



NH Supreme Court affirmed this decision on January 31, 1986, NH Supreme Court Case No. 85-074.

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS
LOCAL 464
Complainant
v.
NASHUA POLICE COMMISSION
Respondent

CASE NO. P-0740:1
DECISION NO. 85-74

APPEARANCES

Representing the International Brotherhood of Police Officers, Local 464

Cynthia Denton, Esq., Counsel

Representing the Nashua Police Commission

Steven A. Bolton, Esq., Counsel

Also in Attendance

- Ray Cabana, Captain, Nashua Police
Walter Bausha, Nashua Police
Margaret Q. Flynn, Nashua Police Commission
Thomas A. Maffee, Nashua Police Commission
Doug Sparks, Nashua Police Department
Robert Goff, Nashua Police Department
Ray Landry, Nashua Police Department
Scott Childs, Nashua Police Department
Steve Sakson, Nashua Telegraph

REVISED DECISION AFTER RE-HEARING.

BACKGROUND

This matter comes before the Board as a result of an unfair labor practice complaint brought by the International Brotherhood of Police Officers Local 464 against the Nashua Police Commission. The original Decision Number 85-41 was issued on June 13, 1985. The Nashua Police Commission filed a timely motion for re-hearing and the Public Employee Labor Relations Board held a re-hearing at its offices in Concord on August 1, 1985 for the limited purpose of hearing new evidence or argument concerning alleged error in the prior decision of the Board. Both parties were represented at the re-hearing and allowed to file post hearing memoranda concerning the alleged errors in the first decision. The Board has considered the post hearing briefs and argument at re-hearing.

In addition to the matters raised in the substance of the complaint, the Police Commission raised two issues concerning membership on the Board. The first was a motion for the recusal of member Russell Verney because of alleged bias. The second was an objection to the participation of Richard Roulx in the first decision because he had left the hearing prior to its conclusion and yet was listed as participating in the first decision. At the hearing, the Board refused to remove Mr. Verney after a statement by him concerning his lack of direct contact with or activities concerning the Nashua Police Commission. Mr. Roulx was not removed from the re-consideration and no action was taken concerning his participation in the first hearing. However, he voluntarily left the rehearing and took no part in the re-hearing or consideration of this decision.

On February 26, 1985, with an amendment filed on April 1, 1985, the International Brotherhood of Police Officers Local 464 (hereafter referred to as Union) complained to the Public Employee Labor Relations Board (hereafter referred to as the Board) that the Nashua Police Commission (hereafter referred to as the Commission) terminated the employment of Officer Scott Childs in retaliation for his participation in a union organizing drive and other union activities; that Officer Childs was denied representation at a meeting with the Chief of Police which was expected to result in disciplinary action; that Officer Douglas Sparks, Union President, was prevented from returning certain phone calls on duty which to his supervisors appeared to be union related; and that the Commission refused to recognize payroll deduction authorization cards for certain union members.

The Commission responded denying that any actions taken against Officer Childs were in retaliation for protected activity; asserted that the denial of representation at a disciplinary meeting was not in violation of the collective bargaining agreement or RSA 273-A; asserted the restriction to Officer Sparks' telephone activity was in compliance with the collective bargaining agreement and any dispute concerning the matter should be resolved through the grievance procedure and that therefore that complaint should be dismissed by this Board; and asserted that payroll deductions for union dues has been and continues to be conducted in compliance with the collective bargaining agreement so therefore any dispute over the application of payroll deductions is a matter for the grievance procedure and that complaint should be dismissed by this Board.

On May 2, 1985, a hearing was held at the Public Employee Labor Relations Board's Office in Concord, New Hampshire with all parties present. At the hearing the Union amended its complaint by striking, in paragraph 3 of their amended complaint, the words "and" in line 4 through "Department" in line 6. The Board issued decision 85-41 on June 13, 1985.

As stated above, the decision dated June 13, 1985 was the subject of re-consideration after the Board granted a motion by the Police Commission asking re-consideration of the finding of an unfair labor practice.

FINDINGS OF FACT

At the hearing, the Union asserted that the case before the PELRB, in addition to the unfair labor practice charges cited, was an elevation of the grievance of Scott Childs that "just cause" did not exist for the Commission to terminate his employment as provided by the collective bargaining agreement.

The Commission argued that "just cause" is not a grievable subject because Chapter 208 of the N.H. Laws of 1891 as amended (City Exhibit 84), reserved to the Commission the ". . . authority to remove any officer at any time for just cause and after due hearing, which cause shall be specified in the order of removal," and objected to the board proceeding with the grievance process on "just cause".

The Board took the Commission's objection under advisement and instructed the parties to proceed with their cases on the unfair labor practice charges.

After lengthy testimony and the submission of numerous exhibits, this Board finds the following facts:

- 1) Officer Scott Childs was actively engaged in union-related activities protected under RSA 273-A, from the Spring of 1984 until his termination.
- 2) Officer Childs, along with Officer Sparks, informed Chief Quigley of their union related activities during the Spring or Summer of 1984.
- 3) Chief Quigley took the union organizing drive as a personal affront.
- 4) Officer Childs' immediate supervisor, Sergeant Goff, advised Officer Childs to mind his "p's and q's" because the Nashua Police Department would hold him to a different standard than other officers due to his involvement in union activities.
- 5) On January 16, 1985, Officer Childs was summoned to meet with Chief Quigley for the purpose of discussing allegations against Officer Childs which could result in disciplinary action. Officer Childs' request to be accompanied by a representative of his choice was denied. The identification "representative" was not made with this request.
- 6) At the January 16, 1985, meeting with Chief Quigley, Officer Childs was informed of allegations against him arising from two incidents and advised he could submit his resignation and receive a favorable recommendation from the Nashua Police Department to future potential employers or face termination of employment proceedings before the Nashua Police Commission.
- 7) On January 17, 1985 Officer Childs received a notice of termination letter (City Exhibit 6) citing three incidents which gave rise to approximately 9 charges of violations of Nashua Police Department rules and regulations and one misdemeanor charge for violating RSA 264:25 "conduct after an accident".
- 8) Officer Childs' immediate supervisor, Sergeant Goff, has previously made arrests under the cited statute (RSA 264:25).

- 9) At the Nashua Police Commission's hearing regarding Scott Childs, in an unsolicited statement, Commissioner Jeffery stated "I frankly . . . every time I hear the talk of union it chills me up and down . . ."1
- 10) Two of the incidents giving rise to most of the charges against Officer Childs were for his involvement in two motor vehicle accidents which resulted in approximately \$505.20 damage. The third charge, failure to file a report on a suspected missing juvenile, results in a dispute over whether or not discretionary judgment was exercised properly.2
- 11) Previous department disciplinary actions for automobile accidents, where there is repeat offense, negligence and/or damage in excess of thousands of dollars has not exceeded a one day suspension.
- 12) The Nashua Police Department and the Nashua Police Commissioners have accepted the resignation of former employees in lieu of disciplinary action before the Nashua Police Commission for separate incidents alleging:
 - sexual advance on duty
 - sexual harassment via telephone
 - drug involvement
 - theft of evidence
 - "peeping Tom" activities

The Nashua Police Department has never before proposed voluntary resignation in lieu of termination proceedings before the Nashua Police Commission as a matter of progressive discipline: i.e. verbal warning, written reprimand, suspension of short duration, suspension of longer duration, then termination for disciplinary reasons has occurred after a significant incident which appeared to be a serious crime.

1. City Exhibit 87, page 141, lines 6 and 7
2. This Board did not hear the merits of those three incidents. This Board will first decide whether or not the allegations and/or disciplinary action were motivated by anti-union sentiment. If the motivation is found to be not in violation of RSA 273-A, the Board may order the grievances, "Did just cause exit; and was the disciplinary action imposed consistent with past department discipline for similar events?", to arbitration.

- 13) In accordance with RSA 273-A:4, the collective bargaining agreement between the Commission and the Union's predecessor, the Nashua Police Association, which is administered by the Union, contains a grievance procedure.³
- 14) There was no testimony to indicate the subject matter of Officer Childs' request to have Officer Sparks return a call was limited to a grievance investigation.

RULINGS OF LAW

The basic issue facing the board in any claim of unfair labor practice violating the provisions of RSA 273-A:5I (b) and (c), those applying to alleged actions because of union activity, is to determine whether action taken was the result of legitimate management concern about activities unrelated to union activity, or was taken because of the existence of the union activities. Both actions taken against employees and the severity of actions taken can be based on a pretext. Notwithstanding the existence of other legitimate reasons for discipline, corrective action or other management decisions, if the Board determines that the actual reason for the action taken was the union activity of the complainant, the unfair labor practice will be sustained. This type of unfair labor practice complaint is independent of any recourse to a grievance procedure, management discretion to discipline or other management rights and is a matter for the Public Employee Relations Board to address directly and not after recourse to a grievance procedure. The test to be used by the Public Employee Labor Relations Board is whether, after consideration of all evidence, the action taken by the employer would not have occurred but for protected union activity. If the Board determines that the management action would not have occurred but for union activity, the unfair labor practice complaint is sustained. If the Board finds that the action taken by management would have occurred notwithstanding union activity, the complaint is not sustained. In the former event, sustaining the unfair labor practice complaint, no recourse to the grievance procedure is necessary. In the latter event, failure to find an unfair labor practice complaint, the employee does have recourse to the grievance procedure if the employee has followed all of

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3. This Board reserves the right to determine whether or not the grievance procedure is "workable" pending any future use of the grievance procedure.

the requirements of that grievance procedure. The finding of an unfair labor practice complaint under the test stated by the Board herein, does not mean that the employer is prohibited from taking other appropriate disciplinary action proper for alleged infractions if the finding of this Board is that the severity of the action taken against the employee was the result of his or her union activity. Such a situation must be considered on a case-by-case basis, however.

In this particular case, the Board finds that the discipline imposed on Officer Childs, dismissal, in light of a non-processed misdemeanor charge, his alleged involvement in two motor vehicle accidents giving rise to damage just over \$500 and a difference of opinion over the officer's exercise of discretion was based on a pretext. While discipline may have been appropriate for these activities, the action of termination is so severe that the Board finds it to be based on his union activity. The findings of fact listed above recite evidence of the extreme distaste and express remarks of representatives of the employer concerning union activity and the entire course of conduct by the employer after union activity was made known, by superiors in the department, makes this conclusion inescapable. In upholding the recommendation of the Chief, the Police Commission ratified the action, whether or not the Commission has the same anti-union animus or intent. Therefore, the actions of the department and Commission in removing Officer Childs constitute an unfair labor practice in violation of RSA 273-A:5, I (a), (b), (c), (d), (g).

Refusal of the Chief to allow Officer Childs to have a representative of his choice accompany him in a disciplinary hearing is a violation of RSA 273-A:11, I (a) and therefore is an unfair labor practice under RSA 273-A:5, I (g). It is not required that an employee, in asking to be accompanied at any point in the grievance procedure, identify the person he wishes to bring with him as his "representative" and in the context of the events taking place in this case, it should have been obvious to the employer that the employee was seeking to bring someone representing him to the meeting.

Several other issues were raised in the unfair labor practice complaint. The Board would note that just cause determinations, except where specifically made optional by other statutes, are grievable and are grievable under the grievance procedure in the contract.

Also, the contract appears to have contained a provision

that grievance investigation not be conducted during duty time and this provision suspends the rights conferred upon the Union through RSA 273-A:11, I (a) and II for the term of the collective bargaining agreement.

The question of probationary employees was raised in the proceedings. Probationary employees, even when their position is part of the bargaining unit, are not members of the bargaining unit and therefore are not covered by the collective bargaining agreement for the bargaining unit unless specific provisions are agreed upon by the parties. Union membership is clearly distinguishable from bargaining unit membership. If the Union believes that certain carryover provisions of predecessor collective bargaining agreements included provisions for authorized payroll dues deductions for non-bargaining unit members of the Union, that dispute constitutes a question of contract interpretation which can properly be resolved through the grievance procedure. The Board will not find an unfair labor practice because of that dispute between the parties.

Finally the Nashua Police Department's prohibition against Officer Sparks' use of non-department phones during break time to return phone calls to Officer Childs is found to constitute an unfair labor practice by discriminating Officer Childs for his involvement in protected activities contrary to RSA 273-A:5, I (a), (b) (c), (d), (g), (h).

As mentioned in the background section of this decision, Board member Richard Roulx was unable to attend the entire first hearing on this matter. He participated in the decision after that first hearing and the Board believes that participation to have been appropriate since the entire record was available to him for review prior to his vote. See RSA 541-A:19 (Supp). However, since another management representative, Seymour Osman, also sat on the case, along with the chairman and a labor representative, Mr. Roulx did not, need to and therefore did not participate in the re-hearing, consideration of this revised decision or vote. Therefore, any objections to his participation are moot and the Board will not consider them further.

The specific requests for findings of fact and rulings of law made by the Nashua Police Commission are dealt with in the preceding decision. However, to be clear, the Board grants the following requests: 1, 2, 3, 4, 5, 6, 8, 9, 10, 12, 13, 14, 15, 16, 20, 26, 27, 28, 33, 36. The following requests are denied: 19 (the Board has jurisdiction in this matter under RSA 273-A:5 I because of the nature of the unfair labor practice complaint. See the discussion above), 24, 25, 31, 34.

No finding is made on request number 7. In regard to request number 11, this is a matter for the grievance procedure and the Board makes no finding at the request of the Commission. On request number 17, this is a matter for the grievance procedure and the board makes no finding at the request of the Commission. On request 18, the Board makes no finding. This would be a matter for the grievance procedure. On request 21, insofar as the actions are not contrary to 273-A, the request is granted. On request 22, the complainant has the burden of proving the retaliatory motivation prior to shifting the burden of proof to the Commission. On request 23, see the test stated above. On request 24, the complainant has the burden of demonstrating that retaliation will be for cause of the action or the degree of the action. On request 29, the request is granted in part. The rights in such a situation are with the employee (RSA 273-A:11, I (a)). On request number 30, it is granted in part. See decision on request number 29. On request 32, it is denied and by further explanation Officer Sparks was instructed not to return phone calls to Officer Childs while on duty under Article XI, Section 1 of the contract. On request number 35, the subject matter is appropriate for the grievance procedure and no finding is made.

ORDER

The Board issues the following order:

The Nashua Police Commission shall cease and desist from retaliation against employees for participation in protected activities.

Officer Scott Childs shall be immediately reinstated to his employment position of January 15, 1985 and made whole with no loss of benefits, rights or wages minus interim earnings. This order is not to be interpreted to restrict the Nashua Police Commission in its right to assign Officer Childs to an equivalent position to ensure the proper operation of the Police Department because of staffing patterns which have evolved since January 15, 1985.

All reference to termination proceedings against Officer Childs shall be removed from Officer Childs' employment record. However, supporting exhibits and disciplinary actions from prior incidents are not covered by this order. In addition, nothing in this order of the Public Employee Labor Relations Board shall be read to prohibit appropriate lesser disciplinary action in connection with Officer Childs because of the incidents complained of,

it being the finding of the Board that the degree of discipline was the result of union activity and the Board having specifically made no finding as to the appropriateness of any other degree of discipline resulting from the actions of Officer Childs which were complained of by the Commission.

A copy of these findings, decisions and orders shall be posted at a conspicuous place or places accessible to all employees at the Nashua Police Commission for a period of not less than 30 calendar days.


Robert E. Craig, Chairman

Signed this 26th day of September , 1985

By unanimous vote. Chairman Robert E. Craig presiding.
Board members Seymour Osman, Russell Verney also voting.
Also present, Evelyn C. Lebrun, Executive Director and
Bradford E. Cook, Counsel.