



NH Supreme Court declined appeal of this decision on January 3, 1991, NH Supreme Court Case No. 90-481.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, S.E.I.U., AFL-CIO, CLC, LOCAL 1984 (BEN MOZRALL)

Petitioner

v.

STATE OF NEW HAMPSHIRE, DEPARTMENT OF SAFETY

Respondent

CASE NO. S-0314:2

DECISION NO. 90-38

APPEARANCES

Representing the State Employees' Association of New Hampshire, S.E.I.U., AFL-CIO, CLC, Local 1984 and Ben Mozrall:

Michael C. Reynolds, Esq., General Counsel

Representing the N. H. Department of Safety:

Stephen J. Judge, Esq., Asst. Attorney General

Robert E. Dunn, Esq., Asst. Attorney General

Also in attendance:

Lynn Presby
William R. Cray, Jr.
B. A. Flanders
Tom Hardiman
Richard Flynn
Richard G. Tuck
George L. Iverson
Douglas Hatfield, Esq.

Lesley E. Warren
Chris Henchey
James V. Carr
John McMasters
Mark Furlone
Pam Manus
Stef. Eaton
Thomas Kennedy

BACKGROUND

On November 22, 1988, the State Employees' Association of New Hampshire, Local 1984, SEIU, AFL-CIO, CLC (hereinafter referred to as "SEA") through its Counsel, Michael C. Reynolds, Esq., filed charges of improper practice against the State of New Hampshire Department of Safety (hereinafter referred to as "State") on behalf of Sgt. Benjamin Mozrall charging, as follows:

On or about October 20, 1988, Sgt. Mozrall was removed from his duty as Commander of the New Hampshire State Police Special Weapons and Tactics Team (SWAT) with a decrease in duties and title and pending decrease in salary. This move, SEA alleges, was in direct retaliation for certain activities which are protected under RSA 273-A; namely, (a) On April 28, 1988, Sgt. Mozrall was elected President of SEA Chapter #52 (State Police) and on or about August 24, 1988,

Commissioner of Safety Richard Flynn and Major Lynn Presby requested a meeting with Ben Mozrall and proposed certain changes in the work week, method of pay and other terms which would have negatively affected state police employees' hours and wages. At that meeting Sgt. Mozrall expressed his strong disagreement with the proposals and stated he believed the state police membership would not accept such proposal. He consulted with SEA staff which sent a letter to all SEA members within the state police, suggesting, that any attempt to change salary and hours constituted unfair labor practices and that agency heads were without authority to negotiate such issues directly with employees.

(b) The Department of Safety, including the Commissioner, was put on notice that SEA considered the proposal itself to be inappropriate under RSA 273-A and that any attempt to implement such proposal had to go through the proper negotiations procedures.

(c) Sgt. Mozrall polled state police chapter members as well as others who expressed overwhelming opposition to the Commissioner's proposal. He again contacted SEA and the Chief Negotiator wrote back among other things that, "the Department of Safety and Officers of Chapter #52 are prohibited by RSA 273-A from entering into negotiations for purposes of reaching a negotiations agreement on these items", and that Commissioner Flynn had to make such proposals through the State's Chief Negotiator, not through an employee.

(d) Sgt. Mozrall continued to express his opposition to the wage/hour proposal and for such, Commissioner Flynn, Major Presby and other management personnel at the Department of Safety retaliated against him.

SEA alleges violation of RSA 273-A:5, (a), (b), (c), (d), (e), (g), and (h) and states that Sgt. Mozrall has no remedies in this matter except through an unfair labor practice charge as the alleged violations are not covered under the CBA grievance procedure nor under the Personnel Rules, and because of this, PELRB has primary jurisdiction over the matter.

The original charge did not contain specific requests for remedies in this case.

On February 7, 1989, SEA on behalf of Sgt. Mozrall filed an amendment to the original charge and requested a Cease and Desist Order in the harassment and intimidation of the complainant alleging continued actions by the Department of Safety management personnel such as: an order to produce certain records dating back approximately 10 years; denial of permission to leave the State; refusal to give Sgt. Mozrall access to his personnel file; and, prohibiting him from going to Headquarters without first obtaining permission to do so. SEA requested PELRB make such orders and relief as may be just.

The State on December 8, 1988 through Counsel, Stephen J. Judge, Asst. Attorney General, answered the complaint by denying that any action was taken against Sgt. Mozrall in retaliation for protected activities and objected to the term "proposal", as the meeting held on or about August 24, 1988 was an informal discussion and not a "proposal" made that would have negatively affected state police employees hours and wages, stating that SEA mistakingly characterized the discussions as a "proposal".

Hearings on this matter was scheduled but delayed on a number of occasions at the request of the parties. Hearings were held beginning on August 10, 1989 and continuing on October 4th, 5th, 13th and November 7th and 8th, 1989.

The case involved three (3) issues:

1. Is management within its rights to assign its personnel to various positions as set forth in RSA 273-A:1, XI, "Managerial Policy"?
2. Were the actions taken by the Commissioner of Safety and other senior management personnel in relieving Sgt. Mozrall from assignments as Fleet Maintenance Officer, Chief Firearms Instructor, Armorer and SWAT Commander prompted and taken in retaliation for union activities?
3. Did the internal departmental investigation of issues discussed at a local SEA Chapter #52 meeting, held off premises, violations of RSA 273-A:5, I, (a) and certain rights granted to public employees?

Following is a summary of the arguments presented by the parties at the hearing.

Sgt. Mozrall became a state trooper in 1970 and received various promotions in '73, '76, '77 and '80. Some of his assignments were as Fleet Maintenance Officer, Armorer, Chief Firearms Instructor and later as SWAT Commander. In 1977, he was promoted to the rank of Corporal, then to Sgt. Technician. In 1980, the Commander of the State Police assigned him as driver for Governor Hugh Gallen and in that year at the request of the Governor, he was assigned the rank of Sgt. Specialist.

Evidence at the hearing indicated that whenever a trooper is assigned as driver to any governor, it is considered special duty and with it goes certain rank and pay considerations. Testimony also indicated that generally when such special duty ceases, the special rank and pay also ceases; however, during the period when Col. Paul O'Leary was Director of the Division of State Police, Sgt. Mozrall was permitted to draw the special monetary allowance for the specialized duty although the duty as driver for the Governor no longer existed. Sgt. Mozrall did, however, continue his duties as Armorer, Firearms Training Officer and Vehicle Maintenance Officer for which no special rank or pay was authorized.

In 1986, a new Director of State Police, Col. George Iverson took over as the head of the Department and Sgt. Mozrall was removed from his assignment as Fleet Maintenance Officer "because of dissatisfaction with his performance, including showing favoritism in the assignment of vehicles". Undisputed testimony indicated that assignment of vehicles was made on the basis of friendship rather than seniority as had generally been presumed to be the practice; however, the assignment of vehicles did not in itself become violative of the duty assignment other than the method in which he accomplished the assignment which became personalized rather than strictly on a seniority and impartial basis.

At the time that Sgt. Mozrall was removed as Fleet Maintenance Officer, he was transferred to Troop D where he continued his normal police duties as the Troop Sergeant.

In late '87 and early '88, the Director of State Police, Col. Iverson removed Sgt. Mozrall as Armorer and Firearms Instructor because of dissatisfaction with the way he was performing his duties with specific reference to the method

in which his records were kept. A case cited was the loss of one weapon which had been stolen and testimony indicated that records were inadequate and precluded proper tracing of the weapon.

In early '88, testimony showed that Sgt. Mozrall utilized a state police cruiser for out-of-state travel without permission or notification as required by department policy. In another instance, he requested permission to attend a meeting in Arizona, was denied permission but still attended.

In October of '89, he was removed from his assignment as SWAT Commander and replaced by another state police officer that Sgt. Mozrall alleged was not qualified to take over the position.

Some testimony was offered and discussion at length regarding the potential eligibility for retirement of Sgt. Mozrall but no evidence was presented that retirement was requested or considered but rather evidence was presented that retirement could affect staffing.

The specialized pay which Sgt. Mozrall had enjoyed since his assignment as the governor's driver was continued without question until December 30, 1988 when it was taken away on the basis that he no longer performed the specialized duty. As evidence and reasoning behind this action, the State cited the policy and practice that certain other specialized duties, such as the K-9 Team, the TAR Team and narcotics unit all receive specialized pay during the assignment of those duties and upon completion of these assigned duties, the specialized pay is no longer authorized. Continuation of the special duty pay after completion of the special duty assignment can be attributed to lax administration by the Department or favoritism.

Testimony was that the extra pay paid to Sgt. Mozrall was upon promotion to Sgt. Specialist as driver for Governor Gallen and not for his combination of duties as armorer, firearms training officer, fleet maintenance officer or SWAT commander. The basis for his removal as SWAT commander was largely based on his alleged poor record maintenance and failure to provide records when requested by certain departmental officers.

The State agreed that the request was not sufficiently responded to by Sgt. Mozrall in any formalized form and that much of the materials had been maintained as his personal records at his home and not at police headquarters; however, this in itself cannot be considered a violation of any operating procedure as no evidence was presented that a specific procedure had been established by the Department for the maintenance of these records. Sgt. Mozrall admitted to being a recordkeeper of questionable capabilities and evidence did indicate that there were minimal departmental requirements for recordkeeping.

At a meeting in August of '88, Commissioner Richard Flynn did discuss with Sgt. Mozrall, the union president, a potential salary and scheduling program for the purpose of getting his reaction. This discussion was termed by SEA as an unfair labor practice as such discussions should have been directed to the Chief Negotiator for SEA. Evidence at the hearing indicated that in fact this discussion had taken place with no intent, or attempt to influence or conduct negotiations; that the management of the Department of Safety were willing and had been willing at all times to discuss any matter with the union or its representative without reservation and this matter was accordingly discussed as a possible item for future negotiations.

As a result of the discussions, a meeting was held between the representatives of the bargaining unit, SEA and the Commissioner and resulted in the matter being labeled a "dead" issue. This conclusion was reached on October 24th at a meeting requested by SEA's Tom Hardiman, Chris Henchey and Commissioner Flynn and Major Presby. No grievance was filed because of this action under the terms of the CBA. The matter could have been disposed of under Article XIV 14.1.2 of the existing agreement which appears to urge informal discussions of potential grievable issues with one's employer.

The charge also alleged that Sgt. Mozrall was unreasonably directed to refrain from coming to headquarters without prior approval, however the CBA, paragraph 12.3 reads, as follows:

"The Employer shall authorize a reasonable amount of time during the regular working hours, without loss of the time or pay, to permit the Steward to carry out his responsibilities in accordance with the provisions of this agreement. The Association agrees that it shall guard against the use of excessive time in handling such responsibilities. Each Steward, before leaving his/her assigned work area to transact appropriate Association business, shall first obtain the consent (which consent shall not be unreasonably withheld) of his/her immediate supervisor; upon entering a work area, other than their own, the Steward shall first advise the appropriate supervisor of his/her presence and specify the name(s) of the employee(s) to be contacted."

Evidence offered at hearing indicated that permission had never been denied Sgt. Mozrall to enter headquarters for the purpose of discussion union business. Verbal testimony of the senior management officials indicated awareness of the requirement and obligations of the public employer with respect to that section of the CBA and supported the process without reservation.

Counsel for Sgt. Mozrall argued at length that the relief from the various specialized duty assignments by management was prompted in retaliation for his union activities and not for any specific actions; that the statement made by Sgt. Mozrall to members of the state police regarding the purchase and issuance of certain type of weapons was only "informative" and not in any way knowingly erroneous information and that the subject of new weapons was of great interest and concern to all members of the force.

The State argued that Sgt. Mozrall knew the weapon issue was a "hot" issue and of great concern to the troopers and did convey incorrect information to them as he, Mozrall, was a member of the Department's committee evaluating a possible new weapon purchase.

Counsel for Sgt. Mozrall argued at length concerning the Department's conduct of an inhouse investigation of a union meeting, held off state property, at which the weapon issue was discussed and stated that such investigation of union meetings was violative of protected activities under RSA 273-A. The results of the union meeting had been reported to the Director of State Police by a trooper, a member of the bargaining unit, who had attended and was inquiring about, "What is going on with the purchase of these new weapons?"

The State stated that Sgt. Mozrall had deliberately conveyed misinformation regarding the purchase of new weapons and caused unrest in the Department and

due to the misrepresentation, an investigation was conducted with allowed procedures.

Counsel for Mozrall throughout the hearing argued that actions in the removal from assignments of Sgt. Mozrall were in direct retaliation for his union activities and attempted to weave a web of circumstantial evidence as cause for the action. The action was not factually supported; quite to the contrary, the oral testimony of witnesses, the majority of whom gave no evidence of union bias, evidenced cooperation with the union and its officers and the maintenance of an open door policy, however, abuse of rights granted could not be tolerated.

FINDINGS OF FACT

Based on all oral testimony, written evidence and exhibits submitted, PELRB makes the following findings which are substituted for the parties requests.

1. Between 1970 and 1989, Sgt. Mozrall was assigned to several positions with special assignments in the Department of Safety; namely, Fleet Maintenance Officer, Armorer, Chief Firearm Instructor, SWAT Commander and Governor Gallen's driver. During this period, he was promoted to Corporal then to Sgt. Technician and as driver for the Governor, to Sgt. Specialist for which special pay was authorized. Assignments were continued under Director O'Leary.
2. In January of '86, Captain George Iverson replaced Colonel O'Leary as head of the State Police.
3. Sgt. Mozrall was removed as Fleet Maintenance Officer on the basis of favoritism in the assignment of vehicles and undisputed dissatisfaction with his job performance; and, upon his removal from that duty he was transferred from headquarters to Troop D.
4. In late '87, Sgt. Mozrall was removed as Armorer and Firearms Instructor because of his duty performance and recordkeeping. (Sgt. Mozrall admitted that his recordkeeping abilities were not the best and could be questioned, however, it was sufficient to get the job accomplished.) He also admitted to violating State Police Rule 4.7,1 concerning the destruction of records.
5. Sgt. Mozrall was removed as SWAT Commander and replaced by a junior member of the SWAT Team. During his tenure, Sgt. Mozrall attained extensive recognition as SWAT Commander and numerous exhibits were presented showing the many letters of commendation he received for his performance in that position. The assignment as SWAT Commander did not, nor does it now, carry a special extra pay.
6. The extra pay received by Sgt. Mozrall was for his appointment as driver to Governor Gallen which carried a Sgt. Specialist grade.
7. Commissioner Flynn did discuss with Sgt. Mozrall salaries and scheduling which SEA alleged was an attempt to negotiate matters without the official bargaining representatives. The label "negotiations" was not supported by the evidence; at best, it can be characterized as an informal discussion with the union president, action which is permitted and encouraged under the CBA Grievance Procedure.
8. At a meeting in October '88, requested by SEA, which was attended by Department of Safety management personnel, the union president and others, the salary

schedules were again discussed and the results were labeled a "dead" issue and is considered as such.

9. Sgt. Mozrall had been ordered to stay away from headquarters unless he received prior approval as he had often appeared unannounced to discuss various items with officers, action contrary to CBA ¶12.3. No evidence was offered that permission had ever been denied Sgt. Mozrall from going to headquarters on union business and no evidence presented that any officer in senior management had ever refused to discuss union business with him.
10. The subject of the selection of Ruger Automatics was of intense interest to the troopers and Sgt. Mozrall knew well of its importance. He did assume a gesture of placing his hand on his hip in response to a question to the SEA representative which indicated that a selection of weapon had been made but no verbal confirmation was made. As a result, the conclusion reached was that "they had chosen Rugers" which served as misrepresentation to the union members at the Chapter meeting.
11. The misinformation imparted by Sgt. Mozrall about the weapons was corrected in a memo from Colonel Iverson on March 13, 1989 to "All Sworn Personnel". The memo was generated by a complaint to Colonel Iverson from one member of the bargaining unit.
12. Investigation of the statement regarding the selection of Rugers at the union meeting was conducted by the State Police in accordance with their rules covering internal investigations, 8.0 Discipline. Testimony supported the allegation that the weapon subject, at best, was controversial and could be termed inflammatory at any meeting of the police officers.
13. As a member of the committee reviewing weapons, Sgt. Mozrall was very familiar with the process of weapon selection and he did make misleading statements not made on fact but rather on the gesture of one individual.

DECISION AND ORDER


- A. The Director of State Police, Department of Safety, did not violate the provisions of RSA 273-A, XI. Under Managerial Rights, the Department possesses the right to determine the organizational structure of the Department and the assignment of its personnel.
- B. SEA on behalf of Sgt. Mozrall failed to prove that any action taken with respect to assignment changes were taken in retaliation for Sgt. Mozrall's union activities.
- C. The cessation of the special pay for special duty was in accordance with departmental policy. Sgt. Mozrall had been permitted to continue to receive special pay because of special treatment on the part of certain prior administrators. It is established that certain special duty assignments command additional pay which is discontinued upon relief of such duty.
- D. The investigation of the union meeting was unwarranted even though certain statements made could be considered false and inflammatory.

PELRB finds the Department of Safety did not take any assignment actions, including the reduction in pay because of Sgt. Mozrall's union activities, therefore, the finding of improper practice for this action is DISMISSED.

The Department of Safety (N. H. State Police) did commit unfair labor practice by its investigation of the union meeting and for that action, PELRB finds them GUILTY, a violation of RSA 273-A:5, I (a).

The Department of Safety (N. H. State Police) is HEREBY ORDERED to CEASE and DESIST from any future investigation of any union meetings.

Signed this 18th day of July, 1990.


EDWARD J. HASELTINE, Chairman

Chairman Edward J. Haseltine and Member Seymour Osman voting majority. Member Daniel Toomey dissenting.

DISSENTING OPINION

I dissent from the decision of the majority for the following reasons:

It must be understood that a union is a legitimate organization, separate and distinct from the management of the workplace. If the employees identified with management completely, totally shared its values and goals and believed all interests, workers' and managers', were exactly the same, then there would have been no impetus to organize into a separate hierarchy. But the New Hampshire State Police did organize and they did elect their own separate hierarchy and clearly this process was recognized by the State of New Hampshire and addressed in its laws.

The activities of a union officer are "protected activities" under the law. A union officer, when acting in his official capacity, even though he or she is on duty, must be viewed as wearing a "separate hat" and be treated as such and not as a subordinate. In addition, a union meeting is a protected activity where union members have the right to meet and assemble freely with other members and express any views, arguments and opinions. Their speech or right to assemble cannot be curtailed by the union holding the meeting and certainly not by management who have no legitimate stake in the meeting. Further, a union officer must have access to communicate with management. This access can be subject to reasonable rules, however, such rules must not discriminate against individual union officers nor be administered in a way to obstruct a union officer from carrying out his or her duties.

Discipline administered to a union officer in his or her capacity as an employee must be well documented and should be looked upon with suspicion when it is inconsistent with past practice or timed with instances of aggressive union activity. Even the appearance of disciplining a union officer as a result of his union activity can be seen as interfering in the internal affairs of a union and must be avoided except for compelling reasons.