NH Supreme Court decline appeal of this decision on May 23, 1991, NH Supreme Court Case No. 91-094.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES' ASSOCIATION OF NEW HAMPSHIRE, LOCAL 1984, SEIU, AFL-CIO, CLC and BENJAMIN MOZRALL Complainant v. NEW HAMPSHIRE DIVISION OF STATE POLICE Respondent	CASE NO. P-0713:3 DECISION NO. 90-131

APPEARANCES

Representing SEA, Local 1984 and Benjamin Mozrall:

Michael Reynolds, Esq., Counsel

Representing New Hampshire Division of State Police:

Thomas F. Manning, Chief Negotiator

Also appearing:

Benjamin Mozrall, State Police
Thomas F. Kennedy, Jr., State Police
William McCarthy, State Police
Gary M. Sloper, State Police
Mark Furlone, State Police
Stuart A. Bates, State Police
Richard Wester, State Police
Frederick H. Booth, State Police
Charles A. Gridley, State Police
Lesley Warren, S.E.A.

BACKGROUND

Before hearing the complaint, the Chairman inquired of the parties as to whether or not they identified any conflict of interest of any of the Board members or knew of any other reason which would support any request on their part that any Board member should recuse himself from hearing the complaint. Both parties expressed their willingness to proceed and no formal objection to the composition or jurisdiction of the Board was made by either party.

The State of New Hampshire moved for dismissal on the grounds that the remedy sought by the Complainant, a promotion, is not within the jurisdiction of the Board to grant and that the Complainant has, rightfully, pursued that remedy before the Personnel Appeals Board, and that the Complainant has failed to exhaust his administrative remedies under RSA 21-A and State personnel rules and that for the Board to hear this complaint would be a violation of PELRB Rule Pub 304.01 (a) (1). The Board acknowledged that it did not have jurisdiction to order promotion of the Complainant and, therefore, ruled that it would not hear testimony on the issue of promotion. It denied the Motion for Dismissal on the grounds that it did have jurisdiction over other elements of the complaint which allege unfair labor practices and those elements are not subject to PELRB Rule Pub 304.01 (a) (1).

Hearing in this matter was held on October 26, 1990 at the PELRB office in Concord, New Hampshire.

FINDINGS OF FACT

After considering all exhibits and oral testimony the Board makes the following findings and substitutes them for the requests of the parties:

1. On February 20, 1989, the Complainant was injured during training, which injury required medical treatment and which caused the Complainant to be on leave from the date of injury or the date following the date of injury and preventing Complainant from undertaking normal duties.

2. On April 17, 1989, the Complainant, acting in his capacity as President of Chapter 52, N.H.S.E.A., the Division of State Police, Chapter of the New Hampshire State Employees Association, sent a letter of complaint to Colonel George L. Iverson, Director of State Police, in reference to a newsletter being written and circulated in Troop B. This letter was acknowledged by Colonel Iverson on April 27, 1989, 10 days later, and the complaint was responded to as evidenced by Colonel Iverson's letter to the Complainant dated May 29, 1989, 40 days after filing of the complaint. The complaint was evidenced by the Complainant's letter of April 17, 1989, was not characterized in the original letter, any subsequent correspondence or at the instant hearing as a formal grievance and no further follow-up or appeal of Colonel Iverson's response to the complaint was brought forth at the instant hearing.

3. On August 8, 1989, the Complainant was asked to respond to an inquiry by Captain Thomas Kennedy as to the progress and status of his medical condition, particularly in light of information that the Complainant had attended National Guard training and had been engaging in private construction work; and, the projected date on which he might return to work. Although the testimony was inconclusive as to what role, if any, the State's workers' compensation office played in initiating or authorizing an inquiry into these matters, it is uncontroverted that this office had authorized the Complainant's attendance at National Guard training. The witness who testified as to information about a State Trooper who performed construction work which had

come from a friend of the witness's teenage daughter, coupled with the witness's knowledge of the Complainant's private construction business was sufficiently credible to support the inquiry into the Complainant's medical status, work activities while on leave and projected date of returning to work which constitutes one element of this complaint. There was no evidence offered nor testimony adduced which showed that any more than one inquiry was made as to these matters or that any adverse action was taken against the Complainant as a result of the Complainant's response to the single inquiry, dated August 10, 1989, two days after the inquiry was posed.

4. On August 31, 1989, the Complainant was given the choice of picking up a cruiser at Headquarters the next day, September 1st, or of using the Troop D spare cruiser on Monday, September 4th, when he returned to work. The Complainant opted to pick up a cruiser at Headquarters and arrived there the next afternoon at 2:45 pm. After a 25 minute wait because the officer he was to see regarding the issue of a cruiser was in a meeting, the Complainant was escorted to the automotive area by a Sergeant Bates, met by a Corporal Gridley, and offered his choice of two unassigned cruisers, one having 90,000 miles and the other having 60,000 miles. The Complainant selected the one with 60,000 miles and, on the same day (September 1, 1989) sent a memorandum of complaint about the cruiser to Colonel Presby (Colonel Presby having succeeded Colonel Iverson in the period since May, 1989). While it was uncontroverted by evidence and testimony that the vehicle selected by the Complainant was removed from service two months later, testimony of the Automotive Shop Supervisor (mechanic) that in his opinion and that of another mechanic that the vehicle had been repaired and was not unsafe to operate was also uncontroverted.

5. On or about January 23, 1990, the Complainant was informed that he had been denied a promotion he had sought. This was stipulated by the Respondent and is not a matter over which the Board has jurisdiction.

6. On or about January 26, 1990, the Complainant was asked by Captain McCarthy why the Complainant had made no traffic stops in an 81 hour period. The testimony on both direct and cross-examination showed that there is an unwritten policy that troopers assigned to traffic duty will have approximated one (1) traffic stop per hour and that there is an expectation of field supervisors in marked vehicles that they will also have made a reasonable number of traffic stops in any given period. Testimony also indicated that the division average was 10-20 traffic stops per month by supervisors. Testimony also showed that no other follow-up discussions were held by Captain McCarthy or any other of the Complainant's supervisors relative to the Complainant's lack of traffic stops nor was there any disciplinary action taken against the Complainant as a result of the single discussion.

7. On or about February 5, 1990, the Complainant was called to a meeting at Headquarters for the purpose of clearing up some conflicts which had occurred recently within the SWAT team, of

which the Complainant was second-in-command. The testimony indicated that even though the Complainant and the SWAT commander, Lt. Furlone, had met three days earlier to resolve the conflicts, the conflicts had come to the attention of Major Sullivan from another source as well as from an earlier memo written by Lt. Furlone and it was out of concern for a conclusive resolution that the Headquarters meeting was called. Testimony also showed that no disciplinary action resulted from this meeting.

At the conclusion of Complainant's presentation of evidence and witnesses, the State made a Motion to Dismiss on the grounds that the Complainant had failed to present a prima facie case. This motion was unanimously denied based on the test of whether or not all the evidence taken in the light most favorable to the Complainant would result in a finding, by a preponderance of the evidence, for the Complainant.

ORDER

The Board unanimously found that the Complainant has not been retaliated or discriminated against due to his union activity. The Board recognizes that harassment and retaliation is a subtle thing and, as was said at the hearing, there is no "smoking gun" in this case. Simply because one event follows another in time does not prove cause. Given the length of time Complainant was out on injury leave, given his supervisory position and given the information coming to the State on Complainant's activities while on leave, the State's first inquiry as to his status, activities and projected return date coming 169 days after the injury was reasonable. What stretches credulity is the allegation that this injury was in some way retaliation for a letter of complaint filed 113 days earlier. The next significant allegeations of retaliation arise from events which occurred another 169-172 days later (338-341 days after the letter of complaint), to wit, non-promotion (being appealed in another forum) and the discussion of the Complainant's traffic stops. Two other, lesser allegations of retaliation - the vehicle assignment and the meeting to resolve SWAT team conflcits - occurred in close chronological proximity to these two major events.

All this is not to say, however, that a pattern of activity may not occur which could be found to constitute retaliation in situations where management is acting even within the parameters of its supervisory authority if it were shown that the motivation of management behind that pattern was an individual's union activity. In crossing that subtle line but, absent clear and convincing evidence of the so-called "smoking-gun" the Board does not find so in this case and the unfair labor practice is hereby DISMISSED.

Signed this 14th day of December, 1990.

EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding. Members E. Vincent Hall and John Andrews present and voting. Also present, Executive Director, Evelyn C. LeBrun.