

Draft

Police Commission
Defina Hearing

Unofficial

Unapproved

Monday May 16, 2011

A grievance hearing was held at the Hooksett Safety Center. Present were Captain Jon Daigle, Commissioner Clark Karolian, Chairperson Joanne McHugh, Officer Jason Defina and Attorney LeFevre.

Chairperson McHugh: We are here this evening for the deliberated discussion with the regard to the two grievances that had been brought forward.

Call to Order at 6:05PM
Proof of Posting.
Pledge of Allegiance.

Personnel issues NH RSA 91-A: 3, II (a) & (c)

Let me go over how we are going to go about this, this evening. As I said earlier this is the deliberated portion of the grievance hearing which means we will not be taking any more testimony from both sides. It will basically be a discussion between the commissioner and myself. And at some point we will not only go through the facts and come to a decision. At a later date there will be a written decision that will be put out. And that is basically how we are going to go about this.

09/06

Chairperson McHugh: So I think the best way to approach this is to go forward with the discussion with regard to grievance to 09/06, which would be the first one and then go onto to the second one. 09/06 I believe is the fake drug one and I believe that was on May 8, 2009, is that right Commissioner Karolian. Commissioner Karolian is that what you have or what you have been able to get from the information. They have down on here as July 3, 2009.

Commissioner Karolian: They have the date and time of the event was July 3, 2009 at 1PM. The beginning of the personnel records entry form states or reads on July 3, the Lt. received the package from Sgt. Dupuis.

Chairperson McHugh: That is correct. He talks about how he reviewed the case number 373004. But if you go on into the documents you will read when the incident actually occurred for the fake drugs. I believe it is what Officer Defina brought forward.

Commissioner Karolian: His initial report was May 8th. They wanted a follow up done on June 18th. That was six weeks later.

Chairperson McHugh: That concerns me a little bit the fact that they waited so long to ask for a follow up.

Commissioner Karolian: If I understand correctly the officer felt it was his opinion that no crime had taken place. That is different from what the supervisors felt. But yet we have the two days suspension brought down to a verbal reprimand. It is supposed to be a corrective non disciplinary action. But yet one of the supervisors said the first day he was not sure why we were here because this is non- grievable because it is not a disciplinary action.

Chairperson McHugh: But isn't anything like that grievable.

Commissioner Karolian: If it is not a disciplinary action then why do I have 40 pages of information here, by the way is all redacted, for what reason I don't know; but yet it is maintains it is a verbal reprimand but yet this verbal reprimand is going to go into the personnel file. It is either a verbal reprimand that is not recorded or you get a written reprimand that is recorded. If it is going to go into somebody's personnel file than it is discipline.

Chairperson McHugh: So then it is grievable. But he is also stating and I think the comment that was also made and I think it was made by Lt. Cline, found that it is not in the CBA and should not be grievable. I do think that something like this is grievable. In fact if you go down and read through the SOPs and read that section with regard to that speaks to verbal and written reprimand.

Commissioner Karolian: P250

Chairperson McHugh: Yes. P250's that's what it is. And in there I believe it states after they decided to put that in there that they only need to speak to the officer or whoever the grievant is he has the opportunity to basically write his comments in there and I don't see anywhere in this material that that was done. Do you see that statement here the employee should be further advised that he or she has the right to file a statement in his/her personnel file setting forth of his/her contrary position in the case of a disagreement.

Commissioner Karolian: You can't have it both ways. You cannot give someone a verbal reprimand document it and put in personnel action form and then say you can't grieve it, as far as I am concerned.

Chairperson McHugh: The other thing with regard to this that has me a little bit concerned is the memos that follow up with this.

Commissioner Karolian: We talked about these paragraphs and we questioned why it went from a two days suspension to a verbal reprimand. We were told because it was just coming in on the 13th and it was within the ten day I recalled talking to the Lt. about it and asking his response, and not verbatim but he discussed it and after he heard the explanation he was given from Officer Defina that he lowered it down. I specifically asked if it was documented because you have some scary stuff in here such as claiming he is incompetent. This is yet another example of incompetence. That is some pretty strong language and then yet when we turned around and asked for explanation none is documented.

Chairperson McHugh: Another thing is I wonder if they made the window that they needed to with regards to the dates with regards to this. That is another thing that made me concerned is whether or not they made those dates. You are talking about the memo that came out on the 18th that was from Sgt. Dupuis.

Commissioner Karolian: That was six weeks after the officer wrote up his first; because his original report dated May 8, 2009 and then on or around June 18, 2009 he returned those reports six weeks later. One has to ask themselves what took so long. Why did it come up at such a later time?

Chairperson McHugh: That was another concern that I had was that it did not meet that window. And the other thing that I saw or looked at that was provided to us was Chapter two of the standard operating procedures. At the back of it, or in it, they have included the memorandum of a grievant that was with the Hooksett School District. There is a thing called Hooksett School System response plan for criminal incident.

Commissioner Karolian: For the record I was given the non- redacted.

Chairperson McHugh: The other thing that has me concern was that standard operating procedures in that document also had Hooksett School response plan criminal incidents. I am surprised that was included because that document was dated August 31, 2009. Well after that, I don't know how the employee is supposed to be held accountable if the agreement is signed after the fact.

Commissioner Karolian: Is that a changed version perhaps or an updated version. Or was that the version that the officer was supposedly disciplined.

Chairperson McHugh: There is no date of the signature of this agreement, there is a signature space for both the Chief and the Superintendent of schools there is no date but at the bottom of the form has a date of August 31, 2009.

Commissioner Karolian: Without those signatures and without the dates on there should we even consider this. Or is this just a copy.

Chairperson McHugh: I think that is just a copy. But where I was going with that is that on page four of that memorandum.

Commissioner Karolian: I am still looking at the fact that this is considered verbal reprimand and it is under the non disciplinary box that they have. I have a problem with that because it is one or the other I don't think you can only have it one way or another. It is either non disciplinary or disciplinary and once you reduce that to writing, all this information as to why you are giving this then it becomes disciplinary. Once the entry form is completed and signed off of it whatever is given then it becomes part of the employee permanent file. If the employee were to authorize someone else to look at their personnel file, outside agency or employment agency, they would sign off on it then that outside agency would be able to see that information and it would reflect negatively on the employee. Especially with the strong language that's in here, and by the way I did talk to him and the things he said were possible, his understanding were misunderstanding and we came to a conclusion this is one sided and it is not fair to the employee. It is not documented to say it is not that bad as we first thought.

Chairperson McHugh: That memo would have been very very important for us to see that memo, that memo that caused him to change his mind. The other thing I think there was a statement made and I believe it was made by the Chief. About the fact that the Chief feels that everything should be documented, documented, documented. And that has not always been the case and in this situation it was not documented. That is unfortunate that we don't have that memorandum.

Commissioner Karolian: No. I don't think it was ever reduced to writing, was it?

Chairperson McHugh: They said there was a memo but they did not include, but there is a memorandum that was made and it is missing in these documents here.

Commissioner Karolian: It is my understanding there was nothing reduced in writing, no explanation put into writing to why that occurred. Why the punishment went from a two days suspension being a corrective disciplinary action to a non disciplinary action according to the personnel records form. That was my understanding and what I heard is they don't do that. Perhaps from now on they will do that. I think it is something that was said. There is no memorandum there.

Chairperson McHugh: The other thing that I think the Chief said when we were talking about documenting or they don't document was that he makes a mention that it

is up to the supervisor as if he decides to write a form like that. There doesn't seem to be anything that shows any consistency about that and that is a little bit troubling. I don't know if you recall the conversation about that.

Commissioner Karolian: I do. I still got to look at this here. I understand that there are some things that are lacking procedurally. But when I look at this particular one the officer made the determination and how it came about, how it was reviewed four or five weeks later. I don't know that we got a satisfactory answer as to why it took so long to get reviewed and kicked back to the officer to follow. Do you recall that because I don't recall a reason why?

Chairperson McHugh: No, I don't think we were given any reason. There is within the information that was presented to us, Lt. Cline's memo in here that is on the 29th. I think basically what he is saying is from his stand point or from his vantage point why that happened.

Commissioner Karolian: This is from Sgt. Dupuis to Lt. Cline.

Chairperson McHugh: Yes, from Sgt. Dupuis to Lt. Cline. Like I say it is a little of troubling dealing with something that far back. The other thing I think that the officer makes mention in his notes what he calls the gist of the grievance, did you read that the gist of the grievant, that originally they did not have any problem with it and then all of sudden Captain Cecilio gave a bunch of reports back to him to tell him to follow up on.

Commissioner Karolian: I still got to go back to the actual grievance and the action that was taken. We would have to make a decision on the grievance itself; without going through the entire testimony now over again; when I look at the reports that was submitted. The bottom line is the officer felt that there was no crime committed. When we talked to and looked at some of the evidence here in his report, or portions I can read in his report, he says that it does not justify that a crime had taken place. The fact that his supervisors felt that there was, and if his supervisor and detectives or investigative division thinks if something needs to be followed up, perhaps the investigation division should have it followed up.

Chairperson McHugh: What you are saying is it should have come back from Sgt. Dupuis.

Commissioner Karolian: No what I am saying is the officer is being written up in a non disciplinary way. Actually he was written up for disciplinary way and then it was changed for non disciplinary. He maintains there was no crime committed in his initial investigation. If something changed perhaps the investigative division should have looked into this and they could have certainly written their decision. I look at it as it was a disciplinary action taken even though they checked off non disciplinary reprimand? They checked off non-disciplinary even though they checked off non

disciplinary then why check it off. If it not going to be used against the employees file then why isn't it disciplinary.

Chairperson McHugh: I think if you look at those SOP's, I think it does say in there that it is part of the file but that is a story for another day whether or not that is the right approach. I think it comes gets down to the probably the officer saying that those are fake drugs.

Commissioner Karolian: I think in his report he makes no mention of sale. The question I look at is why was he disciplined originally and why was it changed down to a verbal reprimand from a two days suspension. If it is because he gave something that was possible and gave his opinion to the Lt., and the Lt. must of said he understood his side and understood that this must go away.

Chairperson McHugh: Although this here is 2007. This is part of the Hooksett response plan for criminal incident system. And these are the guidelines used by the schools.

Commissioner Karolian: I think this is his point, I don't see if this was investigated by anyone other Officer than Officer Defina. Anybody investigate this other than Officer Defina.

Chairperson McHugh: I think they took it back and did some work on it.

Commissioner Karolian: Who did? What was the outcome of the investigation? Regardless of that, this in itself is disturbing there is nothing that changes this. There is a problem with that.

Chairperson McHugh: There was nothing that he could refute in his file. Plus I don't think they met the window, I think they waited too long. For an incident that happened in May and have the Chief sign off from it in July. I think they waited too long. In their rules it says they only have so long to deal with it.

Commissioner Karolian: For discipline, but it is discipline, no wait it is not discipline. Am I confused?

Chairperson McHugh: You can say it is not discipline but it is discipline to a degree because it is included in his personnel file.

Commissioner Karolian: Absolutely that is what I have been saying along. It is discipline. How can you write stuff like this that he has and the department has and then put in a personnel file and say it is not discipline? If this had been gone or redacted or rewritten. If there had been something else to follow this up that said it was not as bad as we thought. That we understood his side and this is what he told us.

Then we would be like there is a page two, and page two says on the heels of page one that maybe it is not as bad.

Chairperson McHugh: I don't think this verbal reprimand goes with what is at the bottom here. What is at the bottom is the two days suspension and 11 B & C, B which says an unwillingness to perform assigned task that goes with the two days suspension along with the failure to perform work status rank grade or position. That goes with that, but there is nothing here that speaks to that.

Commissioner Karolian: The allegation is according to this is he incompetent. So he is incompetent the Police charges but we are going to give him a verbal reprimand. I don't understand there needs to be an explanation as far as I am concerned it is dead in the water.

Chairperson McHugh: I think that it is unfortunate in this case it is a corrective non disciplinary action it does not have with it part of the discussion, or some notation for part of the discussion about why it was changed and to reflect that. There is nothing in there to substantiate that; as I said going back to the fact that there are several things that point to the fact that this should not be allowed to stand because they did not meet the criteria establish for this reprimand because they passed the window. Given those particular points that is where I would go with regard to that. That is my feeling with regards to 09/06. I don't know if you concur or not.

Commissioner Karolian: In the interest of maintaining 91-RSA I am not going to comment anymore. I think we should make a decision here.

Chairperson McHugh: Yes. That is what I was asking.

Commissioner Karolian: Because there are certain things that cannot be said here.

Chairperson McHugh: I think you would need to make that into a motion based on the facts that we brought out or stated earlier.

Commissioner Karolian made a motion that we find in favor of the grievant on 09/06 and that the personnel records entry form for that grievance 07/13/09 be removed from the employees personnel records entry form for the reasons that we stated. Motion seconded by Chairperson McHugh. Motion carried unanimously.

09/07 Grievance

Chairperson McHugh: When you say July 15, 2009 I think you need to be specific and note that is the date the employee was notified of the action with regard to the personnel records entry form and the Chief signed off on it, is that correct.

Commissioner Karolian: Yes. This was for the incident that occurred on December 11th. But yet the conclusion/discipline was handed down on July 15th. Written reprimand and remedial training; the charges were prohibited conduct, incompetence, conduct unbecoming, required conduct, submitting reports and truthfulness. I think based on the evidence presented. I think it is a clear case of double jeopardy.

Chairperson McHugh: I agree and this is what I found really not only disconcerting about the fact that this is the same one he had already been given discipline for on 12/23/08. That was a little disconcerting that he had already had received discipline and then go back and do this. What we were told about this one here was it was based on what he had included on the report both on December 16th and December 19th, which was the reason for it.

Commissioner Karolian: In his conclusion there was something I found interested. His explanation was grossed incompetence or insubordination on his part. I look at that as apples and oranges, if someone is incompetent as you oppose to being sabornate. If you are being insubordination I take it that you are not following directives or; if you are gross incompetence that is a whole other issue. The facts that were submitted and we were very specific all the same things that were charged in this were charged previously that he received discipline on the 23rd. The internal was conducted based on a different accusation.

Chairperson McHugh: Could you explain that please.

Commissioner Karolian: The employee did not get copies of the internal and the internal was used against the employee for discipline purposes. The internal is to be afforded to the employee if it is used in the disciplinary action. That was not done. Although the internal was conducted and no doubt in my mind that it was conducted properly. The end result was done with the IA is not contained in the personnel records entry form as far as I can tell. If these things were so egregious and these accusations, this is not one thing, it says he lied on these dates and therefore we are going to discipline you for it; it says prohibited conduct, conduct unbecoming, violation of chapter rules one and three, chapter one rules and regulations, submitting reports, require conduct, untruthfulness and I am just wondering if anything else could have been added to this. All that stuff was addressed and the discipline was given out. I believe it was then grieved and the discipline lowered in April of 2009. So I guess what I am saying it is a double jeopardy issue. When it comes to this for him being charged and he grieved it and the commission lowered it in April.

Chairperson McHugh: I was quite concerned of the fact that the same day that the incident originally happened December 11th, there was another incident and that led into discussion with questions proposed by two different members of the department, and the other issue that day they didn't take the same issue seriously. That case I believe the victim was not spoken to until seven days after and the report wasn't done for thirteen days. If you are looking for a standard the department first and foremost

should set the standard first and foremost. This is what they should have done. For them to do very than what they needed to do is more than disconcerting. And I wondered why they felt they needed to go forward. And have a written reprimand when they have dealt with the situation already previously. There was no need for it I believe with the statements made it had to do with the fact that with the statements made from the report on the December 16th and December 19th that they were zeroing on and they felt there was a lack of truthfulness and that is why they chose to go forward, but like I say if you look at both situations.

Commissioner Karolian: They went forward with the same facts. He had been tried twice on the same set of facts notwithstanding the other information that came to light and when he was given that reprimand that started the internal. But you have to look at it that you can't have it both ways. If someone comes in and he is being ordered off his shift, if he is being ordered off his shift and we are telling you to go home no overtime for you, the employee says ok I am out of here times up I can't be here. But then it comes back that you didn't tell us about some stuff, what is it going to be stay here and tell the department and make us aware of it or no overtime and go home.

Chairperson McHugh: Exactly. I think the department had a responsibility.

Commissioner Karolian: Absolutely. If I am the responding officer and I am dealing with something that heavy, and I am talking about the child pornography because to me that is what it is that officer is getting no assistance. He is overwhelmed and he is getting no assistance, yes it is his responsibility that he does the investigation on it. And then he makes the attempt to pass it a long and finds out about the fight and the fight does not become at that point, and the fight at that point from what I heard at that point the fight was not a hate crime. It may develop into a hate crime down the road but with the responsibility of the Officer the harsh attitude you have to get out of here no overtime you are not to be here. Aside from what one said that occurred and the denial of the other saying that it did not occur, aside from that situation looking at from what was going on they still want to know what your answer is. You better tell me on your time, if I was the employee I would of said see you later. Why is the employee going to be held to that? It's like you didn't report it to us, we have reports here that went weeks without any follow up. Does anyone get in trouble for not investigate it; they say it is an ice storm, what crime stops because there is an ice storm. Does investigating stop, I don't think so. I think it is a lame excuse.

Chairperson McHugh: The other thing is I think at some point, or at a future meeting we will have to deal with issues of when is overtime is available for the SRO. That is unfortunate because that it appears there was a need not only for the officer to be there and get some back up. But for him to be able to complete what needed to be done or have someone to come down there. I find it troubling to hear that someone says that but not to get a call back and say what is the issue down there explain it to me and then make a decision. Not to basically give a blank statement that says absolutely no overtime. I would think you would want to know what the situation is before you decide.

That is very concerning with the facts. But with the fact that there is a written reprimand is definitely double jeopardy.

Commissioner Karolian: At this point it doesn't make sense to me, with regards to the charges, which are some very serious charges. For a Police Officer to be accused of untruthfulness, as far as I am concerned to me is career ending. Because we expect higher from law enforcement professionals to tell the truth and that goes down the line; when you have charges and yet you want to give him remedial training and written reprimand. I find that troubling, what the purpose of that is. What is the reasoning behind that; just like we did not have it for the lowering/reverse either?

Chairperson McHugh: Corrective disciplinary unlike the other one which was not disciplinary, this here is disciplinary where as the one he received earlier and he got the suspension there was disciplinary action taken. But this does not address that.

Commissioner Karolian: On December 23rd for the same set of facts and the same circumstances set of allegations, outside of that is the internal affairs investigation.

Chairperson McHugh: On December 23rd there was disciplinary action and he was suspended for five days.

Commissioner Karolian: What was the action, do we know what he did. What was the date involved and what was it for. Is it for the same stuff, same action?

Chairperson McHugh: It says you neglected to report this assault in a timely manner on for the assault on December 11, 2009 this is a violation. I am trying to make a point there were two disciplinary actions for the same thing.

Commissioner Karolian: And they took care of it on the 23rd issue for the fight in school for him not reporting it. But then we come up and we have another. What does it talk about; it talks about the same stuff.

Chairperson McHugh: But they are both disciplinary. This one here did not turn around to be a verbal reprimand and it did not turn around to be counseling or anything like that. It is in a category of corrective disciplinary like the other one. Not only which makes it double jeopardy but its like he is getting the same punishment for the same thing. It's like they made it a little less he did not lose time or pay but that's the difference with this one here. So there are a number of issues that come into play with regard to, the other thing that I read in the documents was that on December 16th the SRO Officer said that the Cawley School principal had already taken care of the incident and so therefore as the officer stated he did not think it needed to be addressed. He was following up on the reports and only doing as he was asked to do basically, not what he as a normal officer would do when he was following up with something, and he was basically doing what they told him to do. The other thing that I think that Officer Defina brought up is the fact with regards to the posting threatening messages that they

did, Lt. Cline did direct two officers to go down to the school and it is only at that point that he sent someone over there. It does not look like he took it serious enough. I don't know where we stand with regards with this except for the fact that it does appear to be double jeopardy, it also appears that when you look at the incident of the sexting, that the department basically kind of fell down and only interviewed the victim seven days later; and the final investigation thirteen days later. Yet they were expecting something different from the employee. Like I said I keep going back to the fact I don't understand why this is a written reprimand and why didn't it go to the verbal or counseling. Because it all ends up going into the personnel file. If you have personnel entry's file then things end up there anyways does it not.

(Tape changed)

Commissioner Karolian: That's what seems to have happened. But that is what they chose to do and that is why we are here. I don't have any further discussion on this.

Chairperson McHugh: Are you ready to come to a decision on this. What our conclusion is.

Commissioner Karolian made a motion for grievance 09/07 which is dated for offense December 19, 2008 which consisted of written reprimand and remedial training, find in favor of the grievant and that the personnel records entry form be removed from his personnel records file. Based on the evidence presented we feel it was double jeopardy. Motion seconded by Chairperson McHugh. Motion carried unanimously.

Chairperson McHugh: As I said earlier I had concern about the fact that they were both corrective non disciplinary. The other incident 09/06 they turned around and made it a verbal reprimand.

Commissioner Karolian: And they believed it could not be grieved.

Chairperson McHugh: And that is why they said it could not be grieved and that is why this situation I don't know what the Lt. felt about the situation here but this was a different situation and this could be grieved. In this case it can certainly be grieved in this one.

Commissioner Karolian: I think they both could have been grieved.

Chairperson McHugh: Right. I mean from the comment he had made this is certainly a very grievable as this one here. But this one with the evidence that is grievable.

Commissioner Karolian: I think the Chief made mention the whole grievance that we were on the wrong step. It does not get heard by the Commission.

Chairperson McHugh: There was a little misunderstanding with regard to step three, as far as that is concerned because what I think he was basically saying is step three is the notification is more than that.

Commissioner Karolian: I think it is evident not only by the language of the contract but two we had prior hearings with the Commission in April.

Chairperson McHugh: And those were probably all on step three. Is there any other discussion or anything you want to add to it.

Commissioner Karolian: There will be a written decision.

Chairperson McHugh: The only thing left at this point as I said at the beginning the Commission will need to put this in the form of writing on the decisions we came to and how about we came to it.

Captain Daigle: You are taking votes that you want this removed from the personnel file. Correct?

Commissioner Karolian: Yes.

Captain Daigle: I guess the only question that I have at the time that this transpired there was a litigation of all materials regarding Officer Defina. My question is what is the desire of the commission removing this from the file should it go somewhere else until after the litigation is done.

Commissioner Karolian: I think the decision that has been rendered here should be forwarded to all parties involved. They would know what happened here and what transpired here and they could do whatever they want.

Chairperson McHugh: That is a question that they will have to take up with Attorney that is representing them.

Commissioner Karolian: I certainly would not destroy them. But I think maybe they could be kept in a file separately instead of in the personnel file. Everyone involved should be involved in this.

Captain Daigle: I certainly agree with you. I just wanted to throw it out there.

Commissioner Karolian: It makes perfect sense. The decision making process don't take into account the civil matter. I would say hang onto that.

Meeting adjourned at 7:18PM