

NH Supreme Court reversed and remanded this decision on August 25, 1993, Slip Op. No. 92-225, 137 NH 552 (1993).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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PORTSMOUTH FIREFIGHTERS LOCAL	:
1313, I.A.F.F.	:
	:
Complainant	:
	:
v.	:
	:
CITY OF PORTSMOUTH, BOARD OF FIRE	:
COMMISSIONERS	:
	:
Respondent	:
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CASE NO. F-0106:14
DECISION NO. 92-20

APPEARANCES

Representing Portsmouth Firefighters, Local 1313:

Thomas Hersey, Esq., Counsel

Representing City of Portsmouth:

Thomas Cayten, Esq., Counsel

Also appearing:

Chief Randal Sage
Sheila Loch, City of Portsmouth
Richard Duddy, Local 1313
David Anderson, Foster's Daily Democrat

BACKGROUND

On July 3, 1991, the Portsmouth Firefighters, Local 1313, IAFF (Union), by and through its counsel, Thomas Hersey, Esq., filed improper practice charges (ULP) against the City of Portsmouth Board of Fire Commissioners (Employer) alleging violations of RSA 273-A:5, I (a), (b), (e) and (g). The employer responded by filing an answer on July 12, 1991, by and through its chief negotiator, Thomas Cayten.

The case was set for and heard by this Board on October 8, 1991.

The complaint (ULP) alleges that a Fire Commissioner, Sheila Loch, made derogatory comments about the union, said comments appearing in a local newspaper on May 16, 1991, and allegedly being violative of cited sections of RSA 273-A:5, I. These comments were made after a prior episode in March and April involving a firefighter (1) who was involved in a driving while intoxicated (DWI) incident, (2) who had his license suspended, (3) who was suspended from duty without any pay and benefits, (4) who signed a rehabilitative agreement with the Commission on April 23, 1991, (5) who applied for a six month leave of absence on April 17, 1991, and (6) whose disciplinary record, or a portion thereof in the form of the rehabilitative agreement, reportedly was made available to and approved in local press media.

A representative of the media allegedly advised Loch that a member of Local 1313 (identified as Roger Smith in Employer's brief, page 2) had provided documents from the personnel file of the suspended firefighter on March 15, 1991, during, before or after a meeting of the Fire Commission on that date. Loch's critical comments appeared in the press on March 16, 1991, and, according to the employer's answer, were precipitated by her belief that "Local 1313 had distributed a confidential document regarding [the suspended firefighter] because Local 1313 was angry at newspaper reports of [his] allegations concerning Local 1313." Those obligations, according to press reports of May 16, 1991 involved the suspended firefighter's complaints "that 25% of the firefighters in the department have been stopped by police in alcohol-related incidents but were let go. He was charged with DWI and lost his license."

FINDINGS OF FACT

1. Portsmouth Firefighters, Local 1313, IAFF, AFL-CIO is the duly certified representative for firefighters in the City of Portsmouth.
2. The City of Portsmouth Board of Fire Commissioners is a public employer as defined by RSA 273-A:1, IX.
3. Sheila Loch (Loch) is a member of the City of Portsmouth Board of Fire Commissioners for all times pertinent to these proceedings.
4. On May 15, 1991, there was a meeting of the Portsmouth Fire Commissioners. At some time before, during or after that meeting, personal information concerning the rehabilitative program

of a firefighter suspended for DWI was released to the media by one or more members of Local 1313 as a conscious act of and approved by the executive board of that organization.

5. After the conclusion of the May 15, 1991, meeting Loch, in her capacity as a member (not constituting a majority) of the Portsmouth Fire Commissioners was contacted at home by the media and made comments to the media about the foregoing release of the suspended firefighter's rehabilitative program. Prior to this time, the contents of and the document representing this rehabilitative program were known to and in the possession of the suspended employee, the union and the employer.
6. Comments attributed to Loch and appearing in the media included:

"Commissioner Sheila Loch said she was furious about what happened.

'Everyone has the right to expect their privacy respected...As a human being it concerns me that a person would belong to the kind of group that would do something like that. To me it's low. It's below classless,' said Ms. Loch...

She compared the relationship between the union and a union member charged with an infraction to be akin to client-attorney privilege...

However, Ms. Loch said she believes the union has been led astray by its leadership. 'I am not sure they have done themselves a favor in who they have representing them. I question whether they have chosen the best they could.'

She said she believes there are a number of individuals in the union who are able to compromise and view matters with common sense. 'I don't think these people are in the leadership,' adding she believes the union leadership hurt members during recent contract negotiations..."

"The union represents you in all you do. You lose your identity. You can't do anything on your own."

7. On March 26, 1991, Loch, along with Fire Commission chair, Laura Pantelakos, was a signatory to a letter addressed to members of the bargaining unit which read as follows:

"Dear Firefighter:

The Commission recognizes that there are certain frustrations and dissatisfactions within the Fire Department which appear to have been brewing for some time. It also appears that many of these issues are not subject to the collective bargaining agreement and are not the proper matter of grievances.

However, the Commission has been attempting to address even small irksome situations when brought to its attention. In an attempt to clear the air, the Commission has been meeting with groups within the Department. The Commission has met with the Deputy Chiefs and the Lieutenants and Captains. The Commission would like to meet with every Firefighter regarding input on these non-contractual issues. The Commission is prepared to have a number of meetings so all can participate during on-duty time.

Attached, however, is a letter from Jim Coughenour indicating that the Union opposes such broad input. This seems to impede the type of open communication which we believe is necessary to iron out the existing problems. We encourage each of you to reconsider this position.

We are prepared to meet with those of you who wish to have input in a small group setting if interest is forthcoming.

8. The foregoing letter of March 26, 1991, was sent to members of the bargaining unit at their home addresses after James Coughenour, President of Local 1313, wrote to Fire Commission Chair Pantelakos on March 14, 1991, declining the Commission's prior request to meet with the union regarding "on going problems at the station" and after this proposition of such a meeting had been presented to, voted on, and rejected by the membership, to wit: "The Union voted not to meet with the Fire Commission at this time and to support, unanimously, the Executive Board and it's [sic] ability in handling

these problems." "If the Fire Commission wishes to discuss the results of this vote and the decision of the body, then it must be done with the Executive Board of the Union."

DECISION AND ORDER

Both timing and the sequence of events are important to the resolution of this case. This Board has consistently preserved the right of the parties to exercise protected rights, First Amendment or otherwise, whenever applicable. In Keene Education Association (Case No. T-0282:9, Decision No. 90-54, July 27, 1990) we upheld the right of a dissident member of the School Board to speak against a fact finding report after that report was public and had been approved by a vote of 5 to 2. "All parties were without restriction to state their reputative positions in the press and radio. The majority spoke for the Board and properly pursued its support of the majority position." In Salem Firefighters v. Town of Salem (Case No. F-0116:11, Decision No. 92-09 January 22nd, 1992), we found, absent a negotiations procedures agreement controlling public comment by the parties, that a Selectman, acting individually and not in this capacity as a selectman, could comment adversely about the course of negotiations and encourage non-ratification of any agreement put to the voters for their consideration. In Salem this board found "insufficient evidence for us to conclude that [the selectman's] comments were made in her capacity as a selectman...[He] walked up to the line but did not cross it. Had he utilized information only available to him in his capacity as a negotiator or been speaking on behalf of the Board of Selectmen, this would have been impermissible conduct under RSA 273-A:5, I (e)."

Arguments presented in the Employer's post-hearing brief (page 7) would have us hold that Loch's actions were "an isolated incident where misdeeds of the Union leadership in releasing a confidential document provoked a Commissioner's outrage and comment" and that the case should be dismissed because of the de minimis nature of those comments. We disagree, not necessarily as to the de minimis nature of the comments since there was no testimony as to their actual interpretation by or impact on members of the bargaining unit, but based on the entire course of conduct presented for our consideration from March 14, 1991 to the date of the ULP. That examination reveals that the commentary of May 15, 1991 was not isolated and that it occurred after a prior polite message by Local 1313 to tell the employer "hands off" on attempts to communicate with union members directly. The overall course of conduct is of concern to us.

Chronologically there was an overture for a meeting from the Employer to the Union some time prior to March 14, 1991, when the Union advised that communications must be directed to and through its Executive Board. (Finding No. 8, above). In spite of the Union's letter to the Employer on March 14, 1991, on March 26, 1991, the Fire Commission (i.e., by a majority of the Commissioners; see Finding No. 7) communicated directly with unit members indicating that they, the Commissioners, were "prepared to meet with [firefighters] who wish to have input in a small group setting if interest is forthcoming. "This communication did not prompt a separate complaint (ULP) but is evidence of a course of conduct by which representatives of the employer attempted to circumvent the Union Executive Board by communicating directly with the membership in their capacity as the "employer" and by appealing for independent action, e.g., "We encourage each of you to reconsider this position."

The foregoing exchange of corespondence was followed by Loch's comments which prompted this ULP. We believe the Union hit the proverbial nail on the head when it said of Loch's comments collectively, "Such comments while critical and negative in tone as attributable to the Union and possibly to the Union movement as a whole, we do not find these remarks to be coercive or of an interfering nature." (See Union brief, page 4) We concur. We also concur that Loch's comments "then crossed the line of fair comment..." because those comments involved statements that (1) "...it concerns me that a person would belong to the kind of group that would do something like that;" (2) "I am not sure they have done themselves a favor in who they have representing them;" and (3) "there are a number of individuals in the union who are able to compromise and view matters with common sense...I don't think those people are in the leadership." Loch is also reported to have said she believed the union leadership hurt members during recent contract negotiations.

These comments by Loch were unquestionably made in her capacity as a commissioner. Had she not been a commissioner there is no evidence that her opinion would have been sought, i.e., she was not responding to a spontaneous "citizen on the street" interview. She was identified as "Commissioner" in the newspaper article of May 16, 1991. In Hinsdale Federation of Teachers (Decision No. 91-49), we noted the employer's obligation to deal with the certified bargaining representative and the impropriety of any attempts to circumvent that obligation by attempting to deal directly with the membership.

Given this sense of events, we must question the impact this course of conduct might be expected to have on a union member who (1) had been solicited to come to meetings "in small group settings" after that overture had been presented to, voted on, and rejected by the membership, (2) had learned that a commissioner questioned whether the union or its leadership had done the membership a disservice by the manner in which they represented them, and (3) had learned that that same commissioner questioned the ability of the current leadership to compromise and exercise common sense. Given that the pleas were reported and, in one instance, occurred after a "please don't" message from the Union to the Employer, we must conclude that they had or could have had an impact on the membership of encouraging them to communicate directly with the Employer, to question the effectiveness of their leadership, and to change that leadership. This is impermissible conduct under RSA 273-A:5, I (a) and (h). Given that Local 1313 is the certified exclusive bargaining representative of the bargaining unit, the complained of conduct in this case attempted to circumvent that exclusivity and, therefore, is impermissible under RSA 273-A:I (e).

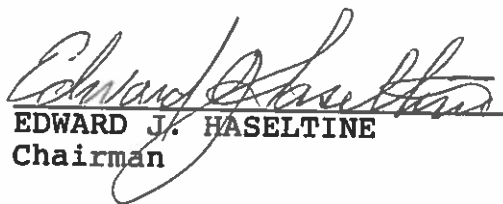
Upon consideration of the pleadings, testimony, evidence admitted and post-hearing briefs, we;

1. Find that the Board of Fire Commissioners committed unfair practices by the foregoing violations of RSA 273-A:I, (a), (b) and (e).
2. Direct that the Board of Fire Commissioners and its agents cease and desist from (1) attempting to circumvent the exclusive status of the bargaining agent by overtures to communicate directly with union members, (2) commenting on or suggesting changes in the elected leadership of the union, and (3) suggesting that the elected leadership of the union is ineffective and was doing a disservice to the membership by the manner in which it represented and negotiated for them.

3. Find that no other unfair practices were committed and that, to the extent alleged, they should be and hereby are DISMISSED.

So ordered.

Signed this 19th day of February, 1992.


EDWARD J. HASELTINE
Chairman

By unanimous vote. Chairman Edward J. Haseltine presiding.
Members E. Vincent Hall and Richard W. Roulx present and voting.