair labor practice complaint under consideration in this decision.

Decision and Order

Decision Summary:

Mr. Porelle's unfair labor practice complaint is dismissed. It was clear by June 21, 2009 at the latest that the NEPBA was asserting the right to exercise control over the grievance arbitration, including the particular claims that would be presented, and the NEPBA was unwilling to go forward with many of the claims and issues that Mr. Porelle wanted to present in the grievance arbitration. This complaint was not filed until May, 2010, well beyond the RSA 273-A:6, VII six month limitation period. Additionally, even assuming the complaint is timely,

there is insufficient evidence to establish that the NEPBA has not satisfied and discharged its representation obligations to Mr. Porelle given the circumstances of this case.

Jurisdiction:

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

Discussion:

Mr. Porelle claims the NEPBA has failed to meet its obligation to provide him with representation in arbitration. He complains that arbitration still has not taken place, that the NEPBA has not taken action to compel the City to participate in arbitration, and that the NEPBA has refused to submit all issues to arbitration as he requests. The NEPBA claims the complaint is untimely under RSA 273-A:6, VII, the complaint is barred by Mr. Porelle's failure to cooperate with NEPBA representatives, and contends it has acted in accordance with its duty of fair representation.

The arbitration has not been conducted and remains incomplete because Mr. Porelle and the NEPBA continue to disagree on the scope of the arbitration. However, whether the NEPBA's disagreement with Mr. Porelle on the scope of arbitration was contrary to is representation obligations is no longer subject to review because any such claims are barred by the six month limitation period set forth in RSA 273-A:6, VII. The parties' respective differences in these areas were clearly defined and stated as of the end of June, 2009. See Finding of Fact 13, 15, 18, 20, 21, 24, 25, and 27. The law does not contemplate that the parties' quarrel over the scope of arbitration can continue indefinitely. In this case, by the end of June, 2009, at the latest, it was incumbent upon Mr. Porelle to either: 1) accept the NEPBA's view of the matters to be arbitrated and proceed with the arbitration on that basis; or 2) formally

challenge the representation the NEPBA was providing by filing an unfair labor practice proceeding within six months. Mr. Porelle did not agree to proceed to arbitration as the NEPBA proposed, and he did not file an unfair labor practice complaint within six months of June 30, 2009. His May 7, 2010 complaint is untimely.

Even if the complaint is timely there is insufficient evidence to show that the NEPBA did not fulfill and discharge its duty of fair representation to Mr. Porelle as referenced in and required under the Settlement Agreement even though the arbitration has not occurred. The NEPBA is obligated to provide representation "without hostile discrimination, fairly, impartially, and in good faith." *See Committee for Fairness in Negotiations v. Somersworth Association of Educators, NEA-New Hampshire et al,* PELRB Decision No. 86-54 (citations omitted). In *Committee for Fairness in Negotiations,* the board reviewed in some detail the nature and extent of a union's representation obligations:

> [W]hile unions have a duty of "complete loyalty to the interests of those whom it represents," the union has a "wide range of reasonableness...in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."....the proper standard for testing union activity when presented with a claim of unfair representation is whether there was overt hostility or discriminatory purpose; whether the action was in furtherance of legitimate purposes; and, whether the action could have been the result of honest mistake.

The NEPBA is not, as Mr. Porelle contends, required to defer to him as the exact issues to be submitted to arbitration and how the arbitration will be conducted. The current dispute arises in the context of statutory collective bargaining, with the NEPBA being charged by law as the exclusive representative of the bargaining unit, and in this capacity the NEPBA has important authority and responsibility over the grievance arbitration, including significant control over and discretion about the presentation and conduct of the grievance arbitration. *See e.g. Jeffrey T. Clay v. Newmarket Teachers' Association and Town of Newmarket,* PELRB Decision No. 2010-

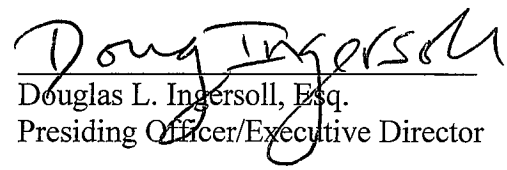
130(summarily affirmed on appeal, NH Supreme Court Case No. 2010-0599). Attorney Perroni met with Mr. Porelle on numerous occasions to discuss and prepare for arbitration. The NEPBA and Attorney Perroni were ready, willing, and able to support Mr. Porelle and proceed with the grievance arbitration. The record reflects the arbitration did not take place because of Mr. Porelle's disagreement with attorney Perroni and the NEPBA's about their assessment of the merits of the involved issues and how they intended to prosecute the matter in arbitration. However, as noted, these concerns reflect Mr. Porelle's misapprehension about the nature and extent of his ability to dictate and control the grievance arbitration, and his failure to recognize the legitimate authority of the NEPBA conferred upon it by virtue of its status as the certified exclusive representative of the bargaining unit.

The NEPBA has been consistent and clear in its communications to Mr. Porelle. The NEPBA's commitment and obligation to present Mr. Porelle's grievance in arbitration is not without limit. As of May 7, 2010 any responsibility of the NEPBA to pursue a grievance arbitration on Mr. Porelle's behalf had been fulfilled and discharged.

In accordance with the foregoing the complaint is dismissed.

So ordered.

November 12, 2010



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