NH Supreme Court rversed and remanded this decision on 5-5-2003, Slip Op. No. 2002-363 (NH Supreme Court Case No. 2002-363).

State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Town of Durham Complainant v. Durham Professional Firefighters Association, IAFF Local 2253 Respondent	*	Case No. U-0612-8 Decision No. 2002-038

APPEARANCES

Representing theTown of Durham:

J. Joseph McKittrick, Esq.

Representing the Durham Professional Firefighters:

John Krupski, Esq.

Also appearing:

Ronald P. O'Keefe, Town of Durham
Brian Murray, Durham Professional Firefighters Association
Lawrence D. Best, Durham Professional Firefighters Association
Jeffrey C. Furlong, Durham Professional Firefighters Association
Glenn G. Miller, Durham Professional Firefighters Association
Dave Emanuel, Dover Professional Firefighters Association
James Brown, Dover Professional Firefighters Association

BACKGROUND

The Town of Durham ("Town") filed unfair labor practice (ULP) charges against the Durham Professional Firefighters Association, Local 2253, IAFF ("Union") on October 5, 2001 alleging violations of RSA 273-A:5 II (d), (f) and (g) resulting from the Union's filing a

grievance on behalf of a "probationary firefighter" and pursuing that grievance to the final step of arbitration after it had been denied by the Town. The Union filed its response on October 22, 2001. After a continuance sought by and granted to the parties, this ULP was the subject of a pre-hearing conference on December 19, 2001, the results of which are reflected in Decision No. 2001-135 dated December 20, 2001. This case was then heard by the PELRB on March 12, 2002, in accordance with the arrangements made and recited in the Pre-Hearing Conference Memorandum (Decision No. 2001-135.) The record was closed upon completion of closing arguments by counsel for both parties on March 12, 2002.

FINDINGS OF FACT

1. The Town of Durham, by virtue of its operation and control of the Durham Fire Department, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The Durham Professional Firefighters Association, Local 2253, IAFF, is the duly certified bargaining agent for "all full-time firefighters...exclud[ing] captains." (See Amended Certification, Case No. F-0135, July 31, 1989 and Union Exhibit No. 2.)

3. The Town and the Union are parties to a collective bargaining agreement for the period January 1, 1998 until December 31, 2001, and thereafter remaining "in full force and effect until a successor agreement is executed." Provisions of that agreement pertinent to these proceedings are, inter alia, as follows:

   Article 2 - Recognition - The TOWN hereby recognizes the ASSOCIATION as the exclusive representative and bargaining agent, for the purpose of collective bargaining, for the employees in the job classification of Permanent Fire Fighter and Fire Prevention/Inspector for the Durham Fire Department. It is specifically agreed to by the TOWN and the ASSOCIATION that this Agreement applies only to the above enumerated positions.

   * * * * *

   Article 9 – Probationary Employee

   Section 1. All new full-time appointees permanently hired for those positions covered by this Agreement shall serve a probationary period of one (1) continuous year from the date of hire. A continuous period of temporary full-time employment with no break in service up to the date of permanent hire shall be counted as part of the one (1) year probationary period. All full-time personnel who have satisfactorily completed the probationary period shall be known as permanent.

   Section 2. The TOWN shall have the right to discipline and/or discharge a probationary employee without recourse by the ASSOCIATION.

Section 3. All probationary employees shall have a written evaluation every third month, that becomes a part of their permanent personnel record, signed by their officer and himself/herself.

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Article II – Seniority

Section 1. A. Definition: Seniority for full-time employees covered by this Agreement shall be defined as the period of full-time employment with the Town of Durham Fire Department (and previously with the Durham/UNH Fire Department) in the work covered by this Agreement, except as broken in accordance with Section 4 of this Article. **B.** In the event that more that one (1) employee was employed on the same date, then the seniority shall be determined according to the final score received on their entrance examination.

Section 2. Seniority Lists: By January 1st of each year and within thirty (30) days after any changes which affect seniority, a list of full-time employees as covered by this Agreement, arranged in order of their seniority, shall be posted on the bulletin board at the Fire Station and a copy furnished to the Association.

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Article 14 – Hours of Work

Section 1. Normal hours of work for all Firefighter/EMT's covered by this Agreement shall be a work week schedule consisting of two (2) consecutive ten-hours days and two (2) fourteen-hour shifts, followed by four (4) days off averaged over an eight (8) week cycle to be forty-two (42) hours per week

Section 2. Day shifts shall commence at 0800 hours and end at 1800 hours while night shifts shall commence at 1800 hours and end at 0800 hours the following morning.

Section 3. It is understood that when a Firefighter/EMT covered by this Agreement is transferred from one platoon to another he/she shall normally be given at least two (2) weeks notice of said transfer which shall take place at the beginning of the above-mentioned eight (8) week cycle. It is further understood that some circumstances require the Department to transfer an employee without the two (2) week notice or within the eight (8) week) cycle. The Department will endeavor to meet the two (2) week notice period but retains the right to make such changes

as may be necessary without said notice and is within its discretion to do so.

Article 15 – Overtime/Emergency Callback

Section 1. Any person covered by this Agreement required to work more than an average of forty-two (42) hours per week over an eight (8) week cycle shall be compensated at the rate of one and one-half (1-1/2) times his/her regular hourly rate. Overtime will be paid for actual time worked to the nearest quarter hour. Paid absences shall be counted in determining whether or not an employee has worked more than an average of forty-two (42) hours per week on an eight (8) week cycle.

Section 2. It is expressly understood that Special Events Duty is not subject to these overtime provisions.

Section 3. Any person covered by this Agreement, called back to work during off-duty time shall be guaranteed a minimum of three (3) hours pay at the individual Firefighter's hourly overtime rate unless said call back is on a holiday as outlined in the Agreement at which time the rate is two (2) times the Firefighter's regular hourly rate. Any firefighter held over for an emergency call shall receive his regular hourly rate of his overtime rate, whichever is applicable, for the time worked for the first one (1) hour held over. If said firefighter is held over for more than one (1) hour, he/she shall be guaranteed a minimum of three (3) hours pay at his/her hourly overtime rate. Not withstanding anything to the contrary contained herein, personnel who respond to an emergency callback and arrive forty-five (45) minutes or more after the emergency callback tone, shall receive only their hourly overtime rate, calculated to the nearest fifteen (15) minutes of time actually worked. The TOWN also reserves the right to not accept the offer of work for any firefighter who arrives after forty-five (45) minutes from the tone and after their services are no longer needed.

* * * * *

Article 17 – Holidays

Section 1. The following days shall be considered paid holidays: New Year's Day, Civil Rights Day, Memorial Day, Independence Day, Labor Day and the prior Friday, Thanksgiving and the day after, Veteran's Day, Christmas Day and either the day before or the day after as determined by the Town Administrator.

Section 2. In lieu of payment for each holiday, all employees covered by this Agreement, shall received 100.8 hours of regular pay under the following conditions: **(A)** Payments are to be made on June 15 and

December 1 in equal amounts for those employees who are full-time members of the Department for he six (6) month period preceding the payment date; and **(B)** Full-time members of the Department who did not render service to the Department for the full six (6) months preceding the payment date, will receive a prorated payment based on the time of employment as compared to the six (6) month period.

Article 18 – Vacation Leave

Section 1. Vacation leave will be granted to all permanent full-time employees on a monthly accrual basis. Accrual shall be based on completed monthly service. Vacation leave accrual for the initial month will be awarded only if the employee is hired no later than the 10th of that month. Thereafter, vacation leave will accrue and will be credited for usage on the first of each month.

Vacation leave will accrue for but may not be used by probationary employees. Probationary employees not attaining permanent status shall forfeit any accrued vacation time.

Eligible employees (probationary excluded) may request vacation leave at any time of the year. Requests for vacation leave shall be submitted for approval in writing (on prescribed form) to the employees Department Head at least fourteen (14) days in advance of the requested leave. Vacation leave will be granted in all cases except those in which the employee's absence will affect essential services of the Department. If vacation requests are made less than fourteen (14) days in advance permission will be granted at the discretion of the Department Head. In the case of conflicting vacation requests, seniority will prevail.

* * * * *

Probationary employees will accrue sick leave but may not draw leave or sick pay for time off taken due to illness until he/she has completed three (3) months of service to the Department. Probationary employees who do not achieve permanent status shall forfeit any accrued sick leave.

* * * * *

Article 22 – Bereavement Leave

Section 1. Bereavement leave shall be granted with pay to full-time employees upon the death of immediate family members for a period not to exceed for (4) work shifts. For purposes of this Section, immediate family members shall include spouse, "significant other", father, mother,

father-in-law, mother-in-law, child, brother, sister or step relation to the same degree.

Bereavement leave shall be granted with pay to full-time employees upon the death of other family members for a period not to exceed three (3) work shifts. Other family members shall include grandparents, grandchild, sister-in-law, or brother-in-law.

* * * * *

Article 23 – Uniform Allowance

Section 1. The TOWN shall provide an annual uniform allowance for all permanent personnel covered by this Agreement, in the amount of Three Hundred Fifty Dollars ($350.00). The above stated payment shall be made available for the employee's use by January 3rd of every year.

Section 2. Employees completing probation shall have a prorated allowance based on a per month equivalent through the remaining portion of the calendar year until the following January.

* * * * *

Article 26 – Grievance Procedure

Section 1. The purpose of this procedure is to provide equitable solutions to grievances. A grievance shall mean a complaint by an employee that the TOWN has interpreted and applied this Agreement in violation of a specific provision thereof. All grievances will be handled as provided in this Article.

Section 2. A matter which is not specifically covered by this Agreement or which is reserved either by this Agreement or by common or statutory law to the employer, is not subject to the arbitration procedure as set forth in this Article. Only grievances as defined above, may be arbitrated under the provisions of this Article.

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Article 26-A – Arbitration

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Section 3. The function of the Arbitrator is to determine the interpretation of specific provisions of this Agreement. There shall be no right in arbitration to obtain and no Arbitrator shall have any power or authority to

award or determine any change in, modification or alteration of, addition to, or detraction from any other provisions of this Agreement.

* * * * *

Section 5. The arbitrator shall be deemed to have the authority to determine arbitrability of any grievance. The Arbitrator shall furnish a written opinion specifying the reasons for his decision. The decision of the Arbitrator, if within the scope of his authority and power within this Agreement, shall be final and binding upon the ASSOCIATION and the TOWN and the aggrieved employee who initiated the grievance.

* * * * *

Article 28 – Station Maintenance

Section 1. All employees covered by this Agreement will perform such ordinary and normal station maintenance as may be required by the Chief at any building or property used solely by the Durham Fire Department.

4. The Durham Fire Department has a welcoming package in the form of a three page memo which it provides to newly hired firefighters. (Union Exhibit No. 1.) This document dates to 1986 and shows revisions on 5/93, 3/95, 6/99 and 3/00. It states, inter alia, "During your year of probation we hope you find the Durham Fire Department a challenging and rewarding place to work" and "all positions in the Department except the Chief's are covered by labor contracts." A similar document bearing a sole revision date of "5/93" (Union Exhibit No. 10) was identified in the testimony of Brian Murray, currently the President of Local 2253, who identified the Exhibit No. 10 version as being what he received when he was hired in March of 1991. Based on the text which read "All positions in the Department except the Chief's are covered by labor contracts. A copy of the contract that covers your position is included with the package" and "a copy of the contract which covers your position will be given to you at time of hire," Murray concluded he was covered by the CBA at time of hire, with the stated exception that the Town had reserved the right to discipline or discharge a probationary employee under the provisions of Article 9, Section 2 of the CBA. Murray testified he reinforced in his belief because the Town's personnel plan defines "permanent employees" as those who are scheduled to work 40 hours a week on a "full-time basis."

5. Notwithstanding the text of the applicable certification document (Finding No. 2, above), the recognition clause of the CBA (CBA, Article 2) indicates that the Town has recognized the Union as the exclusive representative "for employees in the job classification of Permanent Fire

Fighters." Article 9, Section 1 of the CBA provides "All new full-time appointees permanently hired for those positions covered by this Agreement shall serve probationary period of one (1) continuous year from date of hire....All full-time personnel who have satisfactorily completed the probationary period shall be known as permanent."

6. The parties have engaged in negotiations over the terms and conditions of employment for probationary employees, namely the provisions of Article 9, Section 3 requiring the quarterly evaluation of probationary employees, per the testimony of Brian Murray. Likewise, former local President Jeffrey Furlong, employed as a fire fighter since 1987, testified that the Union negotiated an extension in the length of the probationary period with management, from 6 months to a year. Furlong, who has participated in the negotiation of all CBA's since the 1989 certification, said the language of Article 9, Section 2 was designed and intended to remove the discipline and discharge of probationary firefighters from Union scrutiny or input, with the result that all other provisions of the CBA were intended to apply to all full-time fire fighters employed by the Town whether probationary or permanent in status.

7. Many parts of the current CBA apply to all full-time fire fighters whether they are permanent or probationary. According to the testimony of Chief Ronald O'Keefe, the provisions of the following Articles do not distinguish between probationary and permanent status: Article II-Seniority applying to "full-time employees covered by this agreement; Article 14 – Hours of Work applying to "all Firefighters/EMT's covered by this Agreement;" Article 15 – Call back pay applying to "any person covered by this Agreement;" Article 17 – Holidays applying to "all employees covered by this Agreement;" Article 18 – Vacation Leave applying to "all permanent full-time employees...but may not be used by probationary employees;" Article 20 – Health insurance "for each employee;" Article 23 – Uniform Allowance applying to "all permanent personnel covered by this Agreement;" and Article 27 – Lodging applying to "each employee covered by this Agreement." In addition Article 22 – Bereavement Leave with pay applies for "full-time employees" and Article 28, Station Maintenance applies to "all employees covered by this Agreement," as do the salary provisions found at Addendum A.

8. Article 26, Section 1 of the CBA defines a grievance as "a complaint by an employee that the TOWN has interpreted and applied this Agreement in violation of a specific provision..." (Emphasis added.) There is ample evidence that fire fighters in probationary status have traditionally availed themselves of the grievance process in the past, to wit, testimony of Glenn Miller relating to first year training requirements and overtime (Union Exhibit No. 5) settled prior to arbitration; of Brian Murray relating to first year training requirements for advanced life support training and overtime

(Union Exhibit No. 9) settled prior to arbitration, and the pre-arbitration settlement of a "tone out" grievance involving Brian Murray in 2000, well after he was off probationary status (Town Exhibit No. 3). There is also a record of another grievance settlement in 1999 involving then-probationary fire fighter Jason Best. This matter involved the use of sick leave by a probationary fire fighter and was resolved by a non-precedent-setting settlement prior to arbitration. (Union Exhibit 3.)

9. On or about January 22, 2001, the Town hired a new fire fighter, James C. Brown. (Town Exhibit No. 2.) After Brown was hired and placed in the 8 week cycle contemplated by CBA Article 14, management discovered Brown was missing a certain training certification, pulled him from his 8 week, day-night rotational cycle and assigned him to days so he could attend the requisite course. This resulted in an unresolved grievance which claimed that the Town violated the CBA by failing to apply its terms to "permanent," "limited tenure" employees. That grievance then became the subject of a Demand for Arbitration filed by the Union with the American Arbitration Association on August 2, 2001. (Town Exhibit No. 1.) The Town thereafter filed the pending ULP to stop the arbitration proceedings.

10. The parties have negotiated their arbitration process. Under Article 26, Section 1, the grievance or complaint process is available to "an employee." (Finding No. 8.) The parties, however, have contracted further in CBA Article 26-A, Section 3 by defining the function of the arbitrator as being "to determine the interpretation of specific provisions of this Agreement." Article 26-A, Section 5 confers additional authority on the arbitrator by language that "the Arbitrator shall be deemed to have the authority to determine the arbitrability of any grievance." (Article 26-A Section 5 on page 7, above.)

11. Jeffrey Furlong, employed since 1987 and experienced in the positions of secretary, treasurer and president of Local 2253, testified that only two grievances have proceeded to arbitration since he was employed. Neither of them involved a probationary employee or employees. Likewise, this is the first time a grievance of or involving a probationary employee has not been resolved and arbitration ha been invoked.

DECISION AND ORDER

The parties bring to this Board a virtually impossible situation, a scenario where terms in the collective bargaining agreement are inherently self-contradictory and where what the parties have written in the agreement bears only a sporadic resemblance to the manner in which they have lived their labor-management relationship. These circumstances are further complicated because the parties did not elect to have a "definitions" section in the CBA and because there has been a history of frequent and

casual interchanging of terms such as "permanent," "full-time," "permanent full-time" and generic terms such as "all employees covered by this agreement." Thus, we begin with our observations that many parts of the CBA apply, by both language and practice, to full-time fighters, whether probationary or permanent (Finding No. 7) and that there is an unrebutted history of negotiations occurring between the parties concerning terms and conditions of employment for probationary employees, negotiations which were subsequently memorialized in contract language (Finding No. 6).

The amended or "revised" certification issued by the PELRB in 1989 (Finding No. 2), which has now remained the operative document for more than a dozen years, speaks to "all full-time fire fighters" and lends credibility to Finding No. 7 which recites many of the contract provisions applying to probationary and permanent fire fighters alike. In addition, that document is supported by the conduct of the parties, in particular that of management when it has traditionally welcomed new (and, thus, presumably "probationary") employees with welcoming documents suggesting they were already covered by the terms of a collective agreement. (Finding No. 4.) It comes as no surprise, then, that several members of the Union testified that they thought they had, and had been treated as having, full rights and entitlements under the CBA, with the exception of the exclusionary language of Article 9, Section 2. (See testimony of fire fighters Murray and Furlong and Finding No. 4.)

Finally, the stage is set by the fact that there have been numerous "grievances" filed by the Union on behalf of working conditions affecting or impacting non-permanent fire fighters over the years, as demonstrated by Finding No. 8. The distinguishing characteristic of this case was that it was not resolved prior to the time the Union sought to proceed to arbitration. (Finding Nos. 9 and 11.)

We find several ports of calm in the midst of the storm of facts presented by the parties. First, while we cannot and do not rely on it primarily or exclusively, the history of how the parties have treated each other under the current or similar contract language is persuasive of how they have mutually interpreted various provisions of the CBA. One such example is the manner by which non-permanent employees have had access, albeit indirectly, to the grievance procedure when the Union has chosen to act as an advocate on their behalf.

Examples of courses of conduct, however, are not enough, by themselves, to establish a contract right or a recognized change in the composition of a bargaining unit. In Appeal of Somersworth School District, 142 N.H. 837 (1998), an employee, without state certification as a teacher, was hired as a "job coordinator" at the high school, given an employment contract identical to that issued to "traditional" teachers and accorded benefits under the teachers' CBA, including course reimbursements and access to and resolution under the contract grievance procedure. (PELRB Decision No. 1996-021.) When faced with a layoff, the employee attempted to access the grievance procedure once again and was denied by management which claimed he was excluded from the PELRB certified bargaining unit because he lacked the requisite credential. The certified unit was for "all professional personnel...whose employment shall require them to hold a

professional certification issued by the State Board of Education." The Supreme Court agreed with the School District, saying that the employee's five years of employment history, similarity of benefits with those received by certified teachers and placement on the teacher salary scale were "not dispositive of the employee's inclusion in the bargaining unit." (142 NH 837 at 841.) The Court, quoting from Appeal of Londonderry School District, 142 NH 677 at 680 (1998), observed, "The composition of the bargaining unit is limited by laws to those positions identified in the recognition clause at the time the original unit is certified by the PELRB and by any subsequent modifications approved by the PELRB."

Here, the instant case is the converse of Somersworth. When the University System of New Hampshire exited itself from the fire department business by agreement with the Town of Durham in May of 1989, the parties, namely, the University System, the Town and the Union, sought a new certification document, that which is referenced in Finding No. 2. This was accomplished by consensus as represent by the "X" in the "Agreement has been reached" box of the modification petition dated May 16, 1989. Thus, the 1989 "revised" certification document gives every appearance of representing an agreement between the Town and the Union. It was a duly petitioned-for change sought by the parties and satisfies the "subsequent modifications approved by the PELRB" requirement found in Londonderry, 142 NH 677 at 680, and quoted in Somersworth, 142 NH 837 at 840. We have no reason to believe that the parties did not mean what they agreed to in 1989. There is no evidence that any of the parties have attempted any further modifications to the composition of the bargaining unit since then.

The certification document (Finding No. 2) does not exist in isolation in this case. We must be mindful not only of what the parties agreed to for the revised certification document but also what they negotiated in the current CBA. In particular, Article 26, Section 1 makes the grievance procedure available to "an employee" of the Town, without reference to permanent, probationary or full-time status. We understand this reference to mean available to or concerning "an employee" inasmuch as it is the Union and the Town who are the contracting parties to the CBA and because the Union is under no obligation to pursue each and every grievance through to arbitration.

The second prong of the relevant, operative provisions of the grievance procedure is found at Article 26-A Section 5 which vests the arbitrator with the authority to determine arbitrability. This essentially is what this entire case is about, whether the parties have agreed, whether by the language of their contract, by practice, by acquiescence, or by any other generally accepted principles pertaining to grievance arbitration cases, to arbitrate grievances relating to less-than-permanent employees. Under Appeal of Westmoreland School Board, 132 NH 103, 105 (1989) and as cited by Union counsel in closing to the Board, it becomes the Town's burden in opposing arbitration to show with "positive assurance" that "the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." The Town has not done that.

The specificity of Article 26-A, Section 5 suggests that it would be virtually impossible for the Town to pass the "positive assurance" test. As Justice Batchelder

wrote in his opinion in Westmoreland, " The real issue here, however, is whether the contracting parties have agreed to arbitrate a particular dispute." 132 NH 103 at 109. The specificity of Article 26-A, Section 5 suggests the parties have committed themselves to just such a process for resolving issues of arbitrability. The contract language gives every impression that the parties have actually negotiated to arbitrate just such an issue. Westmoreland, 132 NH 103 at 107. And, when they do so, collective bargaining provides a means to bargain for protections or benefits not accorded statutorily See Brown v. Bedford School Board, 122 N.H. 627, 629 (1982) which discusses negotiating the issue of giving reasons for non-renewal to probationary teachers. (Emphases added.) See a lso Appeal of Town of Pelham 124 NH 131 at 137 (1983). Thus, having been negotiated, the contract grievance arbitration provisions may, indeed, exceed what is accorded to Durham fire fighters under the provisions of RSA 273-A.

It is well settled that "grievance language specifically negotiated and agreed upon is binding on both the public employee and the public employer." Appeal of Hooksett School District, 126 NH 202, 204 (1985) and Appeal of Berlin Board of Education. , 120 NH 226, 230 (1980). This is the process to be followed in this case. The Town and the Union "agreed to submit unresolved grievances arising out of the CBA to arbitration. The CBA arbitrations provision gives the arbitrator the power to interpret or apply the terms of the CBA ....[W]hether the terms of the CBA establish arbitration as binding precedent or the "law of the contract" is a matter of contract interpretation for an arbitrator, not the PELRB." Appeal of the State of New Hampshire, (Slip op.,, Docket No. 99-644, October 29, 2001).

The Town violated its obligations under the law and under the contract when it refused to arbitrate the issue of arbitrability. The Town's charges against the Union are DISMISSED; the Town is directed to CEASE and DESIST from refusing to proceed to arbitration over the arbitrability of the pending grievance (Town Exhibit No. 1); and the parties are directed to proceed to grievance arbitration forthwith.

So ordered.

Signed this 21st day of March, 2002.

Jack Buckley

JACK BUCKLEY
Chairman

By unanimous decision. Chairman Jack Buckley presiding. Members Richard Roulx and Daniel Brady present and voting.