



State of New Hampshire  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Hampton Firefighters Local 2664, IAFF  
AFL-CIO, CLC

Complainant

v.

Town of Hampton

Respondent

Case No. F-0118-15

Decision No. 2008-068

Town of Hampton

Complainant

v.

Hampton Firefighters Local 2664, IAFF  
AFL-CIO, CLC

Respondent

Case No. F-0118-16

APPEARANCES

Representing Hampton Firefighters, Local 3017, IAFF:

John S. Krupski, Esquire  
Cook & Molan, P.A.

Representing Town of Hampton:

Elizabeth A. Bailey, Esquire  
Sheehan, Phinney, Bass + Green, P.A.

## BACKGROUND

These two cases involve essentially the same facts and circumstances at issue in case No.s F-127-8 and 9, two cases also involving the Town of Hampton and its fire department. However, the earlier two cases involved a supervisor's bargaining unit and the present case involves a non-supervisors, or rank and file, bargaining unit. See PELRB Decision No. 2006-011. Both the Hampton Firefighters Local 2664, IAFF AFL-CIO, CLC (the "Union") and the Town filed complaints here, as was true in the earlier cases. At the parties' request, the current cases were held in abeyance pending the disposition of Case No.'s F-127-8 and 9, apparently with the expectation that a decision on the merits in those cases would resolve these cases as well. However, following the decision in Case No.s F-127-8 and 9 the Union asked that the present cases go forward on the merits. The Town's subsequent motion to dismiss the present cases based upon the decision in F-127-9 and 9 was denied. See PELRB Decision No. 2006-222 (containing a detailed history of the present cases).

As required by a July 26, 2007 pre-hearing order, PELRB Decision No. 2007-110, the Union filed an Amended and Restated Complaint on August 9, 2007. The Union claims that the Town improperly laid off three firefighters in 2005 in violation of Article 4 of the parties' collective bargaining agreement since adequate funds for the positions at issue existed in the default budget. The Union also alleges that it supported William Sullivan for a seat on the Board of Selectmen in 2005 but he was defeated by Bennett Moore. The Union claims that Mr. Moore before and after his election "began a campaign to retaliate against Local 2664 by attempting to financially cripple [sic] and institute retaliatory layoffs." The Union contends that the Town's actions were intended to dissuade union activism and/or were retaliation for such union activism and constituted illegal discrimination and retaliation in violation of RSA 273-A:5, I.

The Town denies the Union's charges and asserts it acted within its management rights pursuant to Article 4 of the parties' collective bargaining agreement when it laid off three firefighters on April 6, 2005 due to lack of funds. In its complaint the Town claims the Union improperly filed a grievance concerning the lay-offs in violation of RSA 273-A:5, II (f). The Union denies this charge.

The board conducted a hearing on September 27, 2007 and November 16, 2007 at which time the parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. At the parties' request, the record was held open until December 7, 2007 in order to allow the parties to file briefs. Both parties have filed briefs, and the record is now closed. The parties' joint factual stipulations appear as Findings of Fact 1 through 15.

## FINDINGS OF FACT

1. The Hampton Professional Firefighters Association, Local 2664 IAFF, ("Union") is a certified bargaining representative of certain employees including firefighters of the Hampton, New Hampshire Fire and Rescue Department.
2. The Town of Hampton ("Town") is a public employer as that term is defined pursuant to RSA 273-A.

3. The Union and the Town are signatories to a Collective Bargaining Agreement. Joint Ex. 1.
4. On or about March 24, 2005, Fire Chief Hank Lipe notified Jeremy Timson, Justin McDaniel and Shana Clark that they would be laid off from their positions as firefighters on April 6, 2005.
5. On or about April 6, 2005, Michael F. McMahon, President of the Union, filed a grievance with Chief Lipe.
6. On April 6, 2005, Fire Chief Hank Lipe denied the Union's grievance.
7. On April 10, 2005, Union President McMahon appealed the Chief's decision to Mr. James Barrington, the Town Manager.
8. On April 15, 2005, Town Manager Barrington denied the grievance.
9. On April 20, 2005, Union President MacMahon appealed the Town Manager's decision to the Hampton Town Board of Selectmen.
10. On May 5, 2005, James A. Workman, Chairman of the Board of Selectmen, notified President McMahon that the Board of Selectmen had decided to uphold the determination of the Town Manager.
11. Article 4 of the Management's Rights Clause states in full:

ARTICLE 4  
MANAGEMENT RIGHTS CLAUSE

Section 1.

Except as specifically limited by the express provisions of this Agreement, the Employer retains traditional rights (such as historically existed prior to the first agreement) to manage and direct the affairs of the employer in all of its various aspects and to manage and direct its employees including but not limited to the following: to plan, direct, control and determine all operations and services of the Employer; to direct the working forces; to establish the qualifications for employment; and to lay off employees for lack of work or lack of funds; to schedule and assign work; to establish work and productivity standards and to, from time to time, change those standards; to assign overtime; to determine methods, means, organization, and number of personnel by which such operations are to be conducted; to make and enforce rules and regulations; to employ, discipline, transfer, suspend, demote and discharge employees for just cause; to change or eliminate existing methods, equipment or facilities; provided however, that the exercise of any of the above rights shall not conflict with any of the express written provisions of this Agreement.

Section 2.

The provisions of this Article are not subject to the provisions of Article 30, entitled "Grievance Procedure."

12. The Town does not assert a lack of work concerning the Hampton Fire Department in these consolidated matters. See PELRB Decision No. 2006-11 in the matter of Hampton Fire Department Supervisory Association, Local 3017, IAFF, AFL-CIO, CLC v. Town of Hampton, Case Nos. F-0127-7 and F-127-8 ("the Local 3017 Decision"), ¶23.
13. The Town's fiscal year runs concurrently with the calendar year. Therefore, when the Town Meeting rejected the Town's recommended operating budget for Fiscal Year 2005 on March 8, 2005, the Town was already over two months into the operating budget for fiscal year 2005. See the Local 3017 Decision, ¶26.
14. Under a default budget, and pursuant to RSA 40:13, the Town operates under the same budget as the previous year, with certain adjustments required by previous action of the Town Meeting or by law, such as debt services or fulfilling payment obligations under existing contracts. Accordingly, the figures for a default budget can actually be greater than the prior year's adopted operating budget. See the Local 3017 Decision, ¶27.
15. The PELRB found that the fire department's projected default budget for fiscal year 2005 was \$3,683,896, as opposed to \$3,532,602 during fiscal year 2004. See the Local 3017 Decision, ¶28.
16. Bennett Moore is the chairman of the Hampton Board of Selectman. He has served as a selectman since his election on March 8, 2005. Mr. Moore has a background in accounting and budgets, and was a Certified Public Accountant in Ohio. He came to Hampton in approximately 1984, and became involved in the 2005 selectman's race because of 21% proposed budget increase, which he believed was irresponsible.
17. When Mr. Moore was elected as a selectman he was one of 3 candidates vying for 2 selectman positions. William Sullivan was one of the other 2 candidates. Mr. Sullivan served as the Town's fire chief from 1987 to January, 1998, when he retired. Mr. Sullivan was elected two terms on the board of selectmen, with the second term expiring in March 2005. Mr. Sullivan was not elected to a third term.
18. Prior to December, 2004 Mr. Moore had no contacts with the Union.
19. During the time period leading up to the March 2005 Town meeting Mr. Moore met with Union representatives. During this time period he also expressed his opposition to the proposed 21% increase in the operating budget, even though he was unable to describe the impact on fire department operations in the event the proposed budget increase was not approved.
20. For several weeks leading up to the Town Meeting vote, the Town's Board of Selectmen publicly discussed their concerns and the anticipated consequences of the Town's proposed budget not being passed by the voters.
21. During a January 24, 2005 Selectmen's meeting, Selectman William Sullivan stated that

if the budget does not pass, there will definitely be a loss of employees and there could be complete departments lost. At this meeting Town Manager James Barrington "confirmed that if it is necessary to cut [\$2,800,000.00] from the operating budget, it will not be done without personnel being reduced." See Joint Exhibit 2.

22. In a February 17, 2005 e-mail to Town Manager James Barrington and others, Selectman Sullivan wrote:

In a nut shell. There will be at least Fifteen positions lost in town government with a default budget for the second year in a row.

And more importantly, due to the fact that we hold our town meeting in March, NINE WEEKS INTO THE NEW BUDGET, we will have to make immediate cuts in order to fund the reduced operation for the remaining Ten months. Town Exhibit 2.

23. The voters did not approve the proposed operating budget containing the 21% increase at Town meeting, and instead approved the default operating budget in the amount of \$23,552,795.00. See Joint Exhibit 8. This default budget amount is the same figure used in Joint Exhibit 11
24. Prior to the elections, Mr. Moore spent a weekend analyzing the Town budget. He prepared a spreadsheet using budget data, and considered what changes could be made to achieve a \$2,800,000.00 reduction in the budget. He did not share his budget analysis prior to the election.
25. Mr. Moore's spreadsheet is Town Exhibit 6. The abbreviation "BOS" represents the board of selectman's proposal, and "BCOM" represents the budget committee proposal. Mr. Moore's calculations and figures are shown as "Revision 1." Town Exhibit 6 includes all Town departments. Mr. Moore's recommendations did not call for any Union layoffs.
26. After the Town meeting voted down the proposed budget, Mr. Barrington met with the department heads, including Fire Chief Hank Lipe, to discuss how the Town's departments could address the \$2.8 million shortfall between the proposed budget and the default budget. Department heads were asked to cut 15% from their respective budgets.
27. On March 14, 2005 the selectmen held their first meeting since the March 8, 2005 elections, at which time the issue of making necessary budget cuts in order to meet the default budget was reviewed at length. Fire Chief Lipe indicated that in order to meet the 15% cut, layoffs are imminent and that it will require the layoff of 12 firefighters, and that he did not yet know at that time who would be laid off in the officer ranks. See Joint Exhibit 4 at 4-10.
28. At the March 21, 2005 selectmen's meeting the default budget was reviewed in more detail. Mr. Barrington's work with various town departments had resulted in proposed

budget cuts which exceeded \$2,800,000.00 in the aggregate. Mr. Barrington's summary of these proposed cuts included 8 firefighter positions. Ultimately Mr. Moore moved that the board of selectmen reduce the proposed firefighter positions reduction from 8 to 4 and also remove the position of Deputy Chief of Operations. The motion passed on a 3-2 vote. See Joint Exhibit 5 at 3-8.

29. Joint Exhibit 11 reflects the default budget for 2005 in the amount of \$23,552,795.00, together with reductions or increases made in various departments, resulting in an adopted operating budget of \$23,552,795.00. For example, Highways & Streets, Account No. 4312, reflects a default budget amount of \$507,746.00 increased by \$356,657.00 to an adopted operating budget of \$864,403.00. The Fire department, Account No. 4220-4229, reflects a default budget of \$3,683,896.00 reduced by \$577,200.00 to an adopted operating budget of \$3,106,696.00.
30. The minutes from the Board of Selectmen's September 12, 2005 meeting reflect that the board members were considering budgetary issues involved with reinstating the firefighter positions at issue in this case, and they received Town Manager Barrington's recommendation that more time to work through the budget was necessary before he could recommend restoration of the positions. Union Exhibit 8.
31. On October 10, 2005 the Selectmen unanimously approved a Fire Department 2006 proposed budget in an amount sufficient to restore 4 firefighter positions. Town Exhibit 15 at 6-8. However, in 2006 the voters did not approve the proposed operating budget which included these funds. Town Exhibit 1, Article 10. Likewise, in 2007 the voters also defeated a proposed operating budget which contained funds sufficient to restore 4 firefighter positions. Town Exhibits 2 and 3.
32. Union Exhibit 2, the Town's expenditure report for fiscal year 2005, shows that at year end \$251,705.00 of the Town's voter approved 2005 budget remained unexpended. However, Union Exhibit 2 does not represent available cash, in part because it does not report the approximately \$2,200,000.00 in unpaid taxes or the amount of outstanding purchase orders. Additionally, by year end the Selectmen had already acted to restore the firefighter positions in 2006 by including sufficient funding in the Selectmen's proposed 2006 operating budget.

## DECISION

### Jurisdiction:

Pursuant to RSA 273-A:6 I, the PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. *Appeal of State Employees Association of New Hampshire, Inc.*, 139 N.H. 441, 444 (1995).

Discussion:

In Case F-0118-15 the Union claims the firefighter layoffs were not justified by a lack of funds and that the layoffs constituted illegal discrimination and retaliation. The board recently decided another Hampton case involving the Hampton Fire Department Supervisory bargaining unit, the 2005 budget, and firefighter layoffs. The board concluded that the disputed layoffs did not constitute a violation of RSA 273-A:5, I (h) (breach of a collective bargaining agreement):

We do not interpret the "lack of funds" language in Article 4 as strictly as the Union, nor do we consider such language to ultimately limit the Town's statutory discretion in the allocation of its financial resources. We believe that as a result of the voters' rejection of the Town's proposed budget, the resulting implementation of a default budget by action of law, and subsequent budget allocations made by the Board of Selectmen, a sufficient lack of funds was established within the record to validate the Town's actions with respect to Ms. Arsenault and Mr. Benotti under Article 4. In this manner, we do not equate "lack of funds" with there being no funds whatsoever. The Town retains discretion under RSA 273-A in order to maintain public control of governmental functions. Whether self-made or not, the fire department had \$577,200 less in operating funds for Fiscal Year 2005 than was allocated in the default budget, and the Town's actions resulted in a cost savings.

PELRB Decision No. 2006-011 (January 30, 2006).

Subsequent to this PELRB decision, the court rendered its ruling in *Sullivan v. Town of Hampton Bd. Of Selectmen*, 153 N.H. 690 (2006), a case which also involved Hampton's 2005 budget activities. The court turned away the challenge of three taxpayers to the operating budget adopted by the selectmen following the voters' rejection of the proposed operating budget. See Joint Exhibit 11. The court specifically rejected the claim that the selectmen lacked authority to make the adjustments among and between the different line items reflected in Joint Exhibit 11.

Consistent with our earlier decision and the court's ruling in *Sullivan*, we find the Union's complaints about the selectmen's adopted operation budget are without merit. As stated by the court, the voters' rejection of the proposed operating budget justified the selectmen's exercise of their RSA 32:10, I discretionary transfer authority, which is intended to provide the selectmen with the "requisite flexibility to address unplanned needs by redirecting appropriated funds." *Sullivan* at 693. For purposes of Article 4 of the parties' CBA, there was a lack of funds which justified the Town's actions with respect to the 4 firefighter positions in March of 2005 and thereafter. The board's review of the evidence concerning the Town budget planning and expenditure activities during the balance of 2005 and thereafter do not alter our conclusions. These activities constitute the Town's management of its prudential affairs through its elected representatives. This process necessarily required decisions which, in the judgment of the elected officials, were in the best interests of the Town. As illustrated by this case such decisions can be unpopular with particular groups like the Union when there are direct and adverse consequences like the disputed firefighter layoffs. However, in the context of the facts at issue in this case, these disagreements are matters more properly addressed and resolved through the local election and legislative process, and not through an unfair labor practice proceeding.

The Union also complains that the Town's budgeting process and resulting firefighter layoffs were motivated by political retaliation, political payback, and anti-union animus all stemming from the Union's support of William Sullivan in the selectman's race. In Appeal of Prof. Firefighters of E. Derry, 138 N.H. 142 (1993), the court adopted the federal standard for deciding whether an employer's actions were improperly motivated by a desire to retaliate against an employee because of union activity:

[T]o establish an unfair labor practice under federal law, the union must prove by a *preponderance of the evidence* that the discharge or elimination was motivated by a desire to frustrate union activity. The employer can meet the union's evidence of retaliatory motivation with its own evidence, as an employer's motivation is a question of fact to be determined by the board from the consideration of all the evidence. If the board finds by a preponderance of the evidence that the employer was unlawfully motivated to some degree, an employer can still avoid being adjudicated a violator of federal law by proving by a preponderance of the evidence that regardless of the unlawful motivation, the employer would have taken the same action for wholly permissible reasons.

Id. at 144-145 (emphasis in original)(citations omitted). A review of the evidence in this case leads the Board to conclude that the Union has failed to prove, by a preponderance of the evidence, that the Town's actions were in retaliation for union activity or for some other improper motive. In reaching its decision the board has considered all the circumstances of this case, including the adjustments reflected in the adopted operating budget, the selectmen's race, and Mr. Moore's actions during the December 2004 to April, 2005 time period. The board concludes there is insufficient evidence to establish that there was an anti-union animus behind the selectmen's March, 2005 budgetary decisions and firefighter layoffs about which the Union complains. The board also received evidence concerning budgetary expenditures through the end of 2005 and thereafter, and concludes that this evidence is also insufficient to establish a violation of RSA 273-A:5, I.

As to the Town's complaint in Case F-0118-16 that the Union improperly filed a grievance concerning the lay-offs in violation of RSA 273-A:5, II (f) we note that the board denied a similar claim in one of the earlier and related cases:

Finally, we deny the Town's complaint against the Union (PELRB Case No. F-0127-8). In this case the Town claims that the Union violated RSA 273-A:5 II (f) [to breach a collective bargaining agreement] when it filed grievances alleging a violation of Article 4 on behalf of Ms. Arsenault and Deputy Fire Chief Benotti. The thrust of the Town's argument is that, as previously noted, Section 2 of Article 4 specifically states "the provisions of this [a]rticle are not subject to the provisions of Article 31, entitled 'Grievance Procedure,'" and that the Arsenault and Benotti grievances initiated by the Union referencing Article 4 violated this provision.



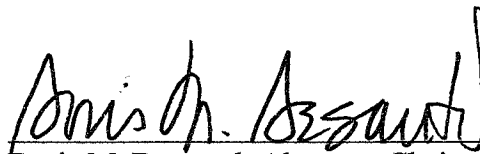
In the interest of encouraging parties to utilize their mutually agreed upon grievance procedures to resolve their disputes, we are hesitant to sustain a complaint against a party for initially attempting, in good faith, to resolve a dispute in this manner and prior to proceeding to arbitration. We also note, at least as to Deputy Fire Chief Benotti, that the grievance involved an additional contract provision, namely Article 13. Since the record indicates that upon meeting with the Board of Selectmen and accepting their reasoning, the Union did not pursue these grievances to arbitration (See Union's Answer to Town's Improper Practice Charge) and instead filed an action with this Board, the Town's complaint does not present a case or controversy.

The board finds this reasoning and ruling equally applicable to the Town's claim in Case F-0118-16 and Town's complaint is denied on that basis.

In accordance with the foregoing, the Union's complaint in Case No. F-0118-5 and the Town's complaint in Case No. F-0118-6 are dismissed.

It is so ordered.

Signed this ~~21<sup>st</sup>~~ day of March, 2008.

  
Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Members E. Vincent Hall and Carol M. Granfield also voting.

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