State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Professional Firefighters of Goffstown Local 3420, IAFF Complainant	*	Case No: F-0143-7
v.	*	Decision No. 2007-048
Town of Goffstown Respondent	*	

APPEARANCES

For the Complainant:

John S. Krupski, Esq., Cook & Molan, P.A., Concord, N.H.

For the Respondent:

Paul T. Fitzgerald, Esq., Fitzgerald & Nichols, P.A., Laconia, N.H.

BACKGROUND

Professional Firefighters of Goffstown, Local 3420 IAFF (hereinafter "the Union") filed an unfair labor practice complaint on August 28, 2006 alleging that the Town of Goffstown (hereinafter "the Town") committed unfair labor practices in violation of RSA 273-A:5 I (e) failing to bargain in good faith, (g) failure to comply with the provisions of RSA 273-A, (h) breaching a collective bargaining agreement, and (i) unilaterally adopting a rule or regulation that invalidates the parties' collective bargaining agreement.

The Union complaint alleges that the parties' collective bargaining agreement ("CBA") expired at the end of 2005 and that the parties then continued to operate subject to the *status quo*

doctrine. The Union alleges that under the *status quo* doctrine bargaining unit members are only to be scheduled Monday through Friday and are not to be scheduled on weekends and holidays except on a temporary basis because of emergency circumstances. Notwithstanding the alleged existence of a *status quo* term or condition of work, the Union claims that on August 7, 2006 the Board of Selectmen directed Chief Carpentino to staff at least one fire station on weekdays and weekends from 6:00 a.m. to 6:00 p.m. and to schedule "full-timers at the regular hourly rate on the weekend" if necessary. The Chief states that the new schedule is effective from August 28, 2006 until December 3, 2006. The Union claims the Town's establishment of the new schedule constitutes a unilateral act of adopting a rule or regulation invalidating a provision of the parties' CBA and amounting to a statutory violation. Additionally, the Union also alleges that the Town's failure to offer proposals to alter hours of work, its inconsistent application of current CBA language, and refusal to negotiate a mandatory subject of bargaining further violates the statute.

The Town filed its answer denying the Union's charge on September 6, 2006 in which it asserts that the schedule change is temporary and is allowed under the CBA. The Town's position asserts that the schedule change is based upon the fire chief's report that lack of station coverage created a serious safety issue.

An informal pre-hearing conference was conducted on September 29, 2006 during which both parties were represented by counsel and from which PELRB Decision # 2006-162 issued. [N.B. Union counsel's pre-hearing worksheet, a procedural form completed by counsel and utilized by the PELRB to organize the parties' respective cases, summarized the Union's position of its "Summary of Issues" as including a complaint that the Town discriminated against Union members through disparate treatment. No such issue is raised by the Union in its complaint or any other pleading filed before or after September 29, 2006. No amendment was made at the final hearing on the merits, nor prior to the date of this decision. As the worksheet used is merely a form to assist in case organization and scheduling and the order that issued from that pre-hearing conference does not incorporate any additional charge, its inclusion there by counsel, without more, does not constitute a legitimate issue for further consideration on the merits by the PELRB].

Following the pre-hearing conference, a hearing on the merits of the Union's complaint was conducted on November 1, 2006. At that time both parties were present and represented by counsel. Each party had the opportunity to present evidence, including the direct examination and right to cross-examine witnesses as well as to submit exhibits. Despite a provision in the pre-hearing order, counsel for both parties did not submit a stipulated joint statement as to uncontested facts and the evidentiary hearing proceeded. At the conclusion of the evidence, counsel made brief closing arguments in lieu of the submission of written memoranda of law. Following the submission of each party's case, the Board requested that the Town counsel file a copy of the fire chief's job description to be added to the record and it received the same on November 6, 2006. After considering the evidence and assigning appropriate probative weight to it, the Board finds as follows:

FINDINGS OF FACT

1. The Town of Goffstown (hereinafter "Town") is a public employer as that term is defined in RSA 273-A: 1(X).

2. The Professional Firefighters of Goffstown, Local 3420, IAFF. AFL-CIO, CLC. (hereinafter "Local 3420") is the exclusive bargaining representative of all such employees of the Goffstown Fire Department as provided under the most current certification issued by the Public Employee Labor Relations Board.

3. The relationship between the parties was governed by a CBA negotiated between the parties that expired on December 31, 2005 and since that time the parties have been under the obligation of maintaining the terms and conditions of the CBA under the doctrine of *status quo.*

4. The parties describe the agreed work schedule for bargaining unit employees in Article 14.3 "Hours of Work" of their expired agreement by incorporating a reference to "Appendix B" of the CBA. (Joint Exhibit #2) The agreed schedule appearing in that appendix expresses the intent of both parties that the employees at issue were not scheduled to work on either Saturday or Sunday. The parties further express the operation of work shift assignment with the following language,

   > "Although this is the typical rotation schedule, emergency circumstances may necessitate a temporary alteration of the rotation schedule to provide adequate staffing." (See App.B)

5. The parties have followed the schedule provided in Appendix B since the inception of the bargaining unit in the early 1990's. The schedule essentially provided that full-time employees were not scheduled to work on evenings, except for Emergency Medical Service dispatched from Station #19, or weekends and the Town relied on its "call force" to supplement full time firefighter coverage.

6. The Board of Selectmen has been aware of staffing problems within the Fire Department and of the need for more personnel to provide comprehensive fire service coverage within the Town for a period of several years either from their independent information and belief or through weekly reports provided to selectmen by the fire chief. Most recently, this need has been discussed in terms of possibly requiring a true full-time fire department providing service throughout the entire day, every day of the week. At a minimum, it was understood that some schedule changes would be necessary for the full time employees since at least 2005.

7. Any staffing change involving the addition of full time firefighters, per diem firefighters or any other regularly scheduled firefighters was of economic concern to the Town for several years.

8. The longstanding problem of sufficient staffing manifested itself in the need to close one of the fire stations, assuring coverage by staffing with only EMT's and concerns of "call" firefighters relating to their need to be available for assignment on weekends and evenings.

9. The short-term cause of the staffing problem related to the unavailability of "call" firefighters for assignments on a regular basis on weekends and holidays. The number of registered "call" firefighters on the Town's roster had diminished over a period of years.

10. Additional recruitment was authorized and undertaken in 2005 resulting in possible candidates for call positions but lacking a short physical agility test.

11. The parties declared impasse in their negotiations to form a new collective bargaining agreement on or about July 19, 2006.

12. In his July 31, 2006 weekly report, the fire chief disavowed his responsibility for the lack of coverage to the community and informed the Board of Selectmen that the safety of the community was being compromised. (See Town Exhibit #1). The Town Administrator characterizes this communication to have "changed the level of emergency...it made it greater."

13. Bargaining unit members were informed on or about August 17, 2006 that a new work schedule for their work assignments was to become effective August 28, 2006 that would require them to work on weekends, at straight time, allowing the scheme to provide coverage for seven days per week using full-time employees. This schedule modified the previously bargained five day schedule that appears as Attachment B to the parties CBA (Joint Exhibit #1). Call firefighters were not ordered to work on weekends.

14. The union filed an unfair labor practice charge with the New Hampshire Public Employees Labor Relations Board. The union did not file a grievance.

15. The parties' CBA states:

    Article 13.1, "A grievance shall be defined as an alleged violation, misinterpretation or misapplication with respect to one or more members of the bargaining unit of any provision of this agreement. See RSA 273-A:1,V."

    Article 13.4, "The decision of the Board of Selectmen shall be final and not subject to further appeal or redetermination [*sic*]."

    Article 3.2, " Management of the Town, its operation, direction of the workforce and the authority to execute all the various duties, functions and responsibilities in connection therewith are vested in the Town. The exercise of such duties, functions and responsibilities shall not conflict with this agreement."

    Appendix B, " Although this is the typical rotation schedule, emergency circumstances may necessitate a temporary alteration of the rotation schedule to provide adequate staffing."

DECISION AND ORDER

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has primary jurisdiction to adjudicate claims between the duly elected "exclusive representative" of a certified bargaining unit comprised of public employees, as that designation is applied in RSA 273-A:10, and a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6,I). The PELRB has sole original jurisdiction to adjudicate claims of unfair labor practices committed by a public employer or an exclusive bargaining representative certified under RSA 273-A:8.

In this case, the Union has complained that the Town's actions relating to a change in the work schedule assignment of bargaining unit employees violated prohibitions by committing unfair labor practices in violation of RSA 273-A:5 I (e) failing to bargain in good faith, (g) failure to comply with the provisions of RSA 273-A, (h) breaching a collective bargaining agreement, and (i) unilaterally adopting a rule or regulation that invalidates the parties' collective bargaining agreement.

PRELIMINARY MOTION

The Town raises a threshold defense questioning the appropriateness of arbitration to this matter. In the context of these statutory charges of unfair labor practice and the fact that the parties' collective bargaining agreement does not provide for binding arbitration following the grievance procedure, the public employee labor relations board, in the context of an unfair labor practice charge, has jurisdiction to interpret the contract. *Appeal of Hooksett School District*, 126 N.H. 202, (1985). There the court upheld the PELRB's ability to interpret a collective bargaining agreement stating,

> Absent a provision for binding arbitration following the grievance procedure, and with no explicit or implicit language in the contract stating that step four of the grievance procedure is final and binding on the parties, the PELRB, in the context of an unfair labor practice charge, has jurisdiction as a matter of law to interpret the contract... *Id.* 204.

The grievance procedure is a necessary and crucial provision of any collective bargaining agreement and should be drawn with extreme care and clarity. We do not find an explicit statement in the parties' CBA expressing that a decision relating to a grievance is "final and binding." We recognize that the parties have agreed to language that may appear to reserve some finality to the decision of the Board of Selectmen. However, against the requirement that parties must agree to be bound to a decision to the exclusion of the clear statutory rights provided to employees under the governing statute, we cannot interpret what is arguably implicit language to eliminate the employees' right to a neutral hearing of the matter on its merits. We therefore accept jurisdiction of the Union's complaint alleging violations of RSA 273-A:5, I of the statute.

DISCUSSION

This matter presents circumstances wherein the Town made a decision to change the work schedule assignment previously agreed to by it and the Union and embodied in their last CBA. Since December 1, 2005 the parties' relationship as to wages, hours and other terms of employment has continued under the doctrine of *status quo*. The town provides fire service coverage through a combination of full-time firefighters and so-called "call" firefighters. One of the terms of employment specifically incorporated into their agreement expressed the hours of work and work shift schedule assignment. (See Joint Exhibit #1 § 14.3, and Appendix B). In summary, the hours of work for certain members of this bargaining unit, except for Emergency Medical Service dispatched from Station #19, were scheduled to be preformed between the hours of 6:00 AM and 6:00 PM Mondays through Fridays. This schedule had been in existence since the creation of the bargaining unit over at least nine years prior to the change of schedule implemented by the Town in August of 2006. This change resulted in full-time employees working on a schedule that caused them to perform regular shift work on all seven days of the week.

These parties have specifically negotiated the scheduling of work for affected full-time employees into their CBA. Such an agreement trumps the general reservation of management rights as expressed in Article 3.2 of the CBA. This is particularly true where there is express language limiting the otherwise typical exercise of management prerogative as appears in the last sentence of that Article, "The exercise of such duties, functions and responsibilities shall not conflict with this agreement."

The Town argues that, notwithstanding the commanding effect of that specific exception, its' action in changing the work schedule previously agreed to by the parties is a proper action under an "emergency" reservation appearing in Appendix B to the parties' CBA. This reservation is expressed there as follows: "Although this is the typical rotation schedule, emergency circumstances may necessitate a temporary alteration of the rotation schedule to provide adequate staffing."

Once again, we are required to determine the existence of an emergency and evaluate that existence as a valid triggering mechanism to activate an emergency clause. (See generally, *Amalgamated Transit Union, Local 717*, PELRB Decision #2001-064). We seek guidance in a familiar resource as the parties have not further delineated or defined "emergency" in their contract. Webster's Third World New International Dictionary (unabridged ed. 1961) defines emergency as a "distressing event or condition that can often be anticipated or prepared for but seldom exactly foreseen." It has received treatment at law involving varying mixtures of the elements of foreseeability, severity and immediacy. (See 29A C.J.S., pp.140-141 generally). We first consider the element of foreseeability. The situation that has lead to the Town's need to utilize the emergency clause involves a longstanding problem of staffing its fire service. We do not accept that the emergency circumstance used to change the staffing was the lone characterization by the fire chief in a single memorandum to the board of selectmen that the "safety of the community was being compromised." We define the situation as a lack of adequate staffing that was known to the Town selectmen and administration for a period of years. It was

aware of the few full-time firefighters it employed, the dwindling list of "call" firefighters on its roster, the refusal of the "call" firefighters to work weekends or holidays, the existence of their agreement with the full-time firefighters, the details of the fire service operation through weekly reports of its chief, and the need to fulfill its management responsibilities. These responsibilities include, among others, planning all operations, functions and policies of the Town (see Article 3.4.1); determining the need for...new employees (see Article 3.4.2); and determining the need for a reduction of an increase in the workforce, (see Article 3.4.7). We believe that over a period of years, if fire service coverage is diminishing, if a fire station must be closed for lack of staffing without evidence sufficiently demonstrating a lack of need due to population or property use shifts, and if staff levels require "call" firefighters to actually serve on what may have risen to a regular basis or at least to a level of frequency that contributed to the refusal of some to serve, then the circumstance existing in the summer of 2006 was foreseeable much in advance of that time.

When we look at the severity of the situation existing in the summer of 2006 not attributable to earlier spring flooding conditions, it appears to us to have been known by the Town to need attention over a prolonged period of time. The fire chief may have used language in his July 31, 2006 report that, according to the Town Administrator, "changed the level of emergency". But the effect of that report more likely drew attention because the chief was putting the selectmen on notice that the chief would "no longer be held accountable or responsible for the lack of coverage of services" being provided. (See Town Exhibit A). There was insufficient evidence that the threat posed by insufficient fire coverage had changed in severity on July 31, 2006 from that level previously existing.

When we consider the immediacy element of our examination of the emergency circumstance we also believe that there is insufficient evidence of immediacy. We are influenced, in part, with what we believe is the lack of urgency shown over time by the Town. The Town's own estimate was that the immediacy of the emergency would continue for at least five months. What evidence we have indicates that the initial and continuing sole remedy sought was to attempt to recruit additional "call" firefighters to the Town's roster. This was apparently doggedly pursued in the face of general knowledge that such individuals are less likely to respond on weekends and holidays in the rapid pace and tightly scheduled life lived today and that with community growth often is accompanied by increased community need. It also seems to us remarkable that with an emergency looming, the Town cannot arrange over a period of months for brief physical testing to be completed on potential candidates that had surfaced. We are aware of the Town's financial concerns and the administration's need to obtain passage of warrants, but that is not a responsibility that should dispossess employees of bargained for benefits or a responsibility that we can ascribe solely to the members of this bargaining unit.

For the above stated reasons, we find that to the extent the Town believes that an emergency existed in August 2006, it was one created in substantial part by its own action or inaction in addressing fire service coverage problems before the chief declared that he was disavowing future responsibility for risk to the community. Having found above that we have jurisdiction, we deny the Town's Motion to Dismiss on that basis. After weighing all of the evidence provided we find that the Town violated the statutory rights of the affected bargaining unit members and committed an improper labor practice when it unilaterally changed their work

schedules without negotiating for such changes. By issuance of this decision, we find the Town's post-hearing motion to dismiss and the Union's objection to the same to be moot. We encourage both parties to address the scheduling issue at the heart of this dispute in their present or next negotiations. If a negotiated resolution of the scheduling issue, alone, cannot be accomplished within thirty days of the date of this decision, the schedule for the affected full-time firefighters shall revert to the schedule as provided in Appendix B as existed prior to the Town's unilateral change. We set this period of time to both allow reasoned discussion to take place between the parties and to assure that fire service operations will not be unnecessarily interrupted for lack of time to prepare for the reversion.

So ordered.

Signed this 13th day of April, 2007

Doris M. Desautel, Alternate Chair

By unanimous decision. Doris M. Desautel presiding. Members James M. O'Mara, Jr. and E. Vincent Hall present and voting.

Distribution:
John S. Krupski, Esq.
Paul T. Fitzgerald, Esq.