

STATE OF NEW HAMPSHIRE
SUPREME COURT
CASE NUMBER 2009-0384

APPEAL OF THE TOWN OF DERRY

BRIEF OF APPELLEE DERRY POLICE PATROLMEN'S ASSOCIATION

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STATEMENT OF THE CASE

This appeal involves two Unfair Labor Practice (ULP) complaints filed at the Public Employee Labor Relations Board (“the Board”) by the Derry Police Patrolmen’s Association (“the Union”) against the Town of Derry (“the Town”) pursuant to RSA 273-A:5. In the first ULP, filed July 11, 2008, the Union argued that Town had violated certain Weingarten rights of the Union and some of its members during the course of internal investigations conducted during May of 2008.¹ *Add. at 1; PELRB Rec. 1*. In a second ULP filed on September 9, 2008, the Union asserted that the Town had retaliated against, interfered with, dominated and discriminated against bargaining unit employees and the Union in violation of RSA 273-A:5, I (a), (b), (c), (d), (e), (g), (h) and (i). *Add. at 2; PELRB Rec. at 24*. The latter ULP was based upon various acts committed by the upper management of the Derry Police Department, including but not limited to the conduct of an investigation into the pooling of a laundry allowance provided to union members under the relevant Collective Bargaining Agreement. *Id.*

The Town answered by denying any unlawful conduct and the cases were consolidated for hearing on October 20 and 22, 2008. *Add. at 2-3*. Following the hearings, the Board issued a decision which included the following summary:

Based upon the Derry Police Department’s conduct of an internal investigation into the use of a contractual benefit as well as other Department action, the board finds that the Derry Police Department committed an unfair labor practice because it improperly restrained, coerced and interfered with bargaining unit members in the exercise of rights conferred by RSA 273-A and also sought to dominate or interfere with the administration of the Association, all in violation of RSA 273-A: 5, I (a), (b) and (c). The Board also finds that the Department violated RSA 273-A:5, I (h) and breached the 2007-08 CBA by using non-contractual procedures to address a contract dispute. The administration

¹ See generally NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975)(union member is entitled to representation during disciplinary interview by employer).

of the Derry Police Department is ordered to cease and desist from such practices, to permanently remove the results of the internal investigation from the personnel files of the affected officers, and to remove from [the Union President's personnel files] and Department records the low scores ... awarded [by certain members of Derry PD management] during the Sergeant's exam. The Association's remaining complaints concerning [among other issues] the Weingarten issues, and the reassignment of [the Union President] from the detective bureau to the patrol division are dismissed.

(Add. 10). This appeal followed the Board's resolution of the Town's motion for rehearing.

STATEMENT OF THE FACTS RELEVANT TO THIS APPEAL

Background

The Union is the board certified exclusive representative for Derry Police Officers below the rank of sergeant pursuant to RSA 273-A:10. *Add. 3*. The Town of Derry is a public employer within the meaning of RSA 273-A:1, X. *Add. 3*. The Association and the Town are parties to a July 1, 2007 to June 30, 2008 Collective Bargaining Agreement (the "CBA"). *Add. 3; PELRB Rec. at 153*.

At all times relevant hereto, Officer Michael Houle was the President of the Union. *Add. 3* Officer Houle has 22 years of experience as a police officer, the last 18 of which have been with the Town of Derry Police Department. *Add. 3*. Officer Houle's service includes 13 years in the Patrol Division and 9 years in the Detective Bureau. *Add. 3*. Houle was an active and vocal Union President who was responsible for, inter alia, negotiating collective bargaining agreements with the Town. *Tr. 10/20 at 29-31*. Houle has been an outspoken public critic of Derry Chief of Police, Edward Garone and the management of the Derry Police Department. *Tr. 10/20 at 29-31, 91-94; Tr. 10/22 20*. As Union President, Houle routinely was the spokesperson for the Union membership on

workplace issues that the Union felt needed to be addressed by Town administrators. *Id.*; *Tr. 10/20 at 29-31*; *Tr. 10/22 94, 136-37*. Because of his Union activity, the relationship between Houle and the Chief and other supervisory officers was extremely acrimonious. *Tr. 10/20 29-32, 91-94*; *Tr. 10/22 94, 136-137*; *PELRB Rec. at 199, Town Exb. 8*. Chief Garone conceded that he had discussed his dislike of Houle and his “activities” with the Captains who managed the police department. *Tr. 10/22 136-137*.

Laundry Allowance Dispute

Paragraph 4 of Article XIX of the 2007-2008 CBA provides that “[t]he Town will provide for the cleaning of fifty-two garments per year (such as one shirt, one trousers)(sic) and, in addition, will provide for the cleaning of outerwear twice during the winter season.” *Add. 5*; *PELRB Rec. at 170-71*. In 2008, police management noticed that some officers were using the clothing allowance for the first time and that other officers were close to reaching a total of fifty-two garments. *Add. 5*. Management learned that officers were “pooling” or “sharing” their cleaning allowance. *Add. 5*. The pooling was accomplished by one officer (who had not reached fifty-two garments) allowing another officer (whose account did not have a balance) to submit paperwork for the cleaning on the account with an available balance. *Add. 5*. The total amount of the cleaning allowance in dispute was less than \$100.00. *Add. at 7*.

Houle had been advised by an attorney that the pooling was permissible under the contract. (*Tr. 10/22 90*). The Union discussed the provision at meetings and advised members that the pooling of the allowance was permissible under the CBA. (*Tr. 10/22 50-53, 90, 209*). The Union believed that a correct interpretation of the CBA allowed

pooling and made no attempt to hide the fact that they were pooling the laundry benefit. (Tr. 10/20 48-49).

Chief Garone claimed that he believed that the officers who were following the Union's interpretation of the CBA and sharing the cleaning allowance might be committing forgery or theft by deception and that the practice also called into question the integrity of the involved officers. *Add. at 5*. Chief Garone concluded that an internal investigation was justified, and between May 1 and May 5, 2008, Captain Thomas and Captain Feole interviewed 8 officers concerning the "pooling" of the cleaning allowance. *Add. at 5*.

The Union and management had previously worked through numerous recent contract interpretation disputes. *Tr. 10/22 15*. Indeed, the CBA provides a "consultation" mechanism which contemplates resolution of matters of mutual concern. *PELRB Rec. at 157; Add. 11*. Management had never used an internal affairs investigation as a mechanism to resolve a difference in interpretation. *Tr. 10/22 15-16, 128-129*. Prior to instituting the internal affairs investigation, Chief Garone was aware that the clothing allowance provision in the CBA was subject to more than one interpretation. *Tr. 10/22 129-133*. Nevertheless, he and management made no effort to discuss with the Union why the members were taking the position that the clothing allowance could be pooled. *Tr. 10/22 15-16*. Management was also informed that the pooling of the allowance was a long-standing past practice and was provided the names of prior employees who could verify the Union's interpretation. *Tr. 10/22 235-236*. No effort, however, was made to ascertain whether there was a past-practice of allowing officers to pool the allowance. *Tr. 10/22 235-36*.

The internal investigation focused directly on what the Union had told members regarding its interpretation of the contract provision and specifically on what advice Houle and the Union had provided to members at union meetings and otherwise. *Tr. 10/20 46-47; Tr. 10/22 51; PELRB Rec. at 105.* During the course of the interviews Captains Thomas and Feole instructed the officers not to discuss the subject of the interview with other officers. *Add. at 6.* Houle was interviewed and was made a subject of the investigation even though there was no allegation that he had participated in any pooling of the allowance. *Add. at 6-7; Tr. 10/20 at 46.* The Union steward who sat in on the interviews, Officer Kevin Jackson, understood that he was prohibited from discussing the ongoing interviews with Officer Houle because, according to Captain Feole, Officer Houle might be a subject of the investigation. *Add. at 6-7.*²

On June 9, 2008, Chief Garone issued written reprimands to eight officers for either “having allowed another officer to utilize your individual laundry cleaning allowance in a manner intended to conceal that activity from the Department” or “having utilized another officer’s individual laundry cleaning allowance in a manner intended to conceal that activity from the Department.” *App. at 7.* Chief Garone concluded that the officers had engaged in “conduct unbecoming an officer” and that repeating the behavior in the future could result in “further discipline, up to and including termination of employment.” *App. at 7.* Officers were also required to repay the Town for value of the laundry allowance the Town contends were improperly pooled. *Tr. 10/22 at 97, 107; PELRB Rec. at 300-307.* The Union has grieved the Town’s action with regard to the

² On June 3, 2008, after the internal investigation interviews were complete but before the issuance of the report providing the results of the investigation, Chief Garone consulted with County Attorney James Reams about the internal investigation and whether issues related to *State v. Laurie*, 139 N.H. 325 (1995) were implicated. *App. 6.* Following the discussion with attorney Reams, Chief Garone concluded there were no *Laurie* issues. *App. 6, PELRB REC. at 240.*

laundry allowance provisions under the grievance provisions of the CBA and the correct interpretation of the CBA is the subject of arbitration proceedings. *App. at 7.*³

Lt. Surrette

After the completion of the internal investigation concerning the pooling of the cleaning allowance, and prior to June 30, 2008, Union member Detective Ed Budroe used most, if not all, of his remaining cleaning allowance. *Add.7.* This involved the cleaning of more garments in a short period of time towards the end of year than might be expected if Detective Budroe had used his cleaning allowance regularly throughout the contract year. *Add. 7.*

In early July, 2008, Budroe's supervisor, Lieutenant Surrette confronted Detective Budroe and told him that the manner in which he had used his cleaning allowance was childish and immature, reflected poorly on his decision-making ability, that Lieutenant Surrette believed the Union had instructed Detective Budroe to use up his remaining cleaning allowance and, in effect, Budroe should have ignored the Union's request. *Add. 7.*⁴ Lt. Surrette made clear that Budroe's career would be impacted if he continued to support and follow the advice of the Union. *Tr. 10/22 73-74.* Lieutenant Surrette also commented that if Budroe wanted to "play this game" he would write up Budroe for every infraction of the rules of the Detective bureau. *Tr. 10/22 74.* A few weeks later, after becoming aware that Det. Budroe had shared his prior comments with the Union, Surrette told Budroe that he had "chosen his path." *Tr. 10/22 75-76.* Lieutenant Surrette

³ In August 2008, after nine years of superlative performance (a fact borne out by his work evaluations) Houle was transferred against his wishes from the Detective division back to the uniformed patrol. *Add. at 9.*

⁴ Lt. Surrette told his subordinate Budroe that he should have told the Union to "go 'f' themselves." (*Tr. 10/22 72-73*).

made similar comments to Detective Turgeon, who according to Lieutenant Surrette understood his point and did not make an issue of it. *Add. at 7.*

Sergeant's Exam

Chief Garone posted a notice of an available Sergeant Position in May, 2008. *Add. at 8.* The posting describes the examination process (written – 40%, oral board – 20%, and staff evaluation – 20%) to be used to establish a one year eligibility list of candidates, and provided instructions to interested candidates. *Add. at 8; PELRB Rec. at 190.* The staff evaluation portion is typically conducted as a meeting of Department Sergeants, Lieutenants, and Captains at which the various candidates are discussed and evaluated. *Add. 8.* During this process each staff member prepares an individual evaluation. *Add. 8.*

Officer Houle applied for the Sergeant's position and was evaluated by the staff. *PELRB Rec. at 193.* Both Captain Thomas and Captain Feole gave Officer Houle a score of 17 out of a possible 100 in their staff evaluation. *Add. 8.* Incredibly, Thomas testified that he was surprised to have scored Houle the same as Feole and admitted that it was "very odd" but claimed it was a coincidence. *Tr. 10/22 191-92.* Such a low score is unusual, and it was significantly lower than the scores awarded by other staff evaluators. *Add. at 9.* The next lowest score by any evaluator was a 75. *Add. at 8-9.*⁵

⁵The results of the Sergeant's exam were distributed in July, 2008 and Officer Houle placed third among the six candidates who took the Sergeant's exam. *PELRB Rec. at 191; Town Exhibit 5.* Officer Houle's final position would not have changed even if Captains Thomas and Feole had provided higher or even perfect scores in their staff evaluations. *Add. at 9.*

Further Retaliation

Prior to relevant periods in 2008, officers serving on the bike patrol did not wear reflective vests. *Add. at 3*. Instead, their clothing, including collared short sleeve shirts, contained reflective material, and their bicycles also displayed reflective devices. *Add. at 3*. On September 5, 2006 the Association's Safety Committee had requested that the Department replace existing orange traffic reflective vests with ANSI class 2 high visibility yellow vests to create a safer work environment for officers working accident scenes or traffic detail. *Add. at 4*. On September 11, 2006 Chief Garone responded in part by stating that he hoped "to receive the vests in the very near future at which time they will be issued. We are also making the necessary changes in our uniform policies to address the new authorized garment." *Add. at 4; PELRB Rec. at 189*.

The reflective vests were eventually obtained, and Chief Garone decided they should also be worn by bike patrol officers, a requirement that met some resistance from Union members. *Add. at 4*. Some officers objected because they believed the vests made them a conspicuous target, a concern related in part to the murder of Officer Michael Briggs, a Manchester Police Officer shot and killed while on bike patrol duty. *Add. at 4*. Officers also believed that the requirement was the Department's response to the fact that the Association had been an outspoken proponent for the reflective vests and had involved Town administration in their efforts to get Chief Garone's approval and willingness to fund the requested change. *Add. at 4*. Some bike patrol officers attempted to resign from bike patrol duty but their requests were denied. *Add. 4*. There was also a decline in the number of officers volunteering for bike patrol duty. *Add. at 4*. Apparently in response to a perception that the Union was advocating that officers not

volunteer , during a June 2008 roll call, Sergeant Morelli commented about the lack of volunteers for bike patrol, stating in effect that individuals running the union wouldn't be there forever and individual officers should start thinking about their own careers. *Add. at 4; Tr. 10/22 38-40.* The Union, in fact, had not instructed members not to apply for such positions. *Tr. 10/22 40.*

The Board's Findings

The Board found, as a matter of fact, that the management of the Derry Police Department was motivated in many of its actions by anti-union animus and the desire to control and dominate the Union. *Add. 1-18.* More specifically, the Board held as follows:

The board concludes that the Department used an internal investigation, a non-contractual process, to retaliate against Association membership in general and Association leadership in particular, to intimidate Association members, to alienate Association members from Association leadership, to improperly dissuade Association members from challenge to or disagreement with management on matters of contract interpretation and administration, to interfere with the administration of the Association, and to obtain otherwise unavailable information about the conduct of Association business. The Department's conduct of an internal investigation into the possible overuse of a contractual benefit, involving in total less than \$100, was also a clear message to all bargaining unit employees of the administration's displeasure, and all bargaining unit members were placed on notice that they could be subjected to similar treatment.

Lieutenant Surette's actions were a continuation of what we find to be management's anti-union animus which included the theme that Association members needed to demonstrate stronger support for and allegiance to the interests of their employer at the cost of less support for the rights and interests secured to them by RSA 273-A in general and the specific benefits obtained through the collective bargaining process or risk adverse impacts on career advancement opportunities. Lieutenant Surette's actions are a further example of the Department's improper interference with its employees in the exercise of rights conferred by the statute as well as dominance and interference in the administration of an employee organization.

The board reaches similar conclusions about Sergeant Morelli's statements to officers concerning problems staffing bike patrol and the low scores Captains Thomas and Feole awarded to Officer Houle in staff evaluations completed during the Sergeant's exam. When confronted with a diminished interest among officers in bike patrol duty, Sergeant Morelli addressed the situation with statements to the effect that the involved officers should reconsider Association advice or guidance on such matters as it could be detrimental to their careers. While Sergeant Morelli's general criticism about an officer's refusal to volunteer for certain duty or requests for reassignment from unpopular duty may have some validity, the manner in which he linked his statements to the Association and in the process suggesting that an officer's perceived connections to the Association could negatively impact career opportunities was improper.

As to the low scores Officer Houle received on the Sergeant's exam, it is true that these scores did not change the exam's outcome, but the actions of Captains Thomas and Feole are still subject to scrutiny. The low scores are undoubtedly attributable at some level to legitimate concerns Captains Thomas and Feole have about Officer Houle as well as personal animus between the involved individuals. However, in this case, based upon the internal investigation and its aftermath, the unusually low level of the scores and the fact that they were identical, the board concludes that Captains Thomas and Feole's staff evaluations of Officer Houle were primarily based upon their and the Department's negative opinion about the Association and Officer Houle's individual role as Association president. The board recognizes that leadership qualities and general support of the Department are legitimate qualifications and obvious factors to consider when evaluating candidates. At the same time, however, Captains Thomas and Feole cannot evaluate Officer Houle on the basis of a negative judgment about the Association and the manner in which Officer Houle has discharged his responsibilities as an official Association representative relative to the competing interests of the public employer. Their conduct represents a restraint and interference with Association members and the administration of the Association.

Add. at 13-15. The Board found that the Town's conduct violated RSA 273-A:5, I (a), (b) and (c). *App. at 17.* In addition, the Board found that the Department's actions violated RSA 273-A:5, I (h) by virtue of the fact that the Town had breached the parties CBA by employing a non-contractual vehicle - the internal investigation - to resolve the contractual dispute. *App. at 17.*

The Board ordered the following remedy:

The Department is ordered to cease and desist from the practices which the board has found to be in violation of the statute, and in particular to refrain from further attempts to interfere with Association members in the exercise of their contractual and statutory rights, and to refrain from undermining, influencing or limiting the extent to which bargaining unit members rely upon Association leadership and guidance in matters concerning their rights under RSA 273-A in general as well as matters of contract interpretation and administration in particular by express or implied threats of adverse impacts on individual employee's career opportunities. The administration is also ordered to permanently remove the results of the internal investigation from the personnel files of the affected officers and the low scores Captains Thomas and Feole awarded to Officer Houle during the course of the Sergeant's exam from Officer Houle's files and other Department files.

App. at 17-18.

Despite finding pervasive anti-union animus and motivation, the Board dismissed other allegations asserted by the Union including allegations surrounding association members' Weingarten rights during the investigation, President Houle's reassignment to patrol from his long-time position in the detective unit, the requirement of reflective vests on the bike patrol and the general conduct of the Sergeant's exam outside of the identical low scores given by Captains Thomas and Feole. *Add. at 15.*

Following the issuance of the decision, the Town filed a motion for rehearing pursuant to Pub 205.02 and RSA 541:3. *PELRB Rec. at 380.* The Town argued, inter alia, that the "PELRB committed an error of law by exercising jurisdiction over the merits of the laundry allowance issue and the related disciplinary action taken by the Town." *PELRB Rec. at 380.* The Town interpreted the Board's Order as "prohibiting the parties" from proceeding to arbitration on the merits of the laundry allowance dispute.

Id. In its Order on the Motion for rehearing the Board held as follows:

The board's decision does not decide the merits of the laundry allowance dispute, which is whether pooling of the laundry allowance is permissible under this or any other contract provision, and it was not the board's intent

to terminate any related arbitration proceedings. Accordingly, the board is granting the Town's motion in part in order to clarify that the Board did not decide the contract dispute concerning the laundry allowance and that it is the board's expectation that this contract dispute will be addressed in arbitration proceedings.

PELRB Rec. at 391. This appeal followed.

SUMMARY OF ARGUMENT

Contrary to the contention of the Town, the Town did not impermissibly exercise jurisdiction over the merits of the laundry allowance dispute. The Board did not decide whether the Union's pooling of the laundry allowance was permissible under the terms of the CBA and that issue will be determined by an arbitrator. The Board decided only the issue submitted to it both parties: Whether, by its various actions, the Town violated RSA 273-A:5? After finding that the Town's actions were retaliatory in nature and motivated by anti-union animus and a desire to undermine the Union, the Board properly applied the law and undertook an analysis of whether, notwithstanding that the anti-union bias and motivation, the Town would have taken the disputed actions for permissible reasons. The Board concluded that Town's actions in initiating the internal investigations, use of direct threats to undermine the Union as well as deliberately ascribing ridiculously low evaluation scores to the Union President could not and were not undertaken for permissible purposes and were therefore unlawful

On the other hand, the Board resolved numerous other issues (Weingarten allegations, forced use of safety vests, Houle's untimely transfer and the general conduct of the Sergeant's examination) in favor of the Town even where the Union proved by a preponderance of the evidence the Town was acting with anti-union animus. The portion of the remedy that the Town contests – the removal of the letters of reprimands –

was an appropriate exercise of the Board's statutory authority and directly related to the violations. Finally, contrary to the contentions of the Town, the Board did not mandate to the Town the manner in which it must address issues within the police department, but rather found that in the circumstance of this case, the Town's use of an internal affairs investigation was motivated by an unlawful desire to retaliate against, undermine and coerce the Union. The Board's well-reasoned and carefully crafted opinion should be affirmed.

ARGUMENT

A. STANDARD OF REVIEW

This Court reviews the decisions of the PELRB pursuant to the familiar standard of review set forth in RSA 541:13. *See Appeal of the State of New Hampshire*, 138 N.H. 716, 719-720 (1994). Pursuant to RSA 541:13:

Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

See also Appeal of Laconia School District, 150 N.H. 495, 496 (2004) (“When reviewing a decision of the PELRB, we 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.”).

B. THE BOARD DID NOT IMPROPERLY EXERCISE JURISDICTION OVER THE MERITS OF THE LAUNDRY ALLOWANCE ISSUE BY DECIDING AND REMEDYING THE VIOLATIONS SET FORTH IN THE UNION'S UNFAIR LABOR PRACTICE COMPLAINTS.

The Town's contentions that the (1) Board improperly decided the merits of the laundry allowance issue and (2) committed reversible error by vacating the letters of reprimand are both without merit. *See Blue Brief at 10, 14.* RSA 273-A:5, I provides in pertinent part as follows:

It shall be a prohibited practice for any public employer:

(a) To restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;

(b) To dominate or to interfere in the formation or administration of any employee organization;

(c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization;

(h) To breach a collective bargaining agreement;

Id. With regard to the proof required to establish an unfair labor practice, this Court has adopted the federal standard applicable to cases brought before the NLRB as follows:

[T]o establish an unfair labor practice [under the federal standard adopted by this Court], the union must prove by a preponderance of the evidence that the discharge or elimination was motivated by a desire to frustrate union activity. The employer can meet the union's evidence of retaliatory motivation with its own evidence, as an employer's motivation is a question of fact to be determined by the board from consideration of all the evidence. . . . If the board finds by a preponderance of the evidence that the employer was unlawfully motivated to some degree, an employer can still avoid being adjudicated a violator of [applicable] law by proving by a preponderance of the evidence that regardless of the unlawful motivation, the employer would have taken the same action for wholly permissible reasons.

Appeal of Professional Firefighters of East Derry, Local 3353, IAFF, 138 N.H. 142, 144-45 (1993) citing NLRB v. Transportation Management Corp., 462 U.S. 393, 399 (1980).

Accordingly, the Union must first prove retaliatory motivation by a preponderance of the evidence at which point the employer can establish the “affirmative defense” that it would have taken the same action for wholly permissible reasons. Appeal of Professional Firefighters, 138 N.H. at 145.

Once a violation is found, the Board’s power to address and remedy prohibited labor practices is broad. RSA 273-A:6 provides as follows:

Upon finding that a party has violated RSA 273-A:5, the board may (a) issue a cease and desist order; (b) order reinstatement of an employee with back pay; (c) require periodic reporting of compliance; (d) order payment of the costs incurred by a party negotiating in good faith in negotiations found by the board to have been carried on not in good faith by the other party, if the board finds such penalty appropriate to the circumstances; or **(e) order such other relief as the board may deem necessary.**

Id. (emphasis added).

The Town first contends that the “PELRB should have refrained from ruling on the merits of the laundry allowance issue and permitted the parties to proceed to arbitration.” *Blue Br. at 11.*⁶ The Board, however, did not improperly exercise jurisdiction over the laundry allowance issue, but instead determined the issue that both parties agreed would be submitted to it for consideration: Whether the Town had committed an unfair labor practice by various actions – including its response to the

⁶ The Town’s reliance on Appeal of the City of Manchester, 153 N.H. 289 (2006) is misplaced. The City of Manchester case involved an attempt by a union to litigate a dispute over the termination of a member at the PELRB over the objection of the employer who claimed the matter was covered by the CBA and its grievance arbitration provisions. Id. 153 N.H. at 292 (City moved to dismiss case and process the dispute at arbitration). Here, there is no dispute that the Town agreed to litigate the ULP, as opposed to the contract dispute, at the PELRB. See e.g. Blue Brief at 11 (“the Town focused on addressing the claims raised by the Union” at the PELRB). Accordingly, the Town cannot, and does not in its brief, claim that the PELRB should have deferred all the issues raised by the ULPs to the arbitrator. *Blue Brief at 10-12; PELRB Rec. at 9, 74* (Town’s answers to the ULP complaints do not assert lack of jurisdiction). Indeed, any such claim has been waived. Appeal of Bosselait, 130 N.H. 604, 607 (1988)(issues must be raised at earliest possible time to give trial forum opportunity to review and correct claimed errors). Instead, the Town’s limited claim is that the PELRB improperly exercised jurisdiction over the merits of the laundry allowance dispute that is to be decided at arbitration.

laundry allowance issue during 2008? In this regard, the Board made the following factual determinations with regard to retaliatory motive:

The board concludes that the Department used an internal investigation, a non-contractual process, to retaliate against Association membership in general and Association leadership in particular, to intimidate Association members, to alienate Association members from Association leadership, to improperly dissuade Association members from challenge to or disagreement with management on matters of contract interpretation and administration, to interfere with the administration of the Association, and to obtain otherwise unavailable information about the conduct of Association business.

Add. at 13. The Board's determination that the managerial employees within the Derry Police Department acted with retaliatory motivation is a finding of fact. Appeal of Professional Firefighters, 138 N.H. at 144-45. The Town has not challenged the finding and, in any case, it is well supported in the record.

Having found that the Town had initiated the investigation with a retaliatory motive and committed an unfair labor practice, the Board acted to remedy the violation pursuant to its authority and duty under RSA 273-A:6. Contrary to the Town's contention, the Board did not decide the merits of the laundry allowance dispute and an arbitrator will determine whether the Union members were permitted, under the terms of the CBA, to "pool" their laundry allowance. As the Board observed in its response to the motion for rehearing, the arbitration of that issue will go forward to a determination of the meaning of the laundry allowance provision. *PELRB Rec. at 391*. The parties will litigate the respective issues in that matter such as whether the pooling was permissible as a "past practice" or otherwise under the terms of the CBA.

Put simply, the Board's choice of remedy in this case was not an adjudication of the merits of the laundry allowance issue, but rather an appropriate exercise of its

statutory authority to “order such relief as it deems necessary.” RSA 273-A:6. Having determined that the internal investigation was initiated in order to retaliate against and dominate the Union and its leadership, and not for any legitimate purpose, the Board properly and reasonably ordered that the tainted products of that illegally motivated investigation – the letters of reprimand – be removed from the personnel files of the affected officers. The Board’s relief was narrow and “compatible with the violation.” Appeal of City of Nashua Bd. of Educ., 141 N.H. 768, 776 (1997).

This conclusion is buttressed by the fact that the Board did not order the Town to reimburse the officers the money that the officers had been ordered to pay back because of the alleged overuse of the laundry allowance. *Tr. 10/22 at 97, 107; PELRB Rec. at 300-307*. Of course, the reimbursement of those funds will be one of the subjects addressed in the arbitration of the substantive merits of the laundry allowance issue. Contrary to the contentions of the Town, the Board did not exceed its jurisdiction or decide any issues that were not properly submitted to it by both parties nor was the remedy employed here unreasonable or otherwise beyond the Board’s authority.⁷

C. THE BOARD DID NOT ERRONEOUSLY MANDATE THE MANNER IN WHICH THE TOWN SHOULD HAVE RESPONDED TO THE LAUNDRY ISSUE BY ITS FINDING THAT THE TOWN’S RESPONSE IN THIS CASE WAS IMPROPER AND MOTIVATED BY ANTI-UNION ANIMUS

This Court should also reject the Town’s contention that the “PELRB erred in mandating the manner in which the Town should have handled the laundry allowance issue.” *Blue Brief at 12*. Contrary to the Town’s argument, the PELRB did not mandate

⁷ In its attempt to demonstrate that the remedy in this case was unreasonable the Town makes the broad allegation that the “PELRB made a number of factual findings and drew a number of substantive conclusions regarding the merits of the laundry allowance issue.” *Blue Br. 14*. The Town challenges only one factual finding, however, arguing that the Board’s finding that the Union did not conceal the pooling of the allowance is not supported by the record. *Blue Br. at 14-15*. The Board’s finding however finds ample support in the record including the testimony of President Houle that no attempt was made to conceal the pooling of the allowance or hide it from management. *Tr. 10/20 48-49*.

the manner in which the Town could respond to the laundry issue nor did it limit or circumscribe the Chief's authority under the CBA or New Hampshire law.

It is axiomatic that the Chief could not use his authority under state law or the CBA as a cover to accomplish the unlawful goal of interfering with or undermining the Union. Here, the Board found expressly that the Department did not undertake the internal investigation for a lawful purpose but instead used the internal affairs interviews to retaliate against and otherwise undermine the Union and its members in the exercise of the rights guaranteed by RSA 273-A. *App. at 13*. This factual finding is not challenged by the Town and the Town has not made any material attempt to demonstrate that the evidence does not support the finding.

The Board's reference to the availability of the CBA's internal contract resolution methods (grievance and consultation) was not a "mandate" to the Town that it may not use investigations *in all circumstances* but rather a recognition that *in the circumstances of this case*, the Town's response (with an internal affairs investigation) was retaliatory discriminatory and an attempt to dominate the Union. As the Board found, the purpose of the investigation and the conduct of managers, Thomas, Feole, Surette and Morelli was to intimidate and alienate union members from the organization and attempt to dissuade them from disagreeing with management's interpretation of the contract. In addition, management attempted the use the investigation process to obtain information about the Union that it had no right to access. See generally, In re Grand Jury Subpoena, 155 N.H. 557 (2007)(acknowledging privilege as to communications between union members against inquiry by the employer).

The Board's unchallenged finding is supported by evidence in the record which indicates that, inter alia, (1) the internal investigation focused on the Union activities, advice given by Union leadership and events and communications at Union meetings; (2) the investigators sought to prevent the members from discussing the issues with Houle the Union's President and labor expert; (3) the Town and the Union had a long standing practice of working out issues of contract interpretation by consultation and use of the grievance procedure; (4) the Chief was aware prior to the investigation that the Union was interpreting the provision to allow pooling of the allowance; (5) the Union believed there was an established past-practice which allowed the pooling and gave management the names of individuals who could support that position; (6) the total alleged amount involved between the numerous officers was less than \$100.00; and (7) the direct career threats made by Morelli and Surette to union members to dissuade employees from following union advice and participating in union activity.

Against this backdrop, the Town's claim that the Chief had the "prerogative" to act under the management rights clause and other provisions of the CBA and/or RSA 105:2-a misses the point. The fact of the matter is that the Chief has the prerogative to undertake a multitude of actions under his considerable authority as Chief. He cannot, however, use his authority as a pretext to undertake illegal actions initiated to undermine the exercise of rights protected by RSA 273-A. Based upon this and the other evidence in the record, the Board's factual conclusion that the use of the internal investigation in this case was retaliatory, unlawful and not to be sanctioned was reasonable and just and this Court should reject any contention to the contrary.⁸

⁸ As stated, the Town has not challenged the factual finding of discriminatory retaliation or any portion of the remedy ordered by the Town aside from the removal of the letters of reprimand. Accordingly, even if

CONCLUSION

For the foregoing reasons the Derry Police Patrolmen's Association respectfully requests that this Court AFFIRM the decision of the PELRB.

Respectfully submitted,
Derry Police Patrolmen's Association

By and through their Lawyers,
NOLAN PERRONI HARRINGTON, LLP

By: 

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Dated: January 4, 2010

this Court were to somehow conclude that the removal of the letters should have been left to the arbitrator, the remainder of the Board's findings and remedy should be affirmed by this Court.

CERTIFICATE OF COMPLIANCE

In accordance with New Hampshire Supreme Court Rule 16(7), the undersigned hereby certifies that an original and eight (8) copies of the Brief of the Appellees have been hand-delivered to the Clerk of the Supreme Court this 4th Day of January 2010.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby certifies that two copies of the Brief of the Appellees have been forwarded, via first class mail, postage prepaid to Thomas Closson, Esq. (Town of Derry) and Donald E. Mitchell, Esq. (PELRB).

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby requests that this matter be heard on oral argument and , further, that Peter J. Perroni, Esq. be designated as the attorney to argue its merits on behalf of the Appellee Derry Police Patrolmen's Association. Counsel requests fifteen (15) minutes for argument.

Dated: January 4, 2010



Peter J. Perroni, Esq.

ADDENDUM

1. PELRB Decision --- PELRB DEC. NO. 2009-057...

A-1



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

DERRY POLICE PATROLMEN'S ASSOCIATION

v.

CASE NO. P-0702-22&23
DECISION NO. 2009-057

TOWN OF DERRY

APPEARANCES

Representing: Derry Police Patrolmen's Association
J. Joseph McKittrick, Esq., McKittrick Law Offices,
North Hampton, New Hampshire

Representing: Town of Derry
Thomas M. Closson, Esq., Flygare Schwarz & Closson, PLLC
Exeter, New Hampshire

BACKGROUND

The Derry Police Association (the "Association") filed two unfair labor practice complaints against the Town of Derry. In Case No. P-0702-22, filed July 11, 2008, the Association complains that the Police Department violated the Weingarten rights of Association members during the course of internal investigation interviews conducted in early May, 2008. The Association complains that: 1) Captain Thomas improperly selected union steward Officer Jackson to act as the union representative during the internal investigation interviews; 2) Captains Thomas and Feole failed to provide Officer Jackson with sufficient information

concerning the subject of the interviews; 3) Captains Thomas and Feole provided insufficient notice of the interviews, thereby preventing the Association from arranging for the attendance of a union steward a higher level of expertise/experience than Officer Jackson; and 4) the Town improperly prevented Association president Mike Houle from serving as a union steward by unnecessarily interviewing him as part of the investigatory process. The Association contends that the Town has violated RSA 273-A:5, I (a), (b), (c), (e), (g), (h), and (i).

In Case No. P-0702-23, filed on September 9, 2008, the Association complains about: 1) the new requirement that bike patrol officers wear a reflective vest; 2) statements to a bike patrol officer concerning Association advice; 3) the conduct of internal investigations concerning the “pooling” of the laundry allowance provided under the parties’ collective bargaining agreement; 4) the manner in which the Department conducted a Sergeant’s examination in June and July, 2008; 5) Lieutenant Surette’s statements to Detective Boudreau concerning the manner in which Detective Boudreau used his laundry allowance at the end of the contract year; and 6) the reassignment of Officer Houle from the Detective Division to the Patrol Division following the Sergeant’s exam. The Association contends the Town retaliated against, interfered with, dominated and discriminated against bargaining unit employees and the employee organization in violation of RSA 273-A:5, I (a), (b), (c), (d), (e), (g), (h), and (i).

The Town filed its answer in Case No. P-0702-22 on July 21, 2008. The town contends that Captain Thomas properly contacted Officer Jackson, a union steward, to request his service as union steward during the internal investigation interviews. The Town filed its answer in Case No. P-0702-23 on September 30, 2008. The Town denies that it has committed unfair labor practices as alleged in this complaint.

The Association also filed a Motion for an Immediate Cease and Desist Order in Case No. P-0702-23 on September 9, 2008 seeking to have Officer Houle immediately restored to a position in the Detective Division. The parties initially appeared for hearing in Case No. P-0702-23 on September 23, 2008. However, the Association's motion to continue that hearing was granted and the above captioned were cases consolidated and subsequently scheduled for hearing on October 20 and 22, 2008. *See* PELRB Decision No. 2008-191. Thereafter the board heard these matters on October 20 and 22, 2008 at the offices of the PELRB in Concord. The parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Both parties argued their cases at the conclusion of the evidence, and the record was held open until November 14, 2008 to allow the parties to submit post hearing briefs.

FINDINGS OF FACT

1. The Association is the board certified exclusive representative for Derry Police Officers below the rank of Sergeant pursuant to RSA 273-A:10.
2. The Town of Derry is a public employer within the meaning of RSA 273-A:1, X.
3. The Association and the Town are parties to a July 1, 2007 to June 30, 2008 Collective Bargaining Agreement (the "2007-08 CBA"). Town Ex. 1.
4. Officer Michael Houle is the president of the Association. Officer Houle has 22 years of experience as a police officer, the last 18 of which have been with the Town of Derry police Department. Officer Houle's service includes 13 years in the Patrol Division and 9 years in the Detective Bureau.
5. Prior to 2008 officers serving on the bike patrol did not wear reflective vests. Instead, their clothing, including collared short sleeve shirts, contained reflective material, and their bicycles also displayed reflective devices.

6. On September 5, 2006 the Association's Safety Committee requested that the Department replace existing orange traffic reflective vests with ANSI class 2 high visibility yellow vests to create a safer work environment for officers working accident scenes or traffic detail. Town Exhibit 2. On September 11, 2006 Chief Garone responded in part by stating that he hoped "to receive the vests in the very near future at which time they will be issued. We are also making the necessary changes in our uniform policies to address the new authorized garment."

7. The reflective vests were eventually obtained, and Chief Garone decided they should also be worn by bike patrol officers, a requirement that met some resistance from the Association members. Some objected because they believed the vests made them a conspicuous target, a concern related in part to the murder of Officer Michael Briggs, a Manchester Police Officer shot and killed while on bike patrol duty. Some also believed the requirement was the Department's response to the fact that the Association had been an outspoken proponent for the reflective vests and had involved Town administration in their efforts to get Chief Garone's approval of the requested change. Subsequently some bike patrol officers attempted to resign from bike patrol duty but their requests were denied. There was also a decline in the number of officers volunteering for bike patrol duty. At a roll call during this time period Sergeant Morelli commented about the lack of volunteers for bike patrol, stating in effect that individuals running the union wouldn't be there forever and individual officers should start thinking about their own careers.

8. According to Chief Garone, the increase in safety resulting from bike patrol officers wearing the new high visibility vests outweighed the bike patrol officers' complaints and concerns about the new requirement.

9. Paragraph 4 of Article XIX of the parties July 1, 2007 through June 30, 2008 collective bargaining agreement provides as follows:

The Town will provide for the cleaning of fifty-two garments per year (such as one shirt, one trousers)(sic) and in addition, will provide for the cleaning of outerwear twice during the winter season.

10. The fifty-two garment figure recited in paragraph 4 is a reduction from a higher number contained in prior agreements, and in return bargaining unit members received an increase in their clothing purchase allowance.

11. The Department tracks the use of the cleaning allowance, and in the past individual officers have been required to pay for any use in excess of the allowance. Association Exhibit D.

12. In 2008 Department officials noticed that some officers were using the clothing allowance for the first time and that other officers were close to maximizing their clothing allowance. The administration ultimately learned that officers were “pooling” or “sharing” their cleaning allowance. This was accomplished by one officer writing another officer’s name on the paperwork necessary to use the cleaning allowance in order to charge the use to another officer’s account.

13. Chief Garone believed that officers who were sharing the cleaning allowance might be committing forgery or theft by deception and that the practice also called into question the integrity of the involved officers. Chief Garone concluded that an internal investigation was justified, and between May 1 and May 5, 2008 Captain Thomas and Captain Feole interviewed 8 officers concerning the “pooling” of the cleaning allowance.

14. Shortly before the first interview Captain Thomas approached Officer Jackson and requested his presence in a Department interview room. Captain Thomas told Officer Jackson that his role would be union steward. Shortly thereafter Captain Thomas, Captain Feole, and

Officer Jackson gathered in the interview room and Officer Jackson was briefly informed about the subject of the interviews.

15. Captains Thomas and Feole did not offer to reschedule the interviews to some other time, nor did they ask Officer Jackson if some other Association representative should attend the interviews in his place. Officer Jackson did not request a rescheduling of the interviews, he did not request the attendance of a different Association representative in his place, and he did not object to the fact that Captain Thomas had contacted him and requested his participation as the Association's steward. Likewise, the officers being interviewed did not object to Officer Jackson's service, request a different Association representative, or request that the interviews be rescheduled to a later date. All officers being interviewed were provided with a written Garrity warning. Town Exhibit 19.

16. Officer Jackson had been designated as an Association steward for more than a year, was designated on the Association bulletin board at having his status, but he had never served as an Association representative in connection with any disciplinary matters and had never received any labor relations training.

17. On June 3, 2008, after the internal investigation interviews were complete but before the issuance of the report providing the results of the investigation, Chief Garone consulted with County Attorney James Reams about the internal investigation and whether *Laurie*¹ issues were implicated. Based upon his discussion with attorney Reams, Chief Garone concluded there were no *Laurie* issues. Town Exhibit 12.

18. During the course of the interviews Captains Thomas and Feole instructed the officers not to discuss the subject of the interview with other officers. Officer Jackson understood that he was prohibited from discussing the ongoing interviews with Officer Houle

¹ *State v Carl Laurie*, 139 N.H. 325 (1995).

because, according to Captain Feole, Officer Houle might be subject to investigation. Officer Houle was eventually interviewed, but he was not ordered to refrain from discussing the subject of the interview with other officers. Association Exhibit C.

19. On June 9, 2008 Chief Garone issued written reprimands to eight officers for either “having allowed another officer to utilize your individual laundry cleaning allowance in a manner intended to conceal that activity from the Department” or “having utilized another officer’s individual laundry cleaning allowance in a manner intended to conceal that activity from the Department.” In each case, Chief Garone concluded that the officers had engaged in “conduct unbecoming an officer” and that repeating the behavior in the future could result in “further discipline, up to and including termination of employment.” The total value of the cleaning allowance in dispute is less than \$100. Town Exhibit 18.

20. The Association has grieved Chief Garone’s written reprimands, and their appropriateness is the subject of arbitration proceedings.

21. After the completion of the internal investigation concerning the pooling of the cleaning allowance, and prior to June 30, 2008, Detective Boudreau expended most, if not all, of his remaining cleaning allowance. This involved the cleaning of more garments in a short period of time than might be expected if Detective Boudreau had used his cleaning allowance on a regular basis throughout the contract year.

22. In early July, 2008 Lieutenant Surette told Detective Boudreau that the manner in which he had used his cleaning allowance was childish and immature, reflected poorly on his decision making ability, that Lieutenant Surette believed the Association had instructed Detective Boudreau to use up his remaining cleaning allowance and in effect Detective Boudreau should have ignored the Association’s request. Lieutenant Surette also commented that the

administration could apply Department rules and regulations in the same way. Lieutenant Surrette made similar comments to Detective Turgeon, who according to Lieutenant Surrette understood his point and did not make an issue of it.

23. Chief Garone posted a notice of Sergeant Position in May, 2008. The posting describes the examination process (written – 40%, oral board – 20%, and staff evaluation – 20%) to be used to establish a one year eligibility list of candidates, and provided instructions to interested candidates. Town Exhibit 4.

24. Lieutenant Twiss assembled a three member oral board consisting of Lieutenant Cunha from the Manchester Police Department, Lieutenant Hansen of the Nashua Police Department, and Lieutenant Brown of the Concord Police Department. Shortly before the oral board process, Lieutenant Twiss provided the oral board with questions prepared by Captain Feole and contained in Town Exhibit 6. Although members of past oral boards may have been supplied with questions, the practice was not routine. Lieutenant Twiss also informed the members of the oral board that they could ask follow up or their own questions. The oral board's reports and comments concerning Officer Houle are contained in Town Exhibits 7 and 9.

25. Department rules and regulations do not establish any particular order for the written exam, the oral board, or the staff evaluation. In the past, the staff evaluation has typically preceded the oral board. In the present case, the staff evaluation component of the exam occurred after the oral board. The staff evaluation is usually conducted as a joint meeting of Department Sergeants, Lieutenants, and Captains at which the various candidates are discussed and evaluated. As part of this process each staff member prepares an individual evaluation.

26. Staff evaluations of Officer Houle are contained in Town Exhibit 8. Captain Thomas and Captain Feole gave Officer Houle a score of 17 in their staff evaluation. Such a low score is

unusual, and it was significantly lower than the scores awarded by other staff evaluators, as the next lowest score was 75. Association Exhibit E.

27. The results of the Sergeant's exam were distributed in July, 2008 and Officer Houle placed third among the six candidates who took the Sergeant's exam. Town Exhibit 5. Officer Houle's final position would not have changed even if Captains Thomas and Feole had provided higher or even perfect scores in their staff evaluations.

28. In October 2005 Captain Thomas prepared a memorandum concerning staff modifications. Town Exhibit 13. The memorandum states the 17 officers are "eligible to retire with 20 or more years of service" and outlines a plan to address anticipated retirements, including a "plan to develop officers for lateral assignments and promotions."

29. Article XXIV – Management Rights of the July 1, 2007 through June 30, 2008 collective bargaining agreement provides as follows:

Except to the extent that there is contained in this Agreement an express and specific provision to the contrary, all of the authority, power, rights, jurisdiction, and responsibility of the Town and the Police Department are retained and reserved exclusively to the Town and the Chief of Police, including but not limited to, the right...to change, reassign, abolish, continue, and divide existing job classifications for all jobs, to require from each employee the efficient utilization of his services; to hire, promote, assign, and retain employees...

30. In late July, 2008 Officer Houle was reassigned from the Detective Division to the Patrol Division, effective August, 23 2008. Officers in the Patrol Division work a 4-2 schedule, and Officer Houle was put on the 2:30 p.m. to 11:00 p.m. shift. In the Detective Division Officer Houle had worked a 5-2 Monday through Friday schedule on the 3:00 p.m. to 11:00 p.m. shift. He also frequently worked on weekends.

31. In August, 2008 Captain Thomas rejected Officer Houle's subsequent request to be assigned to the 5:30 p.m. to 2:00 a.m. shift, indicating that Officer Houle could bid for a shift at

the time of the fall shift change. Officer Houle eventually obtained a different shift at the fall shift change.

32. At the time of Officer Houle's reassignment, 2 patrol officers had returned to duty as school resource officers, and there was also a need to make room in the detective bureau for younger detectives, so they would have adequate training and experience when more senior detectives retired.

DECISION AND ORDER

DECISION SUMMARY

Based upon the Derry Police Department's conduct of an internal investigation into the use of a contractual benefit as well as other Department action, the board finds that the Derry Police Department committed an unfair labor practice because it improperly restrained, coerced and interfered with bargaining unit members in the exercise of rights conferred by RSA 273-A and also sought to dominate or interfere with the administration of the Association, all in violation of RSA 273-A:5, I (a), (b) and (c). The board also finds that the Department violated RSA 273-A:5, I (h) and breached the 2007-08 CBA by using non-contractual procedures to address a contract dispute. The administration of the Derry Police Department is ordered to cease and desist from such practices, to permanently remove the results of the internal investigation from the personnel files of the affected officers, and to remove from Officer Houle's files and Department records the low scores Captains Thomas and Feole awarded during the Sergeant's exam. The Association's remaining complaints concerning the mandatory use of a reflective vest on bike patrol, the general administration of the Sergeant's exam, Weingarten issues, and the reassignment of Officer Houle from the detective bureau to the patrol division are dismissed.

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I. PELRB jurisdiction is proper in this case as the Association has alleged violations of RSA 273-A:5, I (a), (b), (c), (e), (g), (h), and (i).

DISCUSSION:

Much of the controversy in this case stems from Paragraph 4 of Article XIX in the parties' July 1, 2007 to June 30, 2008 collective bargaining agreement ("2007-08 CBA") concerning a laundry allowance:

The Town will provide for the cleaning of fifty-two garments per year (such as one shirt, one trousers)(sic) and in addition, will provide for the cleaning of outerwear twice during the winter season.

As required by RSA 273-A:4, the 2007-08 CBA also contains a "workable grievance procedure" which culminates in final and binding arbitration. The contract also contains a less formal "Consultation" provision, set forth in Article IV, which contemplates informal discussion of "matters of mutual concern." Both of these contractual mechanisms appear well-suited to address possible contract disputes, including those that might concern the laundry allowance. In 2008 there was such a dispute, as by the end of April the Department knew that some members of the bargaining unit were "pooling" their laundry allowance - while the Association did not affirmatively notify management that it believed bargaining unit members were entitled to pool the laundry allowance, neither did the Association conceal the pooling activity, as evidenced by the manner in which bargaining unit members completed related paperwork and the relative ease with which management detected the practice.

The logical course of action for the Department to follow at this point according to the 2007-08 CBA and generally accepted practices applicable to collective bargaining agreement

disputes was to take steps such as the issuance of a Department memorandum on the subject forbidding the practice and requiring reimbursement so that the dispute could be addressed through the grievance process if necessary. Proceeding in this manner would also have been consistent with past Department action taken when laundry allowance overcharge issues had arisen, in response to which the Department required reimbursement from officers who had exceeded their allowance. Alternatively, the Department could have arranged a consultation with Association representatives to discuss the situation. Instead, in what even the Department admits was a novel departure from such contractual procedures, Chief Garone authorized an internal investigation.

The internal investigation was followed in July, 2008 by several encounters between Lieutenant Surrette and bargaining unit members Detective Boudreau and Detective Turgeon, also concerning the use of the contractual laundry benefit. In both cases, Lieutenant Surette in effect counseled the officers against exhausting a contractually negotiated benefit during the final days of the contract, plainly indicating that any Association advice provided to the officers to this effect should have been and should be disregarded.

The autonomy of employee organizations, and the right of public employees to participate in such organizations and in the process of securing and benefiting from collective bargaining agreements without employer reprisal or interference, are recognized and protected in several provisions of RSA 273-A:5, I:

It shall be a prohibited practice for any public employer to:

- (a) to restrain, coerce or otherwise interfere with its employees in the exercise of rights conferred by this chapter;
- (b) To dominate or to interfere in the formation or administration of any employee organization;

(c) To discriminate in the hiring or tenure, or the terms and conditions of employment of its employees for the purpose of encouraging or discouraging membership in any employee organization.

(h) To breach a collective bargaining agreement.

The board concludes that the Department used an internal investigation, a non-contractual process, to retaliate against Association membership in general and Association leadership in particular, to intimidate Association members, to alienate Association members from Association leadership, to improperly dissuade Association members from challenge to or disagreement with management on matters of contract interpretation and administration, to interfere with the administration of the Association, and to obtain otherwise unavailable information about the conduct of Association business. The Department's conduct of an internal investigation into the possible overuse of a contractual benefit, involving in total less than \$100, was also a clear message to all bargaining unit employees of the administration's displeasure, and all bargaining unit members were placed on notice that they could be subjected to similar treatment.

Lieutenant Surette's actions were a continuation of what we find to be management's anti-union animus which included the theme that Association members needed to demonstrate stronger support for and allegiance to the interests of their employer at the cost of less support for the rights and interests secured to them by RSA 273-A in general and the specific benefits obtained through the collective bargaining process or risk adverse impacts on career advancement opportunities. Lieutenant Surette's actions are a further example of the Department's improper interference with its employees in the exercise of rights conferred by the statute as well as dominance and interference in the administration of an employee organization.

The board reaches similar conclusions about Sergeant Morelli's statements to officers concerning problems staffing bike patrol and the low scores Captains Thomas and Feole awarded

to Officer Houle in staff evaluations completed during the Sergeant's exam. When confronted with a diminished interest among officers in bike patrol duty, Sergeant Morelli addressed the situation with statements to the effect that the involved officers should reconsider Association advice or guidance on such matters as it could be detrimental to their careers. While Sergeant Morelli's general criticism about an officer's refusal to volunteer for certain duty or requests for reassignment from unpopular duty may have some validity, the manner in which he linked his statements to the Association and in the process suggesting that an officer's perceived connections to the Association could negatively impact career opportunities was improper.

As to the low scores Officer Houle received on the Sergeant's exam, it is true that these scores did not change the exam's outcome, but the actions of Captains Thomas and Feole are still subject to scrutiny. The low scores are undoubtedly attributable at some level to legitimate concerns Captains Thomas and Feole have about Officer Houle as well as personal animus between the involved individuals. However, in this case, based upon the internal investigation and its aftermath, the unusually low level of the scores and the fact that they were identical, the board concludes that Captains Thomas and Feole's staff evaluations of Officer Houle were primarily based upon their and the Department's negative opinion about the Association and Officer Houle's individual role as Association president. The board recognizes that leadership qualities and general support of the Department are legitimate qualifications and obvious factors to consider when evaluating candidates. At the same time, however, Captains Thomas and Feole cannot evaluate Officer Houle on the basis of a negative judgment about the Association and the manner in which Officer Houle has discharged his responsibilities as an official Association representative relative to the competing interests of the public employer. Their conduct

represents a restraint and interference with Association members and the administration of the Association.

The board resolves all remaining issues in favor of the Department, including Association claims that Officer Houle's reassignment to Patrol, the reflective vest requirement on bike patrol, and the organization and conduct of the Sergeant's exam² constituted illegal anti-union animus. In Appeal of Prof. Firefighters of E. Derry, 138 N.H. 142 (1993), the court adopted the federal standard for deciding whether an employer's actions were improperly motivated by a desire to retaliate against an employee because of union activity:

[T]o establish an unfair labor practice under federal law, the union must prove by a *preponderance of the evidence* that the discharge or elimination was motivated by a desire to frustrate union activity. The employer can meet the union's evidence of retaliatory motivation with its own evidence, as an employer's motivation is a question of fact to be determined by the board from the consideration of all the evidence. If the board finds by a preponderance of the evidence that the employer was unlawfully motivated to some degree, an employer can still avoid being adjudicated a violator of federal law by proving by a preponderance of the evidence that regardless of the unlawful motivation, the employer would have taken the same action for wholly permissible reasons.

Id. at 144-145 (emphasis in original)(citations omitted). In this case, regardless of any unlawful motivation, the Department has established by a preponderance of the evidence that it would have administered the Sergeant's exam, reassigned Officer Houle to patrol, and required bike patrol officers to wear the reflective vest for wholly permissible reasons. The Department provided a valid explanation for the changes in the sequence of the different components of the Sergeant's exam. With respect to Officer Houle's reassignment to patrol, the Department has broad discretion in the direction and assignment of personnel under RSA 273-A:1, XI and the Management Rights provision of the 2007-08 CBA, and it offered legitimate reasons for the reassignment which the board finds are sufficient to avoid the charge of anti-union animus.

² With the exception of the identical low scores awarded by Captains Thomas and Feole, as already discussed.

Likewise, Chief Garone had legitimate safety based reasons which justify his requirement that bike patrol officers wear the reflective vests.

As to the operation of *Weingarten* rights in this case, see *National Labor Relations Board v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), the Department argues that the board should find that such rights do not apply under New Hampshire public sector labor law or, alternatively, that the Department has not violated any rights the Association members may enjoy. At the time in question, the Department in fact identified Officer Jackson as an Association steward, requested his attendance at the interviews in that capacity, and provided him with information about the subject matter of the interviews, thereby behaving as though the officers being interviewed were entitled to union representation. As reviewed in *Appeal of Exeter Police Association*, 154 N.H. 61, 64 (2006), *Weingarten* rights arise when an employee requests union representation in connection with proceedings that may result in discipline. Although in the *Exeter* case the court did not decide “what, if any, *Weingarten* rights attach in New Hampshire,” this board has recognized employees’ rights to such representation in a number of its decisions. *Id.* at 66. Therefore, it is the board’s determination that consistent with its prior decisions, the officers being interviewed were entitled to union representation upon request, and the board further finds that the Department did not violate their right to such representation in this case.

At the time of the internal investigation interviews the involved officers accepted union representation from Officer Jackson and they did not request union representation from someone other than Officer Jackson. If either Officer Jackson or the involved officers believed that the Department was infringing upon their rights under *Weingarten* because of Officer Jackson’s involvement or due to other reasons, it was incumbent upon them to request a delay in the interview process and/or the attendance of a different Association representative. Such requests

were not made and the Department could justifiably conclude that Officer Jackson and the involved officers were satisfied with the arrangements. The board rejects the Association's argument that the Department had an independent duty to do more than it did on the facts of this case. The Department cannot be blamed to the extent the Association believes Officer Jackson was in fact not prepared or qualified to act as a union steward at the interviews - the selection, training and education of such representatives is the Association's business.

In conclusion, the Department does not have the right to use the tactics it employed in this case to interfere with the administration of the Association, control or influence bargaining unit members on matters of contract interpretation, or to usurp or undermine the Association or its members' confidence in or allegiance to the Association. The Department's actions constitute unfair labor practices in violation of RSA 273-A:5, I (a), (b) and (c). The board also finds that the Department's use of a non-contractual process to address the laundry allowance dispute constituted a breach of the parties' collective bargaining agreement and violated RSA 273-A:5, I (h)(to breach a collective bargaining agreement). This particular dispute should have been addressed through the discussed contractual procedures. The board cannot sanction the use of the internal investigation process to address contract disputes like the one at issue in this case.

In accordance with the foregoing, the Association's complaint that the Department has committed unfair labor practices in violation of provisions of RSA 273-A:5, I is sustained in part and dismissed in part. The Department is ordered to cease and desist from the practices which the board has found to be in violation of the statute, and in particular to refrain from further attempts to interfere with Association members in the exercise of their contractual and statutory rights, and to refrain from undermining, influencing or limiting the extent to which bargaining unit members rely upon Association leadership and guidance in matters concerning their rights

under RSA 273-A in general as well as matters of contract interpretation and administration in particular by express or implied threats of adverse impacts on individual employee's career opportunities. The administration is also ordered to permanently remove the results of the internal investigation from the personnel files of the affected officers and the low scores Captains Thomas and Feole awarded to Officer Houle during the course of the Sergeant's exam from Officer Houle's files and other Department files. The Town of Derry shall post this decision for thirty days in a clearly visible location calculated to inform all members of the police department, such as a police department employee bulletin board, and shall file a certificate of posting with the board within ten days.

So ordered.

Signed this 18th day of March, 2009.

/s/ Jack Buckley
Jack Buckley, Chair

By unanimous vote. Chair Jack Buckley presiding with alternate Board Members Kevin E. Cash and Sanford Roberts, Esq. also voting.

Distribution:

J. Joseph McKittrick, Esq.
Thomas M. Closson, Esq.