STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

HAMPTON POLICE ASSOCIATION, INC., HAMPTON FIRE FIGHTERS ASSOCIATION LOCAL 2664, IAFF, HAMPTON FIRE DEPT. SUPERVISORY ASSOCIATION, LOCAL 3017 IAFF, CHAUFFERS, TEAMSTERS AND HELPERS, LOCAL UNION NO. 633 OF NEW HAMPSHIRE

COMPLAINANTS

v.

TOWN OF HAMPTON

RESPONDENT

CASE NO. P-0719-23
G-0104-1
G-0105-1
G-0114-1
(Consolidated Cases)

DECISION NO. 2010-029

APPEARANCES

Representing: Hampton Police Association, Inc.
J. Joseph McKittrick, Esq., McKittrick Law Offices
North Hampton, New Hampshire

Representing: Hampton Fire Fighters Association, Local 2664, IAFF and Hampton Fire Dept. Supervisory Association, Local 3017, IAFF
John S. Krupski, Esq., Molan, Milner & Krupski, PLLC
Concord, New Hampshire

Representing: Chauffers, Teamsters and Helpers Local Union No. 633 of New Hampshire
John D. Burke, Esq., Dumont, Morris & Burke, PC
Boston, Massachusetts

Representing: Town of Hampton
Elizabeth A. Bailey, Esq., Sheehan, Phinney, Bass & Green, PA
Manchester, New Hampshire

BACKGROUND

The Town of Hampton (Town) filed a Petition for Declaratory Judgment and for Preliminary Injunctive Relief in the Rockingham Superior Court on March 31, 2009 followed by a Motion for *Ex parte* Temporary Restraining Order and Expedited Hearing on April 15, 2009 requesting and receiving temporary injunctive relief from advancing sick leave to its employees utilizing a Sick Leave Bank, previously agreed to through the collective bargaining process established by RSA 273-A the "Public Employee Labor Relations Act", so long as the Sick Leave Bank had a negative balance. See *Town of Hampton v. International Brotherhood of Teamsters Local 633, et al*, (including other bargaining units within the Town) Docket No: 09-E-0124. Subsequently, in consequence to the Town's petition to the court, the Hampton Police Association, Inc. (HPA), as an exclusive representative of both the Police Sergeants' bargaining unit and the Police Officers' bargaining unit (collectively "HPA"), filed an unfair labor practice complaint against the Town on June 22, 2009. (PELRB Case No. 0719-23) The basis for the HPA's complaint was that the Town had violated provisions of RSA 273-A:5, I (a), (b), (c), (e), (f), (g), (h),when it petitioned the court without exhausting the administrative and contractual remedies, including the grievance and arbitration procedure set forth in the parties' previously agreed Collective Bargaining Agreement (CBA) with each of the two bargaining units represented by HPA.

Three days later on June 25, 2009 the Hampton Fire Fighters Association, Local 2664, IAFF (PELRB Case #0104-1) and Hampton Fire Department Supervisory Association, Local 3017, IAFF (PELRB Case # 0105-1) (collectively IAFF) also responded to the Town's actions and filed an unfair labor practice complaint with the PELRB against the Town claiming that the Town violated the provisions of RSA 273-A:5, I(e), (g), (h), by refusing to pay the Sick Leave

Bank benefits and by refusing to negotiate and to pursue a contractual remedy in accordance with the parties' own CBA.

On June 26, 2009 the Town filed a motion to stay the proceedings in the HPA case pending the resolution of the litigation in the Superior Court and a motion to dismiss the HPA's complaint. On July 6, 2009 the Town filed similar motions to stay and to dismiss in IAFF cases.

On July 6, 2009 the Town filed an answer and affirmative defenses to the HPA's complaint and likewise, on July 10, 2009, to the IAFF complaint. In its answer, the Town denied the charges and claims and among other things, asserted that the complainants failed to state a claim upon which relief may be granted, that the complainants failed to allege, and cannot prove as a matter of law and fact, that the Town has violated the provisions of RSA 273-A:5, I, and that the PELRB has no authority to order the relief the complainants seek. The Town also filed motions to continue the PELRB adjudicatory hearing until the litigation initiated by the Town in the Rockingham Superior Court could be completed.

The Chauffeurs, Teamsters and Helpers Local Union No. 633 of New Hampshire (Teamsters), like the HPA and IAFF unions, filed an unfair labor practice complaint against the Town on July 22, 2009 claiming the actions of the Town violated provisions of RSA 273-A (a), (e), (g), (h)essentially based upon the same actions undertaken by the Town. See *Chauffeurs, Teamsters and Helpers Local Union No. 633 of New Hampshire v. Town of Hampton*, Case No. G-0114-1.

The PELRB consolidated the HPA and IAFF cases for the purpose of an initial pre-hearing conference. The Town filed motions to continue a pre-hearing conference and an adjudicatory hearing in the HPA and IAFF cases on July 7 and July 10, 2009, respectively. In its motions, the Town requested, inter alia, that the PELRB schedule an expedited hearing on the Town's motions to stay the proceedings and to dismiss the complaints. The Town's requests to continue a pre-hearing conference were denied in both cases. See PELRB Decisions Nos. 2009-

141 and 2009-142. The judgment on the Town's motions to continue an adjudicatory hearing was reserved. See PELRB Decisions Nos. 2009-141 and 2009-142.

On July 24, 2009 the representatives of the Town, HPA, and IAFF attended the pre-hearing conference at the PELRB offices in Concord. The representative of the Chauffeurs, Teamsters and Helpers Local Union No. 633 of New Hampshire (Teamsters) also attended the pre-hearing conference where all parties were informed that the PELRB intended to consolidate all matters for purposes of the evidentiary hearing.

At the pre-hearing conference, the parties were informed that the adjudicatory hearing then scheduled for August 6, 2009 had been cancelled. With the agreement of all the parties present subject to all outstanding motions and all reservations of rights, the adjudicatory hearing was rescheduled for September 22, 2009.

On July 28, 2009 the PELRB issued an additional preliminary order in which it denied the Town's requests for an expedited hearing on its motions to stay and to dismiss and to continue all complaints pending before the PELRB. Also on July 28, the HPA filed a motion requesting the PELRB to refer the matter to arbitration on the basis of provisions in the parties' CBA providing for arbitration of disputes; the Town objected to the HPA motion on August 11, 2009 on the basis of its alleged untimely filing and on several substantive grounds.

Following a consolidation order by the PELRB, see PELRB Decision No.2009-172 on August 12, 2009, the Town filed a another motion to continue the hearing on the merits and a follow up clarification requesting a decision on this procedural motion for a continuance on September 1, 2009,which was denied by the PELRB on September 2, 2009.

These three consolidated cases, representing five of the six certified bargaining units within the Town then went forward to hearing on September 22, 2009 with participating counsel filing stipulated facts and exhibit lists during the interim. On September 14, 2009 the Supreme

Court denied the Town's request for expedited temporary relief as part of the Town's writ of prohibition staying the PELRB scheduled hearing.

On the day of the evidentiary hearing, September 22, 2009, all parties were present and represented by counsel. The Town's most recent September 21, 2009 filing of a motion *in limine* to exclude certain extrinsic evidence related to terms of the parties CBA's and their past practices and the remaining outstanding preliminary motions were presented and considered by the Board. Each party was given the opportunity to present evidence through exhibits, offers of proof and testimony and had the opportunity to cross-examine witnesses. The parties had previously stipulated to several facts prior to the hearing and these facts are included among those that appear below as Findings of Fact numbers 1 through 13 (parenthetical remarks added by board after hearing). At the conclusion of the evidence counsel requested, and were granted, leave to submit post-hearing memoranda of law. A limit on the number of pages was provided by the board to the parties and later upon motion that limit was expanded by order. The record was left open until October 9, 2009 to allow such submissions. Following the closure of the record, the Board considered all of the evidence affording each piece of evidence its appropriate weight and considered the credibility of all witnesses and found as follows:

FINDINGS OF FACT

1. The Town is a "public employer" as that term is defined by RSA 273-A:1, X, and is the public employer of the employees represented by the several exclusive representatives named as complainants in this action.

2. Each of named complainants is the certified exclusive representative for the respective bargaining units named.

3. The Town is a party to separate collective bargaining agreements (CBA) with each of the respective complainants, namely: the International Brotherhood of Teamsters, Local 633; the Hampton Police Association, Inc.; the Hampton Police Association, Inc. (Sergeants); Hampton Firefighters Association, Local 2664 IAFF; and Hampton Fire Department Supervisory Association, Local 3017 IAFF.

4. The Town is also a party to a collective bargaining agreement (CBA) with the State Employees' Association of New Hampshire, Inc., SEIU Local 1984 (SEA). (The SEA us a party to the court proceedings initiated by the Town against all bargaining units, but is not a party to these proceedings.)

5. All CBA's by their terms expired on March 31, 2006 but continue in effect under the *status quo* doctrine.

6. Nearly identical provisions for a common Sick Bank appear in each of these six CBAs, which is to be administered by a Sick Bank Board made up of one representative from each of the six bargaining units and a management representative of the Town appointed by the Town Manager.

7. On April 15, 2009, the Town filed a Petition for Declaratory Judgment and Preliminary Injunctive Relief with the Rockingham Superior Court *ex parte* against the six (6) unions participating in the common Sick Leave Bank.

8. The Rockingham County Superior Court issued Orders dated April 16, 2009, May 7, 2009 and August 10, 2009 which resulted in the issuance of a temporary injunction providing that the Town no longer was required to make sick leave payments to employees drawing on the common Sick Leave Bank while a deficit balance in hours contributed existed.

9. On June 12, 2009, Thomas Noonan, Business Agent for Local 633 sent to Fred Welch, Town Administrator, a letter. (requesting negotiations over Sick Bank, see Town Exhibit Y)

10. On June 26, 2009, Thomas Noonan sent to Fred Welch a letter. (requesting negotiations over Sick Bank, See Town Exhibit Z)

11. On June 29, 2009, Fred Welch sent to Thomas Noonan a letter. (deferring substantive response to Noonan letters to town counsel, See Town Exhibit AA)

12. On July 6, 2009, Thomas Noonan sent to Fred Welch a letter. (requesting general negotiations citing lack of response from town counsel or representative, See Town Exhibit EE)

13. On September 2, 2009, Fred Welch sent Thomas Noonan a letter. (requesting specific dates for negotiations, see Town Exhibit PP; the parties subsequently agreed to meet on September 24, 2009)

14. The Town and each of the complainants have mutually agreed to establish a Sick Leave Bank and have memorialized their agreement in their respective CBA's and have used identical relevant language. (See Sick Leave Bank provision in Complainants' Common Exhibits #'s CE1-CE4, CE6). The provision first appeared in CBA's negotiated for the period 2000-2003.

15. Among the relevant provisions, the only language that directly refers to a "deficit" occurring in the sick bank is as follows: "Should the bank run out of time then the Town will keep records of the negative balance and the monthly contributions will be posted against that negative balance." The Sick Leave Bank and this language was initially negotiated between the parties and incorporated into the Town's CBA's with the bargaining units in 2000.

16. Dawna Duhamel, Finance Director, was the Town's representative on the Sick Leave Bank from its inception through 2005 and Michael Schwotzer, Finance Director, succeeded her on the board through the present time.

17. At the time of hearing, the parties were not engaged in general negotiations for a successor CBA nor had any negotiations been undertaken to address the issue of a deficit in the common sick bank.

18. The IAFF filed grievances for their clients on the issue of contract interpretation of the sick bank provision within the parties' CBA.

19. In February of 2008 the Sick Leave Bank was in deficit and its board acknowledged that status in its minutes of March 31, 2008

20. On August 8, 2001 the Town's representative to the Sick Leave Bank Administration Board first recognized the necessity to increase the number of hours contributed to the bank by employees.

21. In 2002, the firefighters' bargaining unit asked other units to make a one-time voluntary contribution of additional hours to the bank, which they did, because two of their members were caused to use an extraordinary number of hours from the bank at that time.

22. Throughout its existence the Sick Leave Bank has been exclusively funded by contributions of employee hours.

23. On April 16, 2009 the Sick Leave Bank Administration Board ("hereinafter referred to as "Sick Bank Board") discussed means of increasing the bank's balance of hours by requiring employees to each contribute an additional 3 hours and the Town Manager, who was in attendance at the Sick Bank Board meeting that day expressed the opinion that such an increase "might need to be negotiated." (Town Exhibit X)

24. The Sick Leave Bank was in deficit by approximately 3882 hours (4500 – 618 = 3882) (see Town Exhibit TT)

25. All parties were aware that the Sick Leave Bank was in a deficit status during 2008 and continuing through April of 2009 a time during which, notwithstanding the deficit, qualified employees continued to receive an advance of paid sick leave.

26. Throughout the life of the Sick Leave Bank, the Town never made a request of the complainants to have their members contribute an additional amount of sick leave to the bank although the Sick Bank Board had discussed various methods of doing so and had recommended specific actions to the Town.

27. At the time the Town ceased advancing sick leave payments, in April 2009 two employees had been receiving that benefit. One, a firefighter, resigned on March 28, 2009 just prior to a court proceeding. The second, a public works employee, subsequently retired. Prior to that time no qualified employee was denied payment whether the Sick Leave Bank was in a deficit balance or not.

28. At the time of hearing, the complainants' members were continuing to contribute to the Sick Leave Bank at the approximate rate of 125 hours monthly.

29. The Sick Leave Bank accepted or denied an employee's request to be advanced leave from the bank after considering the employee's application and physician's note and informed the Town of Sick Leave Bank acceptances of qualified applications and the Town acted accordingly to advance the sick leave.

30. Kristi Pulliam has been employed by the Town since 1998 and has been the Payroll Supervisor since October of 2002. She has been a member of the Sick Bank Board,

representing the Teamsters, since May 2005. She prepares the Sick Bank status reports and minutes. Her direct supervisor is the Finance Director.

31. Ms Pulliam expressed her opinion that the Sick Leave Bank "can have a negative balance" based upon her observation of the continued operation of the bank during deficit balances appearing in reports since at least February 22, 2008 with hours being advanced to employees.

32. Mr. Fred Welsh has been Town Manager since March 14, 2007. In that capacity he attended a Sick Bank Board meeting on April 16, 2009 wherein several rule changes were proposed related to the operation and contributions to the Sick Leave Bank to which he responsively commented that the additional contributions of hours "might need to be negotiated."

33. At a Sick Bank Board meeting on April 6, 2009 the Town's representative, Finance Director Michael Schwotzer, made a motion to approve an employee's application for advance payment of sick leave from the Sick Leave Bank despite knowledge of the existing deficit. Further, he parried another member's concern about doing so while there was a negative balance by saying, "the [Sick Bank] Board needs to proceed with business as usual."

34. On March 31, 2008 the Sick Leave Bank was carrying a deficit in hours and the Sick Bank Board minutes express the parties agreed that "this would not be the time to go to the union members and ask them to donate more time. It was suggested that next year at

this time we revisit the issue. Another idea was that this could be a topic of discussion while in negotiations."

35. The Business Agent for the Teamsters was not made aware of any contemplated Town action to initiate proceedings regarding adjustments to the existing Town practice until he was served with a copy of the Town's petition to the Rockingham Superior Court.

36. Michael Schwotzer has been the Finance Director for the Town since July 2006 and has served as the management representative on the Sick Bank Board since January 2007. He also had prior experience in finance.

37. Mr. Schwotzer has attended every meeting of the Sick Bank Board since January 2007 during which time he acted upon employee applications for and voted to grant awards of sick leave hours to be advanced to employees.

38. During his tenure the Sick Leave Bank the Sick Bank Board, including Mr. Schwotzer on one occasion, continued to advance hours in the approximate amount of 1,000 hours to an employee who was also receiving workers' compensation.

39. Following its consideration of issues related to the deficit and general use of the Sick Leave Bank, the Sick Bank Board voted to make five changes in its rules that would address the solvency of the Sick Leave Bank's operation and made Town Manager Welsh aware of this action requesting that he inform the accounting department to implement

the changes effective May 1, 2009. (See Town Exhibit T (9), April 18, 2009 letter to Welsh

40. There were no meetings of the Sick Bank Board between September 10, 2007 and March 31, 2008 at which time the members of the Sick Bank Board were aware of the deficit of hours but had no strong reaction to that fact.

41. The Sick Leave Bank had more hours withdrawn from it than contributed to it during each of the reporting periods for the following years: 2002, 2004, 2005, and 2007. It also carried forward an aggregate and increasing deficit from January 2008 to the date of hearing.

42. The Sick Bank Board continued to approve usage of advanced sick leave hours by employees requesting time through April of 2009. On April 6, 2009 the Town's representative put forward a motion, subsequently seconded and approved by committee vote, to award hours from the Sick Leave Bank with full knowledge of the continuing deficit balance.

43. In or about April 2009 the deficit balance was approximately 3800 hours, approximately 120% of the aggregate deficit balance as reported in February 2008 the substantial majority of which was due to the circumstances of two employees now no longer employed by the Town.

44. The annual rate of accumulated hours contributed by employees to the Sick Leave Bank in 2009 was approximately 1500 hours and employees continue to contribute hours to it at the combined rate of approximately 125 hours monthly.

45. The Town is responsible for keeping the records of the Sick Leave Bank.

46. During 2008 the hours that were being advanced by authorization of the Sick Leave Bank were not being posted in a current manner and this posting error contributed to the apparent substantial and speedy increase in the number of hours being shown as withdrawn from the bank.

47. Fred Welsh is an experienced administrator and town manager and has been the Town's Manager since March 14, 2007.

48. The sick bank is not funded by the Town, it is funded through the contributions of employees.

49. Mr. Welsh was concerned about the size of the September 2008 deficit in the Sick Leave Bank because of the potential liability it presented. He had been aware of the approximate 1500 hour deficit that existed at the beginning of that year.

50. Mr. Welsh directly informed the Town Board of Selectmen and the Town's legal counsel, Mark Gerreald, of the deficit in the Sick Leave Bank in the fall of 2008.

51. At some time between Welsh's notice to the Board of Selectmen and March 31, 2009, the Board of Selectmen removed Welsh's authority to either negotiate with the unions or discuss the matter of the Sick Leave Bank with the unions and the Board of Selectmen directed the Town's counsel, Attorney Mark Gerreald, to handle the matter.

52. The Town did not negotiate with the complainant unions regarding the Sick Leave Bank for approximately a year prior to Attorney Gerreald filing a "Petition for Declaratory Judgment and for Preliminary Injunctive Relief" with the Rockingham Superior Court on April 15, 2009, 2009.

53. The Town did not seek to have a "side bar", *i.e.* a modification, added to the existing CBA's with the complainant unions to address the operation of the Sick Leave Bank, nor initiate or engage in arbitration to address the operation of the Sick Leave Bank, nor pursue an administrative remedy through the Public Employee Labor Relations Board to obtain a declaratory ruling from the agency to address the operation of the Sick Leave Bank prior to its filing with the court.

54. The Town drafted the terms of the injunction as part of its filings with the Rockingham Superior Court and which the court (McHugh) signed and issued that proposed order as its own formal order.

55. At some time subsequent to March 31, 2009, the Board of Selectmen returned the authority to Town Manager Welsh to negotiate the operation of the Sick Leave Bank. At the time of hearing no negotiation sessions had been conducted with the complainant unions.

56. The IAFF filed for arbitration under the terms of their CBA's with the Town which the Town attempted, without success, to have dismissed and at least one arbitration session is scheduled to be conducted on March 15, 2010.

57. There is no prohibition or restraint in the court's injunction that would prevent the Town from negotiating with any of the unions to address the Sick Leave Bank deficit issue.

58. Town Manager Welsh did not inform the unions that authority to negotiate had been returned to him and did not respond until September 1, 2009 to Teamsters' Business Agent, Tom Noonan's attempts to request negotiations since June 29, 2009.

59. Town Manager Welsh was on the Town's negotiating team during a previous round of negotiation sessions occurring in 2008 and did not raise the operation of the Sick Leave Bank as an issue nor did the unions raise it as an issue for negotiations.

DECISION AND ORDER

DECISION SUMMARY

We find the dispute between the complainants and the Town primarily raises questions of statutory violation. The basic issue is whether the Town violated RSA 273-A:5,I when it effectively suspended the operation of a recognized Sick Leave Bank practice of advancing sick leave by obtaining an injunction from the Superior Court without negotiating with the complainants. We find that it did so in the face of a "past practice" and order the parties to return

to the Sick Leave Bank *status quo ante* practice followed by both parties and to immediately enter into negotiations on the Sick Leave Bank issue. Additionally, we find that the IAFF complainants timely filed for arbitration and are entitled to arbitration and order the Town to participate in that arbitration.

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has *primary* jurisdiction to adjudicate claims of improper labor practices (RSA 273-A:5) and to order relief it deems necessary (RSA-273-A:6 I, VI) 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 RSA273-A:1,I. The PELRB also has jurisdiction over petitions for declaratory rulings pursuant to RSA 541-A:1, V and Pub 206.01. Neither the action undertaken by the Town in filing a "Petition for Declaratory Judgment and Preliminary Injunctive Relief" with the Rockingham Superior Court nor its attempt to invoke the original jurisdiction of the Supreme Court to stay the proceedings of the PELRB in the valid exercise of its jurisdiction in this matter deprives nor prevents the board from assuming jurisdiction and proceeding in its normal, and expected, course. There is nothing on the face of any of the pleadings filed in these consolidated cases that would have the legal effect of nullifying the express legislative purpose or jurisdiction of this administrative board.

PROCEDURAL MOTIONS

Before proceeding to the merits we address the three motions pending before the board on the day of hearing. The HPA, without objection by any party, withdrew its previously filed motion requesting the board to defer its complaint to arbitration. The board then heard the parties

on two motions filed by the Town. The first was a motion to stay the PELRB proceedings and the second motion requested the board to dismiss the several complaints filed by the respective unions. The parties' arguments supporting their positions on both motions were presented simultaneously. The Town argued, among other things, that allegations contained in several of the complaints lacked a sufficiency of facts to establish a valid charge, and that one of the six bargaining units that was a participant in the underlying "common sick leave bank" issue before the board, the State Employees' Association, Inc./Service Employees International Union (SEA/SEIU) representing certain public works employees, was not a party to these proceedings before the PELRB. Also, the Town argued that it had filed a "Writ of Prohibition" with the Supreme Court to obtain an order prohibiting the PERLB from proceeding at this time and that that action was still pending before the Supreme Court. Furthe r, the Town argued that its separate declaratory judgment action filed in the Rockingham Superior Court was still active and the Superior Court had retained jurisdiction over the litigation filed there and had scheduled a structuring conference to be conducted on December 1, 2009. Finally, the Town argued that if the board were to proceed with its hearing, it would be insinuating itself into an existing litigation process essentially acting as an appellate body over the Superior Court.

The complainants objected to the Town's requests of the board to stay or dismiss the pending matters. For purposes of our decision, the complainants' objections can fairly be summarized as asserting that the complaints before the board are valid charges alleging improper labor practices committed by the Town; that the PELRB has appropriate jurisdiction to hear the pending complaints notwithstanding litigation filed by the Town with the Rockingham Superior Court; and that the charges alleged are sufficient to constitute valid complaints that the Town breached its collective bargaining agreements and violated provisions of RSA 273-A:5,I.

In addition to the Town's motions to stay and to dismiss, on the day before the hearing it filed an additional motion *in limine* to prohibit the use of extrinsic evidence by the complainants related to the parties' respective CBA's. The complainants objected.

After a recess during which the board considered the motions, the hearing was reconvened and the Town's motions to stay and to dismiss were denied and its motion to prohibit the use of extrinsic evidence was deferred until the separate and actual attempts by the complainants to use such evidence during the hearing actually occurred at which time the specific proffered evidence would be considered separately.

Having previously filed for arbitration over the underlying sick bank issue, counsel for both IAFF units took leave of the board and represented that it would limit the presentation of its two respective complaints to offers of proof on the issue of arbitration and requested relief that the board find the Town in violation of its obligation to arbitrate and defer the IAFF matters to arbitration. IAFF did so and thereafter rested its direct case, reserving its right to cross examine witnesses. Then, after representations by the complainants' counsel and agreement among them, counsel for the Teamsters was designated lead counsel for the complainants and proceeded to call its first witness.

DISCUSSION

At the outset we believe a summary of the chronological sequence of certain relevant events leading to these complaints against the Town is helpful. The Town and the complainant unions have a long standing relationship as a public employer and exclusive bargaining representatives for several employee groups. In or about 2000 the parties negotiated terms into their respective collective bargaining agreements describing the establishment and operation of a Sick Leave Bank. This Sick Leave Bank was to be a single common entity for all of the

bargaining units' employees to contribute hours into and to be eligible to draw against the bank if they later qualified. The parties established a Sick Bank Administration Board, comprised of a member from each bargaining unit (6) and a Town representative, to oversee the operation of the bank. In or about February 2008 the bank status dropped into a deficit balance indicating that the hours being approved for use by petitioning employees had exceeded the total number of hours contributed into the bank at that time. Despite continuing monthly contributions by employees, the bank operated in deficit status throughout 2008 and into 2009. During that time the Bank Board continued to authorize these advances of sick leave and the Town paid the hours to the properly approved applicants. The parties had suspended negotiations for a successor agreement to the CBA's after tentative agreements had been rejected by Town Meeting vote. Neither the Town nor the complaining bargaining units initiated any proposal to change the way the sick leave bank was operating or being governed during any previous negotiations for successor agreements. The parties had continued their relations under the doctrine of *status quo* since the expiration of CBA's in 2006. The Sick Bank Administrative Board did continue to develop alternative provisions to make the bank more solvent and did finally recommend changes, in writing, at least by August of 2008 which recommendations were not addressed by any of the parties through negotiations through April 2009. Without any prior notice to the exclusive bargaining representatives of the complaints, the Town filed a Petition for Declaratory Judgment and Temporary Relief in the Rockingham Superior Court and an *Ex parte* Motion for Temporary Restraining Order with the Town's proposed order on April 15, 2009. The court approved the order on April 16, 2009 the effect of which was to allow the Town to cease its advance payments of sick hours while the bank was in a deficit status. Thereafter, the complainants filed charges with the PELRB alleging violations of contract provisions and provisions of RSA 273-A:5,I.

The Town is a party to separate collective bargaining agreements with each of the complaining bargaining units. All of the CBA's expired on March 31 2006 and since that time

the parties have continued their relationship under the terms and conditions existing on that date as provided under the *status quo* doctrine.

Each complainant's CBA with the Town included a provision that established and maintained the operation of a common Sick Leave Bank. This provision provided that employees in any of the bargaining units would deposit an agreed number of earned sick leave hours to the common bank through continuous contributions. Individual employees who had a need for additional hours of compensated sick leave would apply to the bank for an advance of sick leave. If they otherwise are qualified, the Sick Bank Board would consider the application, and if the board approved the application, they would request the Town to advance the leave to that employee. The Sick Leave Bank Board by agreement of all parties was comprised of a representative of each bargaining unit and a Town representative, presently the Finance Director.

All of the CBA's provide the following clause related to the Sick Leave Bank:

> Should the bank run out of time then the Town will keep records of the negative balance and the monthly contributions will be posted against that negative balance.

This language clearly indicates that all parties anticipated that the Sick Leave Bank balance could have a negative balance at some time. There is no other reference to a negative balance or a deficit balance regarding the Sick Leave Bank anywhere in the several CBA's.

It is the PELRB's responsibility to determine whether the Town committed an unfair labor practice when it effectively suspended the full operation of the Sick Leave Bank following its action in seeking and receiving an injunction from the Rockingham Superior Court. The Town has argued, in part, that for this board to do so somehow would take us outside our jurisdiction, as declared by the legislature in RSA 273-A, and position the PELRB as an appellate body over the court. This argument misses the mark. It is not the court's actions, but the Town's actions that are the subject of our jurisdiction and the object of our examination here.

Once an exclusive representative, *e.g.* any of the complainants, is certified to represent a bargaining unit, a duty to negotiate with the other in good faith is imposed by operation of RSA 273-A:3. In this matter, the parties have previously negotiated a term or condition of work namely the operation of the Sick Leave Bank. The parties appear to have negotiated the common Sick Leave Bank into their respective CBA's in 2000. Each party acknowledged that the Sick Leave Bank balance may slip into a negative balance of hours since at least August 8, 2001 and intermittently the issue had arisen in Sick Bank Board meetings since then. Since at least February 2008 the parties were each with knowledge that a long term negative balance had developed over time in the bank. The parties also were aware that the deficit continued to grow through the remainder of 2008 and into April 2009. Throughout this period, employees continued to contribute hours to the bank and qualified employees continued to be accepted and then be advanced sick leave by the Town. Then on April 16, 2009 the Town, without attempting to call for negotiations on the Sick Leave Bank issue or prior notice to the complainants, filed a Petition for Declaratory Judgment and Preliminary Injunctive Relief *ex parte* with the Rockingham Superior Court. The Town sought an order from the court that would allow it to cease advancing any additional sick leave hours to eligible employees. The Town obtained a court order that in relevant part stated, " that so long as the Sick Leave Bank has a negative balance, the Town *may* cease to pay sick time to its Union employees utilizing hours drawn on the Sick Bank..." (emphasis added).

We are troubled by the actions of the Town because the obligation of good faith negotiations is not suspended during a *status quo* period. The legislature anticipated that parties with matters falling within the primary jurisdiction of the PELRB may require a declaratory ruling and Admin. R. Pub 206 provides that avenue. The legislature also anticipated that, albeit infrequently, a party may not comply with a cease and desist order issued by the PELRB and therefore provided the PELRB with the ability to present its order to the court to obtain

injunctive relief pursuant to RSA 273-A:7. Despite this statutory scheme, despite the requirements for the Town to exhaust administrative remedies available to it before pursuing court action and despite the Town's obligation to negotiate modification of terms and conditions of work with the bargaining units, and despite the direct availability of arbitration by mutual consent of the parties, the Town chose to embark on what at best could be characterized as a road truly less traveled and at worse bad faith. We prefer not to find the latter given the long experience of most, but not all, representatives advising the Town. But we are not unaware that the Town's actions had the consequence of delaying our attention to this dispute and initially, but not ultimately, avoiding the PELRB's primary jurisdiction. It had the consequence of avoiding its obligations to collectively bargain, and of avoiding the continuation of adhering to the *status quo* terms and conditions of work. There is insufficient evidence in the record however for us to conclude that its action in going to the court, a right bestowed by law, alone constitutes bad faith.

However, the Town's reliance upon the court's orders cannot serve as a barrier, as the Town seems to argue, to our continued examination of its actions under the provisions of RSA 273-A generally, and the subsections collectively alleged by the complainants particularly RSA 273:5,I (e), (g), (h) and (i). As we have previously stated above, it is not the court's actions but the Town's actions that we review. Having said that, we note for the parties to this action that the court's relevant orders do not compel the Town to continue operation of the Sick Leave Bank or free the Town from its obligations under RSA 273-A. Rather, it is permissive in nature expressly stating that the "Town *may* cease to pay sick time..." Therefore, to the extent that the Town would assert either unconditional judicial support for modifying a term or condition of work or superior jurisdictional authority to free it from all obligations arising under RSA 273-A, we do not share its view.

There is a well understood factor that comes into play in labor relations and that is what is universally referred to in labor law as "past practice." The parties' actions are closely

scrutinized by this board because of the important role "past practice" plays in the unionized workplace. All cases that involve a determination of this board as to whether a past practice existed between the parties are heavily fact driven. When faced with this question we seek to find (1) whether the parties had knowledge of the existence of the practice and, (2) whether the parties demonstrated their acceptance of that practice by their actions over a protracted period of time. We do not view past practice in the workplace as merely an interpretive device by which to examine the language the parties used in their CBA's. Past practice is often akin to a "gap filler" or implied term and condition of work between public employers and public employees who have had, or will have, many cycles of negotiations as long as the employees have an exclusive bargaining representative.

We find that the article appearing in each CBA regarding the Sick Leave Bank creates a term or condition of work agreed to by the parties. For a period in excess of fourteen months the parties clearly continued to operate this Sick Leave Bank knowing that it was in a negative balance. The Town's Finance Director drew attention to the need to address the potential of the bank having insufficient hours as early as 2001. Throughout 2008 and into 2009 the qualified employees applying to the bank were advanced hours despite the negative balance and employees within the bargaining units continued to contribute hours into the bank. The evidence on this practice is not in conflict. The Sick Leave Bank Board was continually aware of the existence of a negative balance and requested that changes be made to the operation of the bank. The Town continued to advance the leave upon the bank's board informing the Town of the acceptance of an employee application up to and into April 2009. Our findings of fact enumerated at length above reveal the extent to which the parties operated the Sick Leave Bank for the last ten years and continued to operate it since at least 2008 with a negative balance. Both parties accepted this manner of operation while they remained away from the negotiating table for reasons unknown to us but apparently of sufficient gravity to put the parties in the position

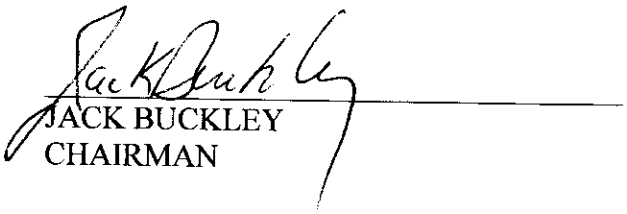
they are at the time of hearing. We conclude that there is sufficient evidence to determine that the operation of the Sick Leave Bank, whether the balance appears as surplus or deficit, constitutes a past practice between these parties.

To the extent that there is any remaining argument by the Town that it is prohibited from advancing sick leave because the Sick Leave Bank is a cost item not authorized by its legislative body, we do not agree. Both parties agree that the Sick Leave Bank is totally funded by employee contributions of sick leave. The Town is obligated to fund employee sick leave under the terms of the parties CBA's and the doctrine of *status quo*. Indeed, the Town continues to deduct paid sick leave from bargaining unit employees. The so-called *Sanborn* defense (*Appeal of Sanborn Regional School Board*, 133 N.H. 520 (1990) does not apply here as there is insufficient evidence of cost to the Town beyond what it clearly is obligated to pay in light of the admission that the Sick Leave Bank is fully funded by the employees.

For the reasons stated above, we find that the Town has committed an unfair labor practice in violation of RSA 273-A:5 I (e), (g), (h) and (i) and order the parties to return to the *status quo* operation of the Sick Leave Bank in effect on April 16, 2010 effective upon the date of this order. We also find that with respect to the IAFF complainants, the Town is obligated to participate in arbitration unless the Town and the IAFF complainants mutually agree to suspend or postpone participating in arbitration. The parties are hereby ordered to enter into negotiations on the issue of the Sick Leave Bank within thirty (30) days and the Town is to provide written confirmation to the PELRB upon the initiation of negotiations with each complainant. If the parties have not reached agreement on the Sick Leave Bank issue within sixty (60) days of the date of this order, then the Town is to notify the PELRB of the identity of any complainant with whom it has not come to a negotiated agreement on this issue and the Town and any remaining complainant shall enter into mediation within (thirty) days of declaration of impasse by either party to negotiations.

So Ordered.

Signed this 11th day of February, 2010.



JACK BUCKLEY
CHAIRMAN

By unanimous vote. Chairman Jack Buckley presiding. Members Kevin Cash and James M.O'Mara, Jr., present and voting.

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