

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

NH Supreme Court declined appeal of this decision on October 7, 1999, NH Supreme Court Case No. 99-463.

STATE EMPLOYEES ASSOCIATION OF
NEW HAMPSHIRE, SEIU, LOCAL 1984

Complainant

v.

STATE OF NEW HAMPSHIRE, DEPARTMENT
OF CORRECTIONS

Respondent

CASE NO. S-0376:9

DECISION NO. 1999-046

APPEARANCES

Representing State Employees Association of
New Hampshire, Local 1984:

Stephen McCormack, Field Representative

Representing State of New Hampshire:

Thomas Manning, Manager

Also appearing:

Michael K. Brown, State of New Hampshire
David Hart, Department of Corrections Employee
Thomas Tewhey, Department of Corrections Employee
Thomas Hardiman, State Employees Association
Lisa Curran, Department of Corrections
Brian Mitchell, State Employees Association
Marshall Quandt, Department of Corrections Employee

BACKGROUND

The State Employees Association of New Hampshire, S.E.I.U. Local 1984 (Union) filed unfair labor practice (ULP) charges on March 9,

1999 against the State of New Hampshire, Department of Corrections (State) alleging violations of RSA 273-A:5 I (h) and (i) resulting from a breach of contract and making rules which invalidate a collective bargaining agreement (CBA), namely, by refusing employees' access to their personnel files. The State filed its answer on March 23, 1999 after which this matter was heard by the PELRB on April 22, 1999.

FINDINGS OF FACT

1. The State of New Hampshire employs personnel at its Department of Corrections and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.
2. The State Employees Association of New Hampshire is the duly certified bargaining agent for all organized state employees at the Department of Corrections.
3. The State and the Union are parties to a CBA for the period July 1, 1997 through June 30, 1999. That agreement contains a final and binding grievance procedure at Article XIV and accords certain employee rights under Article XVI, "Employee Records and Rights," which are pertinent to this case, to wit:
 - 16.1 Access to Personnel Files: All employees shall be allowed access to their personnel files during normal working hours for inspection and/or copies of documents which will be provided by the Employer. Such inspection shall be made subject to prior arrangement with the Employer.
 - 16.1.1 Copies of Letters: An employee shall be provided with a copy of letters of complaint by a third party and letters of commendation at the same time such letters are placed in the personnel file.
 - 16.1.2 Employment Recommendations: If requested, upon termination an employee will be advised of any recommendation for rehire which has been made a part of that employee's record.
 - 16.2. Location of Files: Every employee shall be informed as to the existence and location of all personnel files. A personnel file shall be defined as any file kept by a supervisor or custodian of official records which relate directly in any way to an employee's status

as an employee.

The Union's ULP alleges violations of Article 16.1, 16.1.1 and 16.2.

4. On or about October 7, 1998, three probation and parole officers, Quandt, Tewhey and Pappas, all Field Services employees of DOC, wrote identical letters to NHDOC Commissioner Henry Risley. Those letters said:

I recently received a letter from Lisa Currier stating that I had files existing in medical, training, the personnel office in headquarters and at the state personnel office. I traveled to headquarters and reviewed my personnel file in Lisa's office. Material that I was interested in was not in that file.

During a recent investigative interview conducted by the investigative until I became aware of written information that I do not believe came from my personnel file.

I truly believe that other personnel files exist on me and that they may be located with Mike Brown, Don Parrish, and Dennis Kinnan. In accordance with article 16 of the state employee's contract I hereby request copies of all documents that exist in said files. If said files do not exist then I request a letter to that effect. (Union Exhibit No. 7.)

5. On or about October 29, 1998, Lisa Currier, Human Resource Administrator for DOC, responded to Pappas, naming four parties with whom she had checked and "all parties responded that they do not have a personnel file on you." (Union Exhibit No. 6.)
6. On November 25, 1998, Quandt, Tewhey and Pappas wrote letters to Risley, reiterated the definition of "personnel file" under Article 16. of the CBA, and requested:

that I be shown and be allowed to get copies of all recent or past investigative files that concern me, in anyway, including but not limited to summaries, conclusions, statements by witnesses, complainants, investigators, reports or summaries written to supervisors, written by any DOC personnel, and all other documents arising from any investigations(s) concerning me. This is to include the recent investigation(s) conducted by Investigator Prevost and Chief

Joanne Fortier.

I am also hereby requesting that I review and receive copies of any notes or any documents being held by any supervisor, or any DOC employee. Please verify that these investigations have been completed and there [sic] results. Please comply with this request within 10 days. (Attachments to Union Exhibit No. 5.)

7. By December 15, 1998, this matter had been elevated to and become an item of interest to SEA Negotiator Brian Mitchell, who, on that date, wrote Risley explaining his, Mitchell's, position on the meaning of Articles 16.1, 16.1.1 and 16.2 and asking:

Thus, I am officially requesting that you provide Mr. Marshall E. Quandt, Mr. Thomas Tewhey, Mr. John G. Pappas and Mr. David Hart with all the rights that they are entitled to pursuant to the current Collective Bargaining Agreement, specifically:

1. The Department of Corrections provide to Mr. Quandt, Mr. Tewhey, Mr. Pappas and Mr. Hart any and all copies of complaint(s) by a third party that have been placed in their personnel files(s) as defined by Article 16.2;
 2. The Department of Corrections inform Mr. Quandt, Mr. Tewhey, Mr. Pappas and Mr. Hart as to the existence of any and all Personnel Files kept on them, as defined by Article 16.2;
 3. The Department of Corrections provide Mr. Quandt, Mr. Tewhey, Mr. Pappas and Mr. Hart copies of all documents that exist in all personnel files on said employees;
 4. The Department of Corrections cease s [sic] and desist any further action of this nature because it is a direct violation of the current Collective Bargaining Agreement and an unfair labor practice as defined by R.S.A. 273-A. (Union Exhibit No. 5.)
8. On December 21, 1998, Risley not only responded to Mitchell (Union Exhibit No. 3) but also responded to Pappas, Tewhey and Quandt individually. In those letters, Risley explained the NHDOC position on Articles 16 and 27 under the CBA:

Article 16 of the CBA at section 16.2 defines a personnel file as "any file kept by a supervisor or custodian of official records which relate directly in any way to an

employee's status as an employee." Section 16.5 goes on to address disciplinary investigations and states that "the employee shall be informed, upon a written request, when a disciplinary investigation is complete and of the determination of said investigation."

Article 27.22 also addresses investigations of employees and, among other things, provides the employee with a right of notice when such an investigation is to start and the caused [sic] for the investigation. It also provides the employee with the right to know the outcome of that investigation. Nowhere in Article 16 or 27 does it state that the employee is entitled to read, copy or otherwise have access to the investigation. Clearly, the CBA distinguishes between "personnel files" and "investigations". Also clear is the fact that section 27 does not apply to Field Service employees.

Recently, the New Hampshire Supreme Court stated that "[u]ntil an internal investigation produces information that results in the initiation of disciplinary process, public policy requires that internal investigations files remain confidential." Pivero v. Largy, December 8, 1998. I see nothing in the CBA or in law which would alter the Department's position of this matter.

With regard to the issue of what constitutes a personnel file, it is this Department's contention that there is only one personnel file and that file is kept in the Bureau of Personnel under the custody of the Personnel Administrator. Other files in the Department that may contain documentation, notes or other information linked to you are not "personnel files" as defined by the CBA. Those files do not "relate directly" or solely to you and may contain confidential like-kind information regarding other employees. Further, such files contain information that will not affect your "status as an employee" since there is no disciplinary or other action being taken against you at this time.

Accordingly, any access to records beyond those in the custody of the Bureau of Personnel and Lisa Currier is denied. (Union Exhibit No. 4.)

The reference to Article 27.22 of the CBA is captioned for "Prisons and Secure Psychiatric Unit."

9. On February 24, 1999, Risley wrote Pappas saying, in pertinent part:

One of your concerns was formal notification of the outcome of the investigation conducted in the Brentwood office during summer of 1998.

The investigation undertaken by the NHDOD Investigations Unit concluded with a report to me. After reviewing that report, I closed the investigation with no additional action taken. The report is on file and has

not been disclosed to anyone. The investigation did not uncover a pattern of staff wrong that had not been addressed properly at an earlier time. (Union Exhibit No. 2.)

10. Michael Brown, an attorney for NHDOC, testified that most complaints are usually handled administratively. Cases requiring formal attention are assigned and forwarded to "internal affairs." He confirmed that inquires about the three probation and parole officers referenced in the case had been conducted, were found to have been unfounded and those files were sealed. It is the State's position that those files are not "personnel files" within the meaning of Article 16.2 of the CBA.
11. Thomas Tewhey, one of the officers subject to investigation, testified that he was called to the Investigation Unit at the State Prison, led to a room and interviewed. He requested a copy of any written complaint(s) against him and received none. No discipline resulted from this event.
12. David Hart is a correctional counselor in a custodial unit. He testified that he had received a written counseling letter as the result of a complaint about his attitude in a training class. (Memo dated September 1, 1998 included as attachment of Union Exhibit No. 9.) This prompted Hart to file a grievance and to seek copies of any documentation relating to his conduct. Hart, Brown and union representative Steve McCormack met over this grievance on December 11, 1998, along with Risley. On December 21, 1998, Risley wrote a letter denying Hart's request for information saying, in part, "[E]mployees may have access to certain documents conditioned upon those documents being placed in your personnel file. In this instance, the documents you request[ed] were not placed in your personnel file nor were you subject to disciplinary action." (Attachment to Union Exhibit No. 9.) During his testimony, Hart confirmed that this incident never resulted in the imposition of any discipline or in his being reduced in rank or compensation.

DECISION AND ORDER

This case comes to us as an alleged breach of contract, RSA 273-A:5 I (h), resulting from a refusal to provide certain employees with

access to and material from their personnel files. The crux of the matter in this case boils down to what is a "personnel file" and when an employee is allowed access to it under the CBA.

The New Hampshire Supreme Court recently addressed this issue of personnel file access in Pivero v. Largy, 143 N.H. 187 (1998), but under the provisions of RSA 275:56 rather than under the terms of a CBA. That decision addressed public policy concerns, notably, "until an internal investigation produces information that results in the initiation of disciplinary process, public policy requires that internal investigation files remain confidential....[U]ntil the department initiates the disciplinary process, internal investigations do not affect an [employee's] work history and references in a personnel file do not entitle [that employee] to a copy of those investigative files." Pivero, supra, p. 191. The Court concluded that because Pivero was not subject to disciplinary process and because any letter(s) informing him of citizen complaints against him were removed from his personnel file, Pivero had no right to the investigative file. Thus, if this case were a RSA 275:56 matter, the complaining NHDOC Field Service employees would not have a right to the material they requested on the several occasions noted in the findings, above.

This case differs from Pivero in that the parties have elected to define "personnel file" and when access rights attach in their contract language. Article 16.2 defines a "personnel file" as "any file kept by a supervisor or custodian of official records which relate directly in any way to an employee's status as an employee." Access to letters of complaint, or commendation, is controlled by Article 16.1.1 and become a right of the employee "at the same time such letters are placed in the personnel file." The Union never established that adverse information had ever been placed in the personnel files of any of the individual complainants. Until this occurred, rights of access did not attach under Article 16.1.1.

The record is equally clear that no adverse action was initiated or taken against any of the individual complainants. Finding Nos. 8, 9, 11 and 12. As was the case in the Pivero decision, until disciplinary action, as contrasted to an investigative inquiry, is commenced against an employee protected under the CBA, there is no activity, record or threat to that employee's status as an employee of the State of New Hampshire, as noted in Risley's letter of December 21, 1998, referenced in Finding No. 8, above. Conversely, and by way of precaution, we do note that the Commissioner said, also in Finding No. 8, that "it is the Department's contention that there is only one personnel file and that file is kept in the Bureau of Personnel." While that may be true of the facts of this case as they were presented, the parties must be continually aware that the inadvertent conduct of a supervisor or investigator at NHDOC which transgresses

the contractual provisions of Article 16.2 may create one or more "rogue" personnel files subject to discovery because their contents relate to or impact one's continuing status as an employee of the State. We do not find this to have been the case here, especially because the "sealing" of the investigative files.

This brings us to our last assessment, a comparison between investigative versus personnel files and the consequences of the "sealing" and/or "unsealing" of investigative files. First, our examination of the CBA reveals a delineation between "personnel files" generally, as described in Finding No. 3, above, and "investigations of employees" found at Article 27.22 under the caption "Prisons and Secure Psychiatric Unit." We note three observations. Article 26 of the CBA pertains to "Corrections-Field Services," the umbrella for probation and parole officers. The provisions of Article 27 succinctly define the confidentiality of investigations and, at Article 27.22 (e), provides that "in all cases where the investigation determines that the allegations(s) in a complaint are unfounded, all reports and documents pertaining thereto shall be labeled as "UNFOUNDED" then sealed and stored by the Commissioner separate from the employee's personnel records and files."

Second observation. The testimony of Michael Brown, Finding No. 10, above, detailed the confidentiality of the internal investigation of the three probation and parole officers (PPO's), how the results of that investigation had been found to be "unfounded," and how the investigative records had then been sealed. Thus, notwithstanding the caption for Article 27 of the CBA, Brown described in detail how its provisions and protections were utilized in the investigation of the three PPO's in this case, as a matter of form for the Department of Corrections, without distinction between "Prisons and SPU" and "Field Services."

Our third and final observation is that the union let Brown's testimony on this issue go unchallenged, unchallenged to the point that we have no reason to believe that the practice under the CBA is for anything other than for the investigative provisions of Article 27 to be applied across the breadth of the Department of Corrections. Thus, the Union has failed in its burden to establish the beach of contract it alleged.

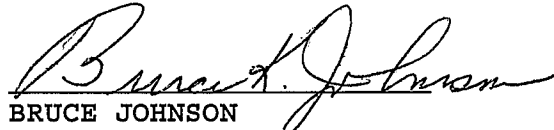
On the matter of "sealing" and the potential, subsequent "unsealing" of investigative reports, we reviewed the totality of Article 16 as it applies to all state employees. Questioning by PELRB Member Hall established that the State takes the position that there can be circumstances which justify the unsealing of investigative files. Given that the entirety of Article 16 as quoted in Finding No. 3, above, is devoted to employee protection, due process rights and access to information, we do find that when any investigative report

is unsealed and leads to or causes the initiation of any disciplinary proceeding, then the full protections of Article 16 immediately attach.

Based on the foregoing, the ULP is DISMISSED.

So ordered.

Signed this 24th day of May, 1999.


BRUCE JOHNSON
Alternate Chairman

By unanimous vote. Alternate Chairman Bruce Johnson presiding.
Members Richard Roulx and E. Vincent Hall present and voting.