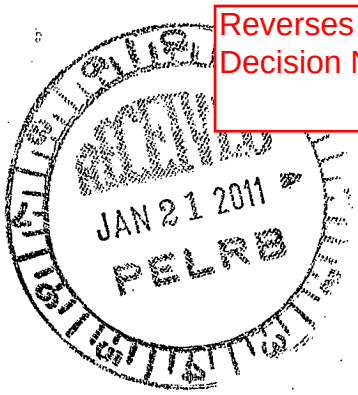
Reverses and remands PELRB Decision No. 2009-118



MANDATE
Certified and Issued as Mandate Under NH Sup. Ct. R. 24
Michelle A. Caraway 1/20/2011
~~Clerk~~/Deputy Clerk Date

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2009-0774, Appeal of Exeter Professional Firefighters Association, IAFF, Local 3491, the court on January 7, 2011, issued the following order:

Having considered the parties' briefs and oral arguments, we conclude that a formal written opinion is not necessary in this case. The petitioner, Exeter Professional Firefighters Association, IAFF, Local 3491, appeals a decision of the New Hampshire Public Employee Labor Relations Board (PELRB) ruling that the PELRB lacked jurisdiction to interpret the disputed portion of the collective bargaining agreement (CBA) between the petitioner and the respondent, the Town of Exeter (Town). We reverse and remand.

The record supports the following facts. The petitioner is the certified bargaining representative for certain members of the Exeter Fire Department. The Town is a public employer. See RSA 273-A:1, X (2010). During the relevant time period, the parties were bound by a CBA. Article 16.5 of the CBA states:

> The employer agrees to authorize a staffing level of not less than five (5) Fire Department Personnel available for response as follows: in FY06, nights (the traditional 14 hour night shift), weekends, and holidays, in FY07, 24 hours per day, 7 days per week.
>
> The employer further agrees that should it become necessary to change that number for reasons of economy, lack of personnel or any other such reason, the employer will discuss the matter with the Association. None of the provisions of [Article] 16.5, Minimum Manning, shall be grievable under [Article] 18, Grievance Procedure.

Article 18 of the CBA provides for a multi-step grievance procedure including "advisory" arbitration, which we interpret to be non-binding arbitration.

In 2008, the Exeter Fire Department assigned a firefighter, who was not a member of the collective bargaining unit, to a regular shift. As a result, the petitioner filed a complaint with the PELRB alleging that the Town breached the CBA in violation of RSA 273-A:5, I(h) (2010) by failing to maintain adequate

staffing as required by Article 16.5 of the CBA. After a hearing, the hearing officer dismissed the complaint, stating that the petitioner was "not entitled to maintain an unfair labor practice based upon the Town's alleged non-compliance with Article 16.5 . . . since the parties agreed that 'none of the provisions of Article 16.5 shall be grievable.'" The hearing officer also held that the PELRB did not have jurisdiction over the petitioner's complaint because by statute "parties are required to have and to use a contractual grievance procedure to address collective bargaining agreement disputes," see RSA 273-A:4 (2010), and "[h]aving agreed not to use that contractual grievance process with respect to Article 16.5 the [petitioner] is precluded from instead proceeding with an unfair labor practice charge under RSA 273-A:5, I(h)." The petitioner sought review of the hearing officer's decision; the PELRB upheld it. The petitioner moved for rehearing, which the PELRB denied. This appeal followed.

When reviewing a decision of the PELRB, we defer to its findings of fact, and, absent an erroneous ruling of law, we will not set aside its decision unless the appealing party demonstrates by a clear preponderance of the evidence that the order is unjust or unreasonable. Appeal of State Employees' Assoc. of N.H., 158 N.H. 258, 260 (2009); see RSA 541:13 (2007). The PELRB has primary jurisdiction of all unfair labor practices, including those involving the breach of a CBA by a public employer. See RSA 273-A:5, I(h), :6, I (2010). Although the parties and the PELRB characterize the issue before us as one of the PELRB's jurisdiction, we believe that the dispute requires us to determine whether the PELRB correctly interpreted the CBA. See Appeal of N.H. Div. of State Police, 160 N.H. 588, 591 (2010). Specifically, the issue is whether the PELRB correctly interpreted Article 16.5 of the CBA.

"Collective bargaining agreements are construed in the same manner as other contracts." Appeal of Lincoln-Woodstock Coop. Sch. Dist., 143 N.H. 598, 601 (1999) (quotation omitted). Thus, we begin by examining the language of the CBA, as it reflects the parties' intent. Appeal of N.H. Div. of State Police, 160 N.H. at 591. Their intent is determined from the agreement taken as a whole, and by construing its terms according to the common meaning of their words and phrases. Id. The interpretation of a CBA, including whether a provision or clause is ambiguous, is ultimately a question of law for this court to decide. Id. Absent fraud, duress, mutual mistake, or ambiguity, we must restrict our search for the parties' intent to the words of the contract. Appeal of Town of Durham, 149 N.H. 486, 487 (2003). A clause is ambiguous when the contracting parties reasonably differ as to its meaning. Appeal of Nashua Police Comm'n, 149 N.H. 688, 690 (2003). Our review is de novo. Appeal of N.H. Div. of State Police, 160 N.H. at 591.

Both parties contend that it is possible to waive the right to grieve a dispute arising under a CBA, but disagree as to the consequences of that waiver. The petitioner argues that the parties agreed only that a dispute arising under Article 16.5 would not be grievable under Article 18; it did not waive the right to bring Article 16.5 disputes directly to the PELRB. The Town asserts that the petitioner bargained away the right to grieve Article 16.5 disputes, which includes review by the PELRB. We assume, without deciding, that parties to a CBA can waive the right to grieve a dispute arising from the CBA.

The Town argues that the petitioner knowingly waived its right to grieve disputes under Article 16.5 and because of this, "there is no need to have an express PELRB waiver." We disagree. A party to a CBA has a statutory right to bring an unfair labor practice complaint before the PELRB. See RSA 273:5, I (2010). While a union may choose to waive certain statutorily protected rights of its members during the collective bargaining process, Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 705 (1983), any such waiver must be "clear and unmistakable." Fowler v. Town of Seabrook, 145 N.H. 536, 539 (2000) (adopting "clear and unmistakable" standard set out in Wright v. Universal Maritime Service Corp., 525 U.S. 70, 79-80 (1998)); cf. Appeal of State Employees' Assoc., 139 N.H. 441, 443-44 (1995) (there must be language in CBA to deprive PELRB of jurisdiction to hear unfair labor practice disputes).

The CBA at issue contains no clear and unmistakable waiver of the petitioner's statutory right to pursue an unfair labor practice complaint before the PELRB. Article 16.5 of the CBA states: "None of the provisions of Article 16.5, Minimum Manning, shall be grievable under [Article] 18, Grievance Procedure." (Emphasis added.) This language is not ambiguous. It simply precludes the petitioner from pursuing Article 16.5 disputes through the grievance procedure articulated in Article 18. It does not constitute a waiver of the petitioner's right to bring an unfair labor practice complaint to the PELRB. Even looking at the CBA as a whole, we cannot find that the parties intended to limit the petitioner's right to bring a complaint before the PELRB because there is no reference to RSA 273-A:5, unfair labor practice complaints, or the PELRB. We, therefore, cannot find that under the plain language of the CBA, the parties clearly and unmistakably waived the right to pursue unfair labor practice complaints before the PELRB. Accordingly, the PELRB erred in determining that the waiver of grievance provision in Article 16.5 precluded the petitioner from bringing an unfair labor practice complaint before the PELRB.

Assuming that the parties could waive the right to grieve, this waiver cannot be construed to be a clear and unmistakable waiver of the right to bring an unfair labor practice complaint before the PELRB because a grievance is not necessarily the same as an unfair labor practice complaint. A grievance is

defined by RSA 273-A:1, V (2010) as "an alleged violation, misinterpretation or misapplication with respect to one or more public employees, of any provision of an agreement reached under this chapter." Thus, a grievance is contractual in nature and arises out of violations of the CBA. See Dunfey v. Seabrook School District, No. 07-cv-140-PB, 2008 WL 1848655, at *2 (D.N.H. April 24, 2008) (analyzing similar definition and concluding "a grievance may only be used to redress harms arising from violations of the contract, not violations of extrinsic statutes or constitutional provisions"). A grievance must be brought through the grievance procedures contained in the CBA. See RSA 273-A:4 (every CBA shall contain "workable grievance procedures"); Appeal of Hooksett School Dist., 126 N.H. 202, 204 (1985) ("[G]rievance language specifically negotiated and agreed upon is binding on both the public employee and public employer.").

An unfair labor practice, however, is statutory in nature. See RSA 273-A:5, I (listing conduct constituting an unfair labor practice). An unfair labor practice complaint is filed directly with the PELRB, see RSA 273-A:6 (2010), and the PELRB has the statutory authority to hear such a complaint. See RSA 273-A:5, I.

While there may be some overlap between grievances and unfair labor practice complaints, see, e.g., Appeal of City of Manchester, 153 N.H. 289, 294 (2006), not all disputes constituting grievances are also disputes constituting unfair labor practices. Further, a CBA or its grievance procedure may not cover all of the unfair labor practices enumerated in RSA 273-A:5, I. For example, RSA 273-A:5, I(f) (2010) states that it is an unfair labor practice to "invoke a lock out." The fact that parties to a CBA do not include a lockout provision in a CBA or provide a remedy for a potential violation in the grievance procedure does not preclude the parties from obtaining relief if the statute is violated. Because a grievance is not necessarily the same as an unfair labor practice complaint, we cannot conclude that waiving the right to grieve also waives the right to bring an unfair labor practice complaint, absent language clearly and unmistakably waiving that right.

Here, the Article 16.5 dispute constitutes a grievance because it is an alleged violation arising out of the parties' CBA. It also constitutes an unfair labor practice complaint because violating Article 16.5 is a breach of the parties' CBA. See RSA 273-A:5, I. Although the parties foreclosed the opportunity to bring this dispute as a grievance, they did not clearly and unmistakably waive the right to bring an unfair labor practice complaint before the PELRB. Therefore, the petitioner may bring this dispute before the PELRB as an unfair labor practice complaint.

The Town invites us to look at the parties' bargaining history and past practices and find that the parties intended to waive the right to bring an unfair labor practice complaint before the PELRB. However, we conduct this type of inquiry only when the terms of the CBA are ambiguous, which is not the case before us. See Appeal of N.H. Dep't. of Safety, 155 N.H. 201, 208 (2007); Appeal of Town of Durham, 149 N.H. at 487.

Reversed and remanded.

DALIANIS, C.J., and DUGGAN, HICKS and CONBOY, JJ., concurred.

Eileen Fox,
Clerk

Distribution:
New Hampshire Public Employee Labor Relations Board G-0071-1
John S. Krupski, Esquire
Thomas J. Flygare, Esquire
Daniel P. Schwarz, Esquire
Attorney General
Marcia McCormack, Supreme Court
Lorrie S. Platt, Supreme Court
Irene Dalbec, Supreme Court
File

STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

EXETER PROFESSIONAL FIREFIGHTERS ASSOCIATION, IAFF LOCAL 3491

v.

CASE NO. G-0071-1
DECISION NO. 2009-118

TOWN OF EXETER

APPEARANCES

Representing: Exeter Professional Firefighters Association, IAFF Local 3491
John S. Krupski, Esq., Molan, Milner & Krupski, PLLC Concord, New Hampshire

Representing: Town of Exeter
Thomas J. Flygare, Esq., Flygare, Schwarz & Closson, PLLC, Exeter, New Hampshire

BACKGROUND

Exeter Professional Firefighters Association, IAFF Local 3491 ("Association") filed an unfair labor practice complaint on November 26, 2008 complaining that the Town has improperly assigned a non bargaining unit employee to the D shift contrary to Section 16.5 of the parties' collective bargaining agreement. The Association claims the Town's actions violate RSA 273-A:5, I (h)(to breach a collective bargaining agreement). [1]

[1] In its brief, the Association also cites, for the first time, RSA 273-A:5, I (i). However, the Association has never sought an amendment to add a claim under RSA 273-A:5, I (i).

As relief, the Association requests that the PELRB find: 1) that the Town violated RSA 273-A:5, I (h); 2) order the Town to cease and desist from further breach of Section 16.5; 3) make whole any member of the bargaining unit who was denied overtime compensation who should have been assigned to the shift's fifth member position and was displaced by the non-unit employee; and 4) grant such other and further relief as may be just.

The Town filed its answer and a motion to dismiss on December 11, 2008. The Town's motion to dismiss, based upon the Association's failure to file a grievance, has been resolved as a result of the Town's January 12, 2009 filing, submitted in accordance with the pre-hearing order, PELRB Decision No. 2009-005. In response to the complaint, the Town generally contends that its staffing decisions are not subject to review through the grievance procedure or via an unfair labor practice charge and that the Town otherwise did not violate the parties' collective bargaining agreement.

The Town requests that the PELRB: 1) dismiss the complaint with prejudice; 2) order the Association to reimburse the Town for its expenses and fees in connection with this matter; and 3) order such other relief as may be just.

The undersigned hearing officer conducted a hearing on January 26, 2009 at the PELRB offices in Concord. The parties had a full opportunity to be heard, to offer documentary evidence, and to examine and cross-examine witnesses. At the parties' request, the record was held open until February 27, 2009 and later extended to March 3, 2009 to allow the parties to file post-hearing briefs. Both parties have filed briefs, and the record is closed. The parties stipulated facts were submitted at hearing as Joint Exhibit 3, and are set forth below as Findings of Fact 1-9.

FINDINGS OF FACT

1. The Exeter Professional Firefighters Association, IAFF Local 3491 is the certified bargaining representative of certain members of the Exeter Fire Department.

2. The Association was certified by the PELRB on September 11, 1978.

3. The Town is a public employer as defined in RSA 273-A:1, X.

4. The Association and the Town are parties to a collective bargaining agreement effective January 1, 2006, which expires on June 30, 2009 (the 2006-09 CBA). Joint Exhibit 1.

5. Article 1.1 of the 2006-09 CBA states as follows:

> The Town recognizes the Association as the exclusive bargaining agent within the meaning of RSA 273-A with regard to the following jobs as enumerated in the certification of the Exeter Permanent Firefighters' Association dated September 11, 1978: Firefighters, Lieutenants and Captains.

6. Article 3.1 of the CBA states as follows:

> All eligible full-time employees who have satisfactorily completed the probationary period shall become permanent employees and shall become members of the bargaining unit.

7. Article 16.5 of the CBA states as follows:

> The employer agrees to authorize a staffing level of not less than five (5) Fire Department Personnel available for response as follows: in FY06, nights (the traditional 14 hour night shift), weekends, and holidays, in FY07, 24 hours per day, 7 days per week.
>
> The employer further agrees that should it become necessary to change that number for reasons of economy, lack of personnel or any other such reason, the employer will discuss the matter with the Association. None of the provisions of Section 16.5, Minimum Manning, shall be grievable under Section 18, Grievance Procedure.

8. The authorization of five (5) Department Personnel per shift in the 2006-09 CBA was an increase from three (3) Department Personnel in previous contracts. Joint Exhibit 2.

9. On or about October 28, 2008, due to the extended medical absences of two employees, call firefighter Patrick Robicheau was assigned by the Department as the sixth member of D shift.

10. The September 11, 1978 bargaining unit certification for the Exeter Permanent Firefighters covers Captains, Lieutenants, and Firefighters.

11. The parties refer to the authorization of 5 Department Personnel per shift language contained in Article 16.5 of the 2006-09 CBA as minimum manning. Such language first appeared in the parties' 1982 collective bargaining agreement ("1982 CBA"), Town Exhibit 4. Article XXXI of the 1982 CBA provides:

MINIUMUM MANNING – Policy Statement:

The Board agrees to authorize a staffing level of no less than three (3) Fire Department Personnel available for response at anytime of the day or week.

The Board further agrees that should it become necessary to change that number for reasons of economy, lack of personnel, or any other such reason, the Board will discuss the matter with the Association.

None of the provisions of Section 31, Minimum Manning, shall be grievable under Section 29, Grievance Procedure.

12. John Carbonneau was a member of the Town fire department from 1966 to 2000. He was a call firefighter until 1973, when he became a full time career firefighter. He became a Lieutenant in 1981, Assistant Fire Chief in 1985, and Chief in 1992. He retired in 2000. In 1982 Mr. Carbonneau was a member of the Association and he helped negotiate the 1982 CBA and he signed the 1982 CBA as an Association negotiator.

13. During the 1980's time period the Town reorganized the police, fire, and public works departments consistent with a national trend toward "public safety officers." Under this structure, the Exeter Police Chief became the Director of Public Safety. This change prompted

the Association to bargain for and obtain the inclusion of the first version of the minimum manning language in dispute in this case in the 1982 CBA. The minimum manning language was intended to assuage Association concerns that, for example, police officers on duty in a cruiser with a SCBA or air pack would also be counted as responders for fire station minimum manning purposes.

14. According to Mr. Carbonneau, the term "Fire Department Personnel" used in the 1982 CBA minimum manning provision (and in all subsequent contracts) was intended to broadly describe all Exeter firefighters, regardless of whether they were call firefighters or full time permanent firefighters, and regardless of whether their positions were covered by the bargaining unit certification.

15. The term "Fire Department Personnel" only appears in the minimum manning provision of the 1982 CBA.

16. In the 1982 CBA and in the 2006-09 CBA, the parties only use Fire Department Personnel in connection with the Minimum Manning language. Elsewhere the contract refers to the unit or bargaining unit employees. Both contracts also establish that probationary employees do not become members of the bargaining unit until they have successfully completed their probationary period.

17. The Minimum Manning language contained in the 1982 CBA remained unchanged in contracts prior to the 2006-2009 CBA, except for the movement of the Minimum Manning provision to Article 16.5 and the substitution of "employer" for "board."

18. The Minimum Manning staff level increased from 3 to 5 in the 2006-09 CBA as a result of Association bargaining proposal #1.9. Town Exhibit 1. In this proposal the Association

also requested the elimination of the second and third sentences of Article 16.5, a request rejected by the Town.

19. The Town Fire Department maintains 4 shifts, known as A Shift through D Shift. As of January 26, 2009, the D Shift was staffed by Lt. Norman Byrne, Crew Chief Jason Greene, Justin Pizon, Kevin St. James, Andrew Martin, and Patrick Robicheau. Association Exhibit 1. Although he is listed as assigned to D Shift, Daniel Bilodeau is not actively serving on D Shift because of work related disability and has been working light duty on a Monday to Friday, 8 to 4 schedule since October, 2008.

20. Patrick Robicheau began working for the Town as a call firefighter in August, 2007. In October, 2008 he was assigned to D Shift on a full time basis. According to Assistant Fire Chief Wilking, who is responsible for maintaining, training, and supervising the Town's call company, in October 2008 Patrick Robicheau was offered and accepted a temporary firefighter position and has been assigned to D Shift on a full time basis ever since. There is no difference between the work Patrick Robicheau does and the work of other permanent firefighters on the D shift. He is paid according to the Town's personnel plan, and does not receive benefits under the parties' collective bargaining agreement.

21. In addition to Mr. Robicheau, the Town employs 24 full time probationary and permanent firefighters ("full time firefighters") and also maintains a roster of approximately 12 call firefighters.

22. The respective duties of call firefighters and full time firefighters are outlined in written position descriptions, Association Exhibits 2 and 3.

23. Patrick Robicheau has successfully completed all prerequisites for hire as a full time firefighter, including an oral board, and is considered a qualified candidate for hire as a career firefighter.

DECISION AND ORDER

DECISION SUMMARY

The Association's claims are denied. Although the subject of Article 16.5 in the parties' collective bargaining agreement is a permissive subject of bargaining, the Association is not entitled to maintain an unfair labor practice based upon the Town's alleged non-compliance with Article 16.5 under RSA 273-A:5, I (h)(to breach a collective bargaining agreement) since the parties agreed that "none of the provisions of Article 16.5 shall be grievable." It would be contrary to RSA 273-A:4 for the PELRB to serve as a substitute for the entire and statutorily mandatory contractual grievance procedures contained in the parties' collective bargaining agreement. Under that statute, the parties are required to have and to use a contractual grievance procedure to address collective bargaining agreement disputes. Having agreed not to use that contractual grievance process with respect to Article 16.5 the Association is precluded from instead proceeding with an unfair labor practice charge under RSA 273-A:5, I (h). The Association's remaining claims are denied as they were not properly pleaded and/or are not supported by sufficient evidence.

JURISDICTION

The PELRB has primary jurisdiction of all violations of RSA 273-A:5. *See* RSA 273-A:6, I. Subject to a ruling on the Town's request for dismissal, PELRB jurisdiction is proper in this case as the Association has alleged violations of RSA 273-A:5, I (h)(to breach a collective bargaining agreement).

DISCUSSION:

The Town argues that Article 16.5 is unenforceable because it delves into prohibited subjects of bargaining and the complaint should be denied on that basis. According to the Town, the number of firefighters per shift is an exclusive management prerogative, is not negotiable, and if negotiated and included in a contract is unenforceable.

Under *Appeal of International Association of Firefighters,* 123 N.H. 404 (1983) the number of personnel, including firefighter platoon staffing, is within the exclusive prerogative of the employer and is a permissive subject of bargaining. *Id. at* 408. Over ten years later the court decided *Appeal of State*, 138 N.H. 716 (1994), and adopted a three step analysis to clarify the managerial policy exception under consideration in the *Firefighters* case. Under the first prong of this test, a particular topic is only a prohibited subject of bargaining if "it is reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation." *Id.* at 722. *Appeal of City of Nashua Board of Education,* 141 N.H. 768 (1997) underscores that in order to be a prohibited subject of bargaining under the first prong of this test an "*independent* statute" or constitutional provision or valid regulation that "reserves" to the public employer the "exclusive authority" to determine, for example, the number of personnel, is required. *Id.* at 774 (emphasis in original)("We reject the city's bootstrapping attempt to utilize the statutory managerial policy exception as the statute that determines the scope and applicability of the managerial policy exception.") In accordance with these authorities, the subject matter of Article 16.5 is not a prohibited subject of bargaining, and accordingly the Town's claim that it is unenforceable on that basis is without merit.

The Town also contends that because the parties expressly agreed that "[n]one of the provisions of Section 16.5, Minimum Manning, shall be grievable under Section 18, Grievance Procedure" the Association's unfair labor practice charge, filed under RSA 273-A:5, I (h)(to breach a collective bargaining agreement claim), should be dismissed. I conclude that the PELRB cannot consider the Association's RSA 273-A:5, I (h) claim given this language and the fact that having the PELRB serve as a substitute for the entire contractual grievance process is contrary to the statutory scheme for the resolution of collective bargaining agreement disputes and related court decisions

According to *Roberts' Dictionary of Industrial Relations, 4th Edition,* a "grievance" is a complaint or dispute that "may involve the interpretation and application of the collective bargaining agreement" and "[q]uestions concerning the interpretation and application of the collective bargaining agreement are subject to the grievance procedure culminating in arbitration." The term "grievance" is broader than just contract disputes, but it clearly encompasses contract disputes like the current dispute over the interpretation and application of Article 16.5.

The Association's claim that permanent bargaining unit employees were improperly denied overtime work based upon the Association's interpretation of Article 16.5 constitutes a contract dispute that could have been presented as a grievance under the Article 18 grievance procedure but for the language cited by the Town and agreed to by the Association. Under RSA 273-A, the presentation of a "grievance" involving a contractual dispute through the contractual grievance process constitutes the submission of a dispute through a legislatively required mechanism to resolve such disputes. In *Appeal of Pelham,* 124 N.H. 131 (1983) the court emphasized the importance of the contractual grievance process:

> In enacting the Public Employee Labor Relations Act, the legislature included a statement of policy in which it declared that it is the public policy of the State to promote harmonious and cooperative relations between public employer and their employees. In keeping with that policy declaration, the legislature has expressly mandated the inclusion of a grievance procedure in every collective bargaining agreement. The reasons for this statutory requirement are obvious. If a dispute arises as to the interpretation or application of the agreement, there must be a mechanism for resolving the dispute or else the agreement is meaningless.

The "mechanism" is the "workable grievance procedure" that must be included in every collective bargaining agreement. "Every agreement negotiated under the terms of this chapter shall be reduced to writing and shall contain workable grievance procedures." *See* RSA 273-A:4. Under this provision of the statute the Town and the Association were required to agree to a "workable grievance procedure" other than PELRB adjudicatory proceedings to address, and hopefully resolve, among other things, disputes arising under their collective bargaining agreement. It would be inconsistent with this statutory requirement to conclude that the parties are not also required to use their statutorily required "workable grievance procedure." This doesn't meant that the PELRB will never consider the merits of collective bargaining disputes, as there are several recognized avenues by which contractual disputes may come before the PELRB. See *Appeal of Nashua Police Commission,* 149 N.H. 688 (2003)(filing an unfair labor practice complaint with the PELRB as the final step in the grievance process) and *Appeal of Hooksett School District,* 126 N.H. 202 (1985). In *Hooksett* the court held that:

> Absent a provision for binding arbitration following the grievance procedure, and with no explicit or implicit language in the contract stating that [the last step] 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.

Parties to collective bargaining agreements are free to agree in advance, as the Town and the Association have done in this case, that certain potential disputes, like those that might arise under Article 16.5, will not be grieved. Under RSA 273-A, and in particular given the provisions

of RSA 273-A:4, such an agreement means that such potential disputes will not be subject to any formal review or adjustment. For these reasons, the Association's claim that the Town improperly denied overtime employment to permanent firefighters based upon the Association's interpretation of the Town's rights and obligations under Article 16.5 is dismissed.

In its post-hearing brief the Association requests that the Town be ordered to pay Mr. Robicheau "retroactively all benefits that would have been paid to a probationary firefighter during this period including New Hampshire Retirement System contributions."[2] This request for relief is denied for several reasons. First, the Association did not raise this claim in its complaint, and there have been no amendments to the complaint. Second, even assuming this claim is properly before the PELRB, it has not been proven. The Association has not identified any contractual provision that the Town has breached with respect to Mr. Robicheau. Both parties agree Mr. Robicheau is not a permanent firefighter. He is not part of the bargaining unit, is not represented by the Association for purposes of collective bargaining and grievances under RSA 273-A, the terms and conditions of his employment are not addressed in the parties' collective bargaining agreement, nor are the nature and extent of the Town's obligations with respect to the New Hampshire Retirement System.

In the final sentences of its brief the Association cites RSA 273-A:5, I (i)(to make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule). However, the Association has never sought to amend its complaint to add a claim under this statutory provision, and the Association's reference to it in the final sentences of its post-hearing brief is insufficient to request and/or obtain an amendment.

[2] Earlier in its brief the Association asserts that "[i]t is undisputed that Firefighter Robicheau is not a full-time permanent firefighter, a probationary firefighter or a part-time firefighter."

Neither the Town nor the PELRB was ever apprised that the Association was proceeding with a claim under this statutory provision, and it is denied on that basis. It is also denied as the Association has failed to develop a sufficient basis for this claim, either in the record or in its argument.

In accordance with the foregoing, the Association's complaint is dismissed.

So ordered.

June 11, 2009

Douglas L. Ingersoll, Esq.
Hearing Officer

Distribution:
John S. Krupski, Esq.
Thomas J. Flygare, Esq.

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Exeter Professional Fire Fighters Association, IAFF, Local 3491

v.

Town of Exeter Fire Department

Case No. G-0071-1
Decision 2011-133

Appearances: John S. Krupski, Esq., Molan, Milner & Krupski, PLLC Concord, New Hampshire for the Complainant

Thomas J. Flygare, Esq., Jackson Lewis LLC, Portsmouth, New Hampshire for the Respondent

Background:

The relevant procedural history in this case includes the following. In its complaint the Association charges that the Town violated Article 16.5 (Minimum Manning) of the parties' collective bargaining agreement (CBA) and thereby committed an unfair labor practice in violation of RSA 273-A:5, I (h)(to breach a collective bargaining agreement).[1] After a June 11, 2009 adjudicatory hearing the undersigned hearing officer issued PELRB Decision No. 2009-118 (June 11, 2009), which dismissed the Association's RSA 273-A:5, I (h) claim and also denied a

[1] Normally, the Association would be entitled to maintain a grievance concerning an alleged violation of the CBA, since per Article 18 (Grievance Procedure), the "purpose of the contractual grievance procedure is to provide the mutually acceptable procedure for adjusting grievances arising from an alleged violation, misinterpretation or misapplication with respect to one or more unit employees, of any provision of this Agreement." However, Article 16.5 provides that the minimum manning provisions are not grievable, but the Association is entitled to maintain a statutory breach of collective bargaining agreement claim, as discussed later in this decision.

second claim raised for the first time in the Association's post hearing briefing which charged a violation of RSA 273-A:5, I (i)(to make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule.)[2]

The Association appealed the PELRB's dismissal of its RSA 273-A:5, I (h) claim to the New Hampshire Supreme Court. In its January 7, 2011 order the court returned that claim to the PELRB for a decision on the merits. *See* January 7, 2011 court order in *Appeal of Exeter Professional Firefighters Association, IAFF, Local 3491,* Case No. 2009-0774. The court stated that "[b]ecause a grievance is not necessarily the same as an unfair labor practice complaint, we cannot conclude that waiving the right to grieve also waives the right to bring an unfair labor practice complaint, absent language clearly and unmistakably waiving the right." However, neither the court's order nor the record reflect that the Association appealed or the court acted with respect to the PELRB's denial and dismissal of the Association's RSA 273-A:5, I (i) claim. Further, as reflected in PERLB Decision No. 2009-118, the determination of that claim did not depend upon the disposition of the Association's RSA 273-A:5, I(h) claim. The Association's RSA 273-A:5, I (i) claim is therefore not subject to further consideration, review or adjudication.

The court's January 7, 2011 decision did not order or require a new hearing or the receipt of additional evidence in these remand proceedings. I do not otherwise find that a new hearing

---

[2] In this claim the Association requested that the Town be ordered to pay Mr. Robicheau "retroactively all benefits that would have been paid to a probationary firefighter during this period including New Hampshire Retirement System contributions." PELRB Decision No. 2009-118 provided in part as follows:

> In the final sentences of its brief the Association cites RSA 273-A:5, I (i)...However, the Association has never sought to amend its complaint to add a claim under this statutory provision, and the Association's reference to it in the final sentences of its post-hearing brief is insufficient to request and/or obtain an amendment. Neither the Town nor the PELRB was ever apprised that the Association was proceeding with a claim under this statutory provision, and it is denied on that basis. It is also denied as the Association has failed to develop a sufficient basis for this claim, either in the record or in its argument.

or the receipt of additional evidence is required. *See* PELRB Decision No. 2011-124 (denying Association's request for further hearing on remand). The Findings of Fact in prior PELRB Decision No. 2009-118 as well as the record of the prior proceedings constitute the record for decision in these remand proceedings, and the Findings of Fact established in PELRB Decision No. 2009-118 are set forth below.

Findings of Fact

1. The Exeter Professional Firefighters Association, IAFF Local 3491 is the certified bargaining representative of certain members of the Exeter Fire Department.

2. The Association was certified by the PELRB on September 11, 1978.

3. The Town is a public employer as defined in RSA 273-A:1, X.

4. The Association and the Town are parties to a collective bargaining agreement effective January 1, 2006, which expires on June 30, 2009 (the 2006-09 CBA). Joint Exhibit 1.

5. Article 1.1 of the 2006-09 CBA states as follows:

> The Town recognizes the Association as the exclusive bargaining agent within the meaning of RSA 273-A with regard to the following jobs as enumerated in the certification of the Exeter Permanent Firefighters' Association dated September 11, 1978: Firefighters, Lieutenants and Captains.

6. Article 3.1 of the CBA states as follows:

> All eligible full-time employees who have satisfactorily completed the probationary period shall become permanent employees and shall become members of the bargaining unit.

7. Article 16.5 of the CBA states as follows:

> The employer agrees to authorize a staffing level of not less than five (5) Fire Department Personnel available for response as follows: in FY06, nights (the traditional 14 hour night shift), weekends, and holidays, in FY07, 24 hours per day, 7 days per week.
>
> The employer further agrees that should it become necessary to change that number for reasons of economy, lack of personnel or any other such reason, the

employer will discuss the matter with the Association. None of the provisions of Section 16.5, Minimum Manning, shall be grievable under Section 18, Grievance Procedure.

8. The authorization of five (5) Department Personnel per shift in the 2006-09 CBA was an increase from three (3) Department Personnel in previous contracts. Joint Exhibit 2.

9. On or about October 28, 2008, due to the extended medical absences of two employees, call firefighter Patrick Robicheau was assigned by the Department as the sixth member of D shift.

10. The September 11, 1978 bargaining unit certification for the Exeter Permanent Firefighters covers Captains, Lieutenants, and Firefighters.

11. The parties refer to the authorization of 5 Department Personnel per shift language contained in Article 16.5 of the 2006-09 CBA as minimum manning. Such language first appeared in the parties' 1982 collective bargaining agreement ("1982 CBA"), Town Exhibit 4. Article XXXI of the 1982 CBA provides:

MINIUMUM MANNING – Policy Statement:

The Board agrees to authorize a staffing level of no less than three (3) Fire Department Personnel available for response at anytime of the day or week.

The Board further agrees that should it become necessary to change that number for reasons of economy, lack of personnel, or any other such reason, the Board will discuss the matter with the Association.

None of the provisions of Section 31, Minimum Manning, shall be grievable under Section 29, Grievance Procedure.

12. John Carbonneau was a member of the Town fire department from 1966 to 2000. He was a call firefighter until 1973, when he became a full time career firefighter. He became a Lieutenant in 1981, Assistant Fire Chief in 1985, and Chief in 1992. He retired in 2000. In

1982 Mr. Carbonneau was a member of the Association, he helped negotiate the 1982 CBA, and he signed the 1982 CBA as an Association negotiator.

13. During the 1980's time period the Town reorganized the police, fire, and public works departments consistent with a national trend toward "public safety officers." Under this structure, the Exeter Police Chief became the Director of Public Safety. This change prompted the Association to bargain for and obtain the inclusion of the first version of the minimum manning language in dispute in this case in the 1982 CBA. The minimum manning language was intended to assuage Association concerns that, for example, police officers on duty in a cruiser with a SCBA or air pack would also be counted as responders for fire station minimum manning purposes.

14. According to Mr. Carbonneau, the term "Fire Department Personnel" used in the 1982 CBA minimum manning provision (and in all subsequent contracts) was intended to broadly describe all Exeter firefighters, regardless of whether they were call firefighters or full time permanent firefighters, and regardless of whether their positions were covered by the bargaining unit certification.

15. The term "Fire Department Personnel" only appears in the minimum manning provision of the 1982 CBA.

16. In the 1982 CBA and in the 2006-09 CBA, the parties only use Fire Department Personnel in connection with the Minimum Manning language. Elsewhere the contract refers to the unit or bargaining unit employees. Both contracts also establish that probationary employees do not become members of the bargaining unit until they have successfully completed their probationary period.

17. The Minimum Manning language contained in the 1982 CBA remained unchanged in contracts prior to the 2006-2009 CBA, except for the movement of the Minimum Manning provision to Article 16.5 and the substitution of "employer" for "board."

18. The Minimum Manning staff level increased from 3 to 5 in the 2006-09 CBA as a result of Association bargaining proposal #1.9. Town Exhibit 1. In this proposal the Association also requested the elimination of the second and third sentences of Article 16.5, a request rejected by the Town.

19. The Town Fire Department maintains 4 shifts, known as A Shift through D Shift. As of January 26, 2009, the D Shift was staffed by Lt. Norman Byrne, Crew Chief Jason Greene, Justin Pizon, Kevin St. James, Andrew Martin, and Patrick Robicheau. Association Exhibit 1. Although he is listed as assigned to D Shift, Daniel Bilodeau is not actively serving on D Shift because of work related disability and has been working light duty on a Monday to Friday, 8 to 4 schedule since October, 2008.

20. Patrick Robicheau began working for the Town as a call firefighter in August, 2007. In October 2008 he was assigned to D Shift on a full time basis. According to Assistant Fire Chief Wilking, who is responsible for maintaining, training, and supervising the Town's call company, in October 2008 Patrick Robicheau was offered and accepted a temporary firefighter position and has been assigned to D Shift on a full time basis ever since. There is no difference between the work Patrick Robicheau does and the work of other permanent firefighters on the D shift. He is paid according to the Town's personnel plan, and does not receive benefits under the parties' collective bargaining agreement.

21. In addition to Mr. Robicheau, the Town employs 24 full time probationary and permanent firefighters ("full time firefighters") and also maintains a roster of approximately 12 call firefighters.

22. The respective duties of call firefighters and full time firefighters are outlined in written position descriptions, Association Exhibits 2 and 3.

23. Patrick Robicheau has successfully completed all prerequisites for hire as a full time firefighter, including an oral board, and is considered a qualified candidate for hire as a career firefighter.

Decision and Order

Decision Summary:

The Town did not violate Article 16.5 because during relevant time periods five or more Fire Department Personnel staffed the D shift. The term "Fire Department Personnel" is not limited to bargaining unit employees. Fire Department Personnel is inclusive of department personnel like Firefighter Robicheau, who is a fully qualified and trained firefighter who was scheduled and employed in the same manner as other full time D shift firefighters. The Association's claims are denied and the complaint is dismissed.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6.

Discussion:

The dispute in this case arises under Article 16.5, which provides as follows:

> The employer agrees to authorize a staffing level of not less than five (5) Fire Department Personnel available for response as follows: in FY06, nights (the traditional 14 hour night shift), weekends, and holidays, in FY07, 24 hours per day, 7 days per week.

> The employer further agrees that should it become necessary to change that number for reasons of economy, lack of personnel or any other such reason, the employer will discuss the matter with the Association. None of the provisions of Section 16.5, Minimum Manning, shall be grievable under Section 18, Grievance Procedure.

In order to establish a violation of this provision, the Association must prove that the Town reduced the staffing level below five Fire Department Personnel on the D shift and that the Town did not discuss the matter with the Association as required under the second paragraph of Article 16.5. The Association argues that the Article 16.5 minimum manning requirements can only be satisfied by bargaining unit employees.

Prior to October, 2008 it is undisputed that Firefighter Robicheau was a call firefighter. However, once he was assigned to the D shift he was regularly scheduled to work in the same manner as the permanent firefighters assigned to D shift, and Firefighter Robicheau's status changed. He was no longer a call firefighter within the meaning of RSA 273-A:1, IX (d). After his assignment to the D shift he became either a temporary full time employee or a probationary full time employee. Either way, he was not a bargaining unit employee per the CBA and the statute.[3]

The Association's argument that the term "Fire Department Personnel" is equivalent to and limited to bargaining unit employees is not persuasive. On its face, the term is broader and more inclusive than just bargaining unit employees. The term is only used in Article 16.5 of the CBA. Other employee references in the CBA are to the "unit" or "bargaining unit employee." This supports a finding that the parties intentionally used the term "Fire Department Personnel" in Article 16.5 because the parties did not intend to limit staffing numbers for minimum manning

---

[3] Per RSA 273-A:1, IX "Public employee" means any person employed by a public employer except...
(d) Persons in a probationary or temporary status, or employed seasonally, irregularly or on call. For the purposes of this chapter, however, no employee shall be determined to be in a probationary status who shall have been employed for more than 12 months or who has an individual contract with his employer, nor shall any employee be determined to be in a temporary status solely by reason of the source of funding of the position in which he is employed.

purposes to bargaining unit employees. The bargaining history is consistent with this interpretation, as it shows that the minimum manning provision was implemented to address concerns in the early 1980's about the Town's possible use or reliance upon other public safety workers (like a police officer equipped with a SCBA unit) to provide staffing necessary for firefighting and related services. The record also reflects that in the past probationary (non-bargaining unit) employees had been counted for minimum manning purposes without objection, an arrangement established at hearing by Association and Town witnesses. This is consistent with a finding that "Fire Department Personnel" is broader and more inclusive than just "bargaining unit employees," and that it encompasses and is inclusive of department personnel like Firefighter Robicheau.

Based upon the foregoing, I find that the number of Fire Department Personnel did not fall below five. Therefore, the Association has failed to establish a violation of Article 16.5 of the CBA, the Association's claims are denied, and the complaint is dismissed.

So ordered.

May 4, 2011

Douglas L. Ingersoll, Esq.
Executive Director/Presiding Officer

Distribution:

John S. Krupski, Esq.
Thomas J. Flygare, Esq.

NH Supreme Court reversed and remanded this decision on 01-07-2011, Slip Op. No. 2009-0774.
(NH Supreme Court Case No. 2009-0774)

State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Exeter Professional Fire Fighters Association, IAFF, Local 3491

v.

Town of Exeter Fire Department

Case No. G-0071-1
Decision 2011-201

Order on Motion for Review of Hearing Officer Decision

The Association filed Motions for Review of Hearing Officer Decisions 2011-124 and 2011-133 pursuant to Pub 205.01, which provides in part as follows:

(a) Any party to a hearing or intervenor with an interest affected by the hearing officer's decision may file with the board a request for review of the decision of the hearing officer within 30 days of the issuance of that decision and review shall be granted. The request shall set out a clear and concise statement of the grounds for review and shall include citation to the specific statutory provision, rule, or other authority allegedly misapplied by the hearing officer or specific findings of fact allegedly unsupported by the record.

(b) The board shall review whether the hearing officer has misapplied the applicable law or rule or made findings of material fact that are unsupported by the record and the board's review shall result in approval, denial, or modification of the decision of the hearing officer. The board's review shall be made administratively based upon the hearing officer's findings of fact and decision and the filings in the case and without a hearing or a hearing de novo unless the board finds that the party requesting review has demonstrated a substantial likelihood that the hearing officer decision is based upon erroneous findings of material fact or error of law or rule and a hearing is necessary in order for the board to determine whether it shall approve, deny, or modify the hearing officer decision or a de novo hearing is necessary because the board concludes that it cannot adequately address the request for review with an order of approval, denial, or modification of the hearing officer decision. All findings of fact contained in hearing officer decisions shall be presumptively reasonable and lawful, and the board shall not consider requests for review based upon objections to hearing officer findings of fact unless such requests for review are supported by a complete transcript of the proceedings conducted by the hearing officer prepared by a duly certified stenographic reporter.

We have reviewed the hearing officer decisions in accordance with the provisions of Pub 205.01 and unanimously approve the hearing officer's decisions and deny the Association's motions.

So ordered.

Date: July 27, 2011

Charles S. Temple, Esq.
Alternate Chair

By vote of Alternate Chair Charles S. Temple, Esq., Board Member Kevin C. Cash, and Board Member Carol Granfield.

Distribution:

John S. Krupski, Esq.
Thomas J. Flygare, Esq.