State of New Hampshire
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Professional Firefighters of Hanover, Local 3288 Complainant v. Town of Hanover Respondent	*	Case No: F-0137-7 Decision No. 2004-106
Town of Hanover Complainant v. Professional Firefighters of Hanover, Local 3288 Respondent	*	Case No: F-0137-8

APPEARANCES

Representing Professional Firefighters of Hanover, Local 3288:

John S. Krupski, Esquire

Representing the Town of Hanover:

Charles P. Bauer, Esquire
Marie M. McPartlin, Esquire

BACKGROUND

The Professional Firefighters of Hanover, Local 3288 (hereinafter "the Union") filed an unfair labor practice complaint on October 23, 2003 alleging that the Town of Hanover

(hereinafter "the Town") committed an unfair labor practice by failing to comply with an arbitrator's award issued to the parties on October 1, 2003 ordering the reinstatement of Firefighter/EMT-I Larry Ackerman with full back pay and benefits. The Union further claims that by letter dated October 21, 2003, the Town informed the Union that it would not be reinstating the grievant. The Union contends that such conduct by the Town is contrary to the "final and binding" arbitration provision contained in the parties' collective bargaining agreement (CBA) and violates the Public Employee Labor Relations Act (RSA 273-A). The Union's request that the PELRB order the Town (1) to cease and desist from disobeying the arbitrator's award and (2) to reimburse the Union for its costs and attorney's fees incurred in this matter.

The Town states that it refuses to implement the arbitrator's award because the award violates public policy by endangering the public's safety. *Appeal of Amalgamated Transit Union*, 144 N.H. 325 (1999). The Town also asserts that the instant matter remains within the jurisdiction of the arbitrator based upon specific language contained within the award. The Town requests that the PELRB (1) decline jurisdiction at this time and remand the matter to the arbitrator for further review, (2) declare that the Town has not committed an unfair labor practice, and (3) award the Town its' attorney's fees and costs. On November 7, 2003, the Town filed an unfair labor practice complaint against the Union alleging that the Union's demand that the award be implemented constitutes a breach of the parties' CBA and thereby also violates RSA 273-A:5 (II)(f) which prohibits an employee representative from breaching the terms of a CBA.

Several motions and responsive pleadings were filed by the parties prior to the conduct of the evidentiary hearing and were considered by the board on the same date of the scheduled hearing on the merits, as has been its practice of long standing. The hearing was convened on March 16, 2004 at the offices of the Public Employee Labor Relations Board in Concord on the complaint filed by each of the parties. At that hearing both parties were represented, provided the opportunity to present witnesses and offer exhibits and had the opportunity to cross-examine witnesses. Board member Carol Granfield indicated that she had an acquaintance with one of the Town's material witnesses, namely Julie Griffin who is the Town Manager, that had developed through their professional associations in the New Hampshire Municipal Association and the Municipal Management Association. Ms. Granfield indicated that she did not feel that that association would impair her ability to impartially hear the evidence and render an opinion in these matters. Mr. Bauer indicated that he had acted in a representative capacity for the Town of Derry when Ms. Granfield was Town Manager of that community and had performed work for the Town of Meredith of which Ms. Granfield had subsequently become Town Manager. No objection was made by the Union to Attorney Bauer's continued representation notwithstanding his prior relationship with Board member Granfield, nor did the Union object to Ms. Granfield continuing to sit as a fact-finder and decision maker in these matters despite her affiliation with Town Manager Griffin. The Board then reviewed all filings submitted by the parties and considered all relevant evidence, including the "Stipulated Facts" submitted by the parties incorporated below as Findings of Fact #1-14. The Board held the record open to allow the parties to submit post-hearing briefs. Upon receipt of the parties' post-hearing submissions, the Board closed the record, reviewed the cases as submitted and determined the following:

FINDINGS OF FACTS

1. The Town of Hanover ("Town") employs individuals within its fire department and therefore is a public employer within the meaning of RSA 273- A:1, X.

2. The Professional Firefighters of Hanover, Local 3288 of the International Association of Firefighters, AFL-CIO, CLC is the exclusive bargaining representative for certain members of the Hanover Fire Department, including Firefighters. (NB. Also as evidenced by its "Certificate of Representative and Order to Negotiate" on file with the PELRB, dated February 8, 1990 describing unit composition as follows: "Firefighters and Fire Prevention Officer".)

3. The parties were signatories to a collective bargaining agreement, during the relevant period of time, that governs the terms and conditions of the parties' relationship that includes a workable grievance procedure as that term is defined by RSA 273-A:4 (See Joint Exhibit #1).

4. The relevant grievance procedure terminated in "final and binding" Arbitration. (Joint Exhibit 1, Article 13-6.

5. The grievance procedure reads, in relevant part, "the decision of said arbitrator will be considered final and binding upon the Town and the Union..." *Id.*

6. On or about December 23, 2002, the Town terminated the employment of Firefighter/EMT-I, Larry Ackerman.

7. As a result of the termination, the Union proceeded to arbitration pursuant to the collective bargaining agreement between the parties.

8. Arbitrator Leslie A. Williamson, Jr. was appointed arbitrator by the Public Employee Labor Relations Board on March 18, 2003.

9. The one-day arbitration was conducted on June 25, 2003.

10. The parties stipulated to the following issue before the arbitrator:

> "Whether the Town of Hanover had just cause and acted in conformance with the Collective Bargaining Agreement between the parties when it did not provide a merit increase and terminated Larry Ackerman from the position of Firefighter/EMT-I. If not, what shall the remedy be? (See Joint Exhibit #2, 26 page arbitrator's award at page 2).

11. The parties had stipulated that arbitrability was not in question in this matter.

12. Bert Hennessey, Union president, was present during the entire arbitration hearing on June 25, 2003.

13. On October 1, 2003, Arbitrator, Leslie A. Williamson, Jr. issue (sic) a decision. (See Joint Exhibit #2)

14. On October 21, 2003, the Union was informed that the Town would not reinstate Firefighter/EMT-I Ackerman. (See Joint Exhibit #3 – Atty. McPartlin letter).

15. On October 23, 2003 the Union filed a complaint of unfair labor practice against the Town alleging, in the main, the Town's failure to abide by the terms of the arbitrator's decision and award of reinstatement of Ackerman. (See ULP Complaint, Case F-0137-7, Paragraphs 11-13).

16. On November 7, 2003 the Town filed a complaint of unfair labor practice against the Union alleging that the Union's attempt to implement the Arbitrator's decision constitutes a breach of the parties' collective bargaining agreement. (See ULP Complaint, Case F-0137-8, Paragraphs 20, 21).

17. The Town, without objection, voluntarily participated in arbitration that it understood would result in a final and binding award.

18. A pre-hearing conference was conducted for the parties by Attorney Peter C. Phillips the Agency's Hearing Officer on November 13, 2003 which amounted to a structuring conference commonly and routinely used in the ajudicatory process and thereafter, Hearing Officer Phillips' participation in these matters ceased.

19. An article written by another Board member purported to concern the earlier arbitration of issues relevant to these proceedings and the fact that the Town had filed to seek review of the arbitration decision by this Board was attached to a recusal motion by the Town's counsel. That article and his pleading were not reviewed by the specific Board members empanelled to hear this matter, but rather these members were informed by staff of the motion's general rationale without any specific reference to the contents of the attached article. The other Board member, who had written the article, did not participate on the tribunal that heard these matters and did not participate in its decisions.

20. The parties' CBA addresses issues involving the discipline of employees in Chapter 12: DISCIPLINARY ACTIONS, as follows:

> "ARTICLE 12.1 – Discipline Policy
>
> No employee shall be disciplined but for just cause. Any discipline shall be commensurate with the alleged violation and shall be progressive and corrective in nature.

ARTICLE 12.2 - Types of Disciplinary Action

> The type of disciplinary action taken will vary with the severity of the situation and may include the following measures: Oral or Written Reprimand, Suspension, Disciplinary Probation, Discharge."

21. The parties' CBA provides, in relevant part, that, " The decision of said arbitrator will be considered final and binding upon the Town and Union…" (See Joint Exhibit #1, ARTICLE 13.6)

22. The parties have made no reference to RSA 542 or made any other reservation of appellate rights within their CBA or other document to have the PELRB or any other body review the merits of the arbitrator's award.

23. The Arbitrator's award provided that if the parties could not resolve what we characterize as the "economic wholeness" or the monetary issue resulting from Firefighter/EMT-I's reinstatement, that the arbitrator would retain jurisdiction in resolving the monetary award issue, solely. The Arbitrator did not retain general jurisdiction as to other aspects of the arbitration proceeding, namely the reinstatement remedy. (Joint Exhibit #2, page 3, Fact 2 and 3).

24. The Arbitrator issued a twenty-six page decision that includes ninety-one separate findings of fact based upon substantive evidence presented to him by both parties during their hearing before him that included detailed examination of the performance evaluations that led the Arbitrator to his conclusions and his decision to award reinstatement of Firefighter/EMT-I Ackerman to his position based upon hid interpretation of the terms and conditions of the parties' CBA regarding disciplinary procedures, including the issue of a discharge related to "just cause". (Joint Exhibit #2 generally and at page 26.)

25. Firefighter/EMT-I Ackerman has obtained several certifications culminating in his rating as a Firefighter I, Firefighter II, Firefighter III and EMT-I. The authority charged with granting these credentials is the New Hampshire Department of Safety, Fire Safety and Standards Division. (See RSA 21 P:26)

26. The Arbitrator determined that Firefighter/EMT-I Ackerman was found "fit for duty" by his treating physician (Joint Exhibit #2, page 25) and capable to meet the essential functions of his position by his direct supervisor (Joint Exhibit #2, page 20).

27. The Arbitrator determined that Firefighter/EMT-I Ackerman "might be perceived as a 'high maintenance employee'" whose conduct did not rise to the level "just cause" to justify termination without progressive discipline.

28. The Arbitrator appropriately expresses the purpose served by a progressive discipline provision as used in labor relations and as used by these parties' in their CBA as a device "designed, in general, to provide employees with the progressive awareness that exhibited conduct must change. It is accepted as a method by which, in no uncertain terms, the employee is made aware of the consequences if change does not occur." (Joint Exhibit #2, page 24).

29. The Arbitrator found that there were numerous instances where Firefighter/EMT-I Ackerman's conduct was deficient although the most severe discipline imposed was one written warning and several oral warnings. (Joint Exhibit #2, page 22).

30. The Arbitrator found that the Town admitted that Firefighter/EMT-I Ackerman was not terminated for one single egregious act and the Arbitrator determined that "numerous infractions do not comport to one egregious act." (Joint Exhibit #2, page 22).

31. The Arbitrator determined that the Town "did not act within the scope of the Collective Bargaining Agreement and did not have just cause to terminate Larry Ackerman." (Joint Exhibit #2,page 26).

32. Julia Griffin, who has been the Town Manager of Hanover for nearly eight years, in consultation with the Board of Selectmen made the decision not to implement the arbitration award and reinstate Ackerman. She is the only witness that did not testify at the arbitration hearing.

33. The standard used by Ms. Griffin to delineate the public policy that would be violated by implementation of the Arbitrator's award was that "she did not feel comfortable" that Ackerman could provide adequate life safety services to the community. The "post" against which she stated that she would measure whether or not the arbitrator's decision to reinstate Ackerman would be implemented was her "own self and family situation." She also characterized the standard she employed as "whether myself and my family, as residents, could be safely served by [Ackerman]".

34. She further characterized her decision not to implement the arbitrator's award as being based upon the "totality of the information available to [her]" and the "totality of the behaviors and circumstances" existing, and the "accumulation of deficiencies" she believed Ackerman had displayed in the past.

35. Ms. Griffin has had exposure to the type of liabilities municipalities are exposed to through her relationship with the Property and Liability Trust affiliated with the New Hampshire Municipal Association.

36. Under cross-examination, Ms. Griffin admitted that Ackerman possessed qualifications and certifications that exceeded those required of his position, that her decision was an expression of her subjective judgment taking into consideration those beliefs stated above in Paragraphs #33 and #34.

37. Ms. Griffin's motivation in not reinstating Ackerman was based upon her need to protect the town against unnecessary liability, to avoid subjecting herself to claims of negligent retention and was testified as being necessary to "assure the life and safety of citizens" and for "safety-related issues" and for "safety concerns".

38. Barry Cox is Assistant Town Manager and Human Resource Director. In those capacities he made a determination that Ackerman was "incapable of performing the essential functions of the job" and also recommended the move to terminate Ackerman.

39. In response to his counsel's inquiry of "What are your public policy concerns?" (regarding fulfillment of the arbitration award of reinstatement) Mr. Cox testified that he had a concern with what Ackerman "would be required to do and what he can't do." He further testified that his worst "nightmare" was that he didn't want to find himself on the [witness] stand [in other litigation]" and told, "You knew or should have known he was incompetent."

40. Mr. Cox was concerned that the Town could face liability and that he was motivated by future vulnerability to a negligent retention claim on behalf of a citizen as well as the protection of fellow firefighters.

41. Captain Michael Hinsley is presently a Captain with the Hanover Fire Department and observed and supervised Ackerman from in or about April 2002 to November 2002. His primary criticism of Ackerman is that he doesn't "trust him" and that he wasn't always completely honest. That while he felt that Ackerman was dedicated, would not abandon him in a burning building, possessed state certifications as to performance as a firefighter and EMT, and graded him on his evaluation as "meets expectations" in the categories of "knowledge", "commitment to complying with all rules" and "safety", he nonetheless lacks confidence that Ackerman can apply the knowledge gained through achievement of his certificates of qualification to actions on duty.

42. Captain Hinsley testified that Ackerman preferred to rely on written forms in executing his work, but that the Department "doesn't have a lot of written policies, rules."

43. Under cross-examination, Captain Hinsley admitted that he did not report Ackerman to the EMT Board of Licensure at any time prior to his termination.

44. Captain Hinsley believes that Ackerman's continued employment is unsafe to himself and his colleagues, is contrary to the provisions of the collective bargaining agreement and would represent a "safety hazard".

45. Chief Robert Bradley is the Fire Chief and has been at all times relevant to these proceedings. He testified that he had trouble getting Captain Doolen, a prior supervisor of Ackerman, to document complaints and incidents involving Ackerman.

46. Chief Bradley did not appear to be very directly involved in evaluating or supervising Ackerman and when asked by his counsel "What safety concerns do you have if [Ackerman] is reinstated?" responded that he concurred and concluded that "what the Captains brought

to me was accurate. He also testified that what he believed to be Ackerman's inability to perform the functions of the job, that Ackerman is going to hurt himself, other firefighters, or those he is to serve.

47. No witness made a reference to a statute or ordinance or regulation or language therein that clearly expressed a statement of public policy that the arbitrator's decision to deprive Ackerman of his merit increase, to find that he was not terminated for just cause and therefore be reinstated, or to have him made economically whole violated.

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides, that the PELRB has sole original jurisdiction to adjudicate claims by the exclusive representative of a certified bargaining unit comprised of individuals employed by a "public employer" as defined in RSA 273-A:1,I. (See RSA 273-A:6) The PELRB also is authorized to determine whether claims alleging the commission of an improper or unfair labor practice pursuant to RSA 273-A:5, I are filed in a timely manner as calculated in RSA 273-A:7.

In matters involving the interpretation of language used by the parties in their CBA and the parties' mutual pursuit of final and binding arbitration through utilization of a proper grievance procedure to which they have both agreed and which they have included in their CBA, the PELRB most often limits its exercise of jurisdiction. This general self-restraint on the exercise of its jurisdiction by deference to binding arbitration and refusal to rehear matters presented to an arbitrator or to second guess the conclusions, decisions and awards of arbitrators is a long recognized practice at the PELRB and is well settled at law.

A narrow exception has been reserved for the exercise of jurisdiction to review an arbitrator's decision. The PELRB, as the agent of the citizens of New Hampshire acting through the enactments of the General Court, does have the authority to overturn an arbitrator's decision that it determines violates public policy.

Therefore, the PELRB accepts jurisdiction over both the complaint filed by the Union and the complaint filed by the Town.

PROCEDURAL MOTIONS

Several preliminary motions were considered by the board before reaching the merits of the respective complaints.

First, the Town's motion to recuse PELRB Hearings Officer Peter C. Phillips, Esq. who conducted a pre-hearing conference in this matter on the basis that he had, earlier in his legal career, acted as legal representative for a bargaining unit union comprised of other employees of the Town is denied as being moot at the time of the final evidentiary hearing.

Second, the Town filed a motion seeking to recuse the three specific members assigned to hear the instant disputes between the parties as well as all other members of the nine-member Public Employee Labor Relations Board (five members and four alternate members). The Town's basis for this blanket recusal was that Richard Molan, a member of the board, not assigned to hear these matters and who is also a partner in the law firm that represents the Union had written an article relating to the arbitrator's previous decision in this case and the Town's reactions to the decision and this article had been published in a professional journal.

The Public Employee Labor Relations Board has nine members serving staggered terms and who are nominated by the governor and confirmed by the executive council. Hearings are generally convened before a tribunal comprised of one member appointed for their experience in management, one member appointed for their experience in labor and one member, acting as the chairman of the tribunal appointed to represent the public at-large. The non-participating members who are not assigned to a specific tribunal do not participate in any way in the tribunal's decision.

That a non-participating member wrote an article that was published in a journal the existence of which was unknown to the members of this tribunal until raised by the Town's lawyer and the contents of which were never reviewed by members of the tribunal does not present a situation that would require members of this tribunal to recuse themselves from the duties and obligations assigned to them through the nomination and confirmation process by which they are appointed. Clearly, the member who authored the article could not, and did not, participate in the decisions rendered in these matters. The Board members in the instant matter proceeded in a carefully measured manner, declaring their ignorance of the contents of any article related to these matters and that they have no knowledge that could improperly influence their judgment in coming to a decision on these matters. The Board allowed sufficient oral argument of counsel on the issue of recusal while limiting counsel from referencing the specific contents of the article at issue. None of the members assigned to these matters has any personal bias or direct interest in the outcome. None have any reason to believe that they could not render an impartial and fair determination of the issues before us. None of the members of this panel has a direct personal, monetary, or professional interest in the outcome or decision in these matters. ADMIN. RULES PUB 201.09. Therefore we do not find that the Town has established a sufficient cause for our recusal and its motion to do so is denied.

During the argument of counsel at this stage in the hearing the Union made an oral motion to have the substantive content of the Town's motion to recuse the entire board and the attached article sealed. The Town objected to the Union's motion to seal and the Board sustained the objection of the Town and denied the Union's motion to seal these documents.

Third, the Board, upon its own motion and in accordance with ADMIN RULES PUB 201.07(i) consolidated the cases presented by the complaints of both parties, namely Case F-0137-7 and Case F-0137-8. The Union had no objection to this consolidation. The Town indicated that it had no objection condition upon its ability to participate in an evidentiary hearing on the issue of the "public policy" exception to the non-reviewability of the arbitrator's decision. See *Appeal of Amalgamated Transit Union*, 144 N.H. 325 (1999). The matters were consolidated and evidence allowed.

Fourth, the Union filed a motion to limit the scope of the hearing by prohibiting the "re-litigation" of the factual determinations of the Arbitrator, limiting the Board's consideration to the question of whether the Arbitrator's decision violates "public policy", and to limit presentation of the cases to oral argument. The Town objected to the motion asserting that the PELRB had jurisdiction to vacate an arbitrator's award if it violates public policy and that separate factual inquiry by the board is necessary to make that determination. In making its decision regarding the degree to which the parties would be allowed to present evidence, the Board is mindful of the legitimate role arbitration plays in labor relations, the parties' volitional submission to arbitration of this termination, and its otherwise limited jurisdiction to review an arbitrator's decision where the parties have not reserved the right to administrative review. See *Appeal of International Association of Firefighters,* 123 NH 404, 409 (1983); See also, *appeal of Hooksett School District,* 126 NH 202,204 (1985). However, where it is alleged that an arbitrator's decision violates public policy, this Board has shown its ability to evaluate whether or not implementation of an arbitrator's award does violate a public policy. See *Amalgamated, Id.* The Board therefore does not believe that the issue the parties placed before the Arbitrator is to be re-litigated before the Board and to that extent limits the scope of evidence to be presented by the parties at this hearing. It does find that the parties can present evidence on the issue of whether or not the October 1, 2003 arbitrator's decision violates public policy.

Fifth, the Union filed a motion requesting that the Town's complaint be dismissed because it had not been filed in a timely manner. The cause of action giving rise to the Town's complaint of unfair labor practice is the alleged action of the Union in "seeking to implement the Arbitrator's decision...because the decision is contrary to public policy and therefore beyond the scope of the CBA and unenforceable." See Town's Complaint, Paragraph #20. Since efforts by the Union to implement the Arbitrator's decision could not occur before that decision was issued and, arguably, did occur with the filing of its complaint with the Board on October 23, 2003, we find that the Town's complaint, filed on November 7, 2003, cannot be dismissed for reason of timeliness as the statute allows actions to be filed within a period of six months from an alleged violation. See RSA 273-A:6, VII.

TOWN'S COMPLAINT

This Board is a proponent of parties reaching agreement between themselves in furtherance of the state's policies as expressed in RSA 273-A of promoting harmonious and cooperative relations between employer and employee, and of the parties having a workable grievance procedure and reducing that procedure to a written agreement. These parties have done so. These parties agreed to participate in arbitration and did so. They have stipulated that the issue of the Ackerman termination be determined by an arbitrator and for that arbitrator to fashion a remedy if the arbitrator found that the Town had not terminated Ackerman in accordance with the mutually agreed upon terms that appeared in the parties' CBA.

The actions the Union has undertaken, from our review of the pleadings and the evidence, is to attempt to enforce an arbitrator's decision through the use of the complaint process as provided in RSA 273-A. Each party had previously agreed to follow the grievance procedures

expressed within their CBA, including resolution by an arbitrator that is "final and binding." Since the Union is, in part, attempting to follow the decision of the arbitrator, "[i]t simply cannot be that a party who complies with a CBA's contractual duty to be bound to an arbitration award can be found to have breached the CBA by fulfilling this duty." *Appeal of Belknap County Comm'rs,* 146 N.H. 757,761. We do not find that the Union's actions constitute a statutory breach of the parties' agreement and therefore dismiss the Town's unfair labor practice complaint against the Union.

UNION'S COMPLAINT

The basis for the Union's complaint that the Town has committed an unfair labor practice lies in the refusal of the Town to reinstate Ackerman to his position with the fire department and make him economically whole which are components of the arbitrator's decision. Failure to implement an arbitrator's award can be the basis for a finding that one or another of the parties to a collective bargaining agreement has breached that agreement and consequently violated the provisions of RSA 273-A:5, I or II.

The Town and the Union are parties to a collective bargaining agreement that contains a workable grievance procedure ending in final and binding arbitration of grievances such as that which arose involving Ackerman's termination. When parties agree to be bound to arbitration awards as part of the terms and conditions of a CBA, failing to comply with an award results in a breach of the contractual duty to be bound. The parties definitely intended to submit this matter to final and binding arbitration. By doing so, they were obligating themselves to abide by the determinations of the arbitrator.

The issue before the arbitrator was not in question as the parties stipulated to the wording of the issue. They framed their dispute in their own language and consistent with the terms of their grievance procedure. That is, the parties agreed on what they wanted the arbitrator to decide. They also used time-honored language relative to the remedy, i.e., if the contract was violated what does the arbitrator think the remedy should be. Specifically, the issue they presented was stated in the following manner:

> "Whether the Town of Hanover had just cause and acted in conformance with the Collective Bargaining Agreement between the parties when it did not provide a merit increase and terminated Larry Ackerman from the position of Firefighter/EMT? If not, what shall the remedy be?"
>
> Arbitration Award, page 2.

The language used to form these questions is common in labor arbitration. It allows the arbitrator to first determine if a party, in this case the Town, did not have just cause and did not follow the terms of the CBA, what remedy, within the normal and customary practices of labor relations, would be appropriate to adjust or "make right" the wrong which has been committed. The arbitrator's remedy on the second issue follows his findings on the first issue pertaining to a violation. He was not constrained by the parties to a selection of remedies but, instead, was given authority in the second issue to fashion a "usual and customary" remedy consistent with labor

relations practices. When the parties proceeded with their arbitration proceeding before the arbitrator, they were not engaging in an extraordinary event. They were merely engaging in a contractually agreed to process they had promised to each other in the course of bargaining, a process which is not only sanctioned, but required by RSA 273-A:4. Further, they were agreeing to the specific issues the arbitrator was to decide.

The decision of an arbitrator, particularly where there is no issue raised regarding the determination of arbitrability, is not usually subject to review by the Board unless the award is brought into question, as here, by a separate complaint to the Board alleging an improper labor practice due to the failure of a party to implement the arbitrator's award. Until the *Appeal of Amalgamated Transit Union,* 144 N.H. 325 (1999), it needed to exercise this authority "only in two narrow areas: first, where the collective bargaining agreement either restricts the arbitrator's discretion or provides for administrative or judicial review, and second, where "in the case of an unrestricted submission to arbitration, an allegation is made that the arbiters either expressly intended that the case be decided according to principles of law and were mistaken in their application thereof, or were so mistaken on the facts as to preclude a fair consideration of the issues." See *Board of Trustees of the University System of New Hampshire v. Keene State College Education Association,* 126 N.H. 339,342 (1985). Later, in *Amalgamated* the court decision stated that the "[Board] inherently has limited jurisdiction to apply strong and dominant public policy as expressed in controlling statutes, regulations, common law and other applicable authority, to address matters necessary to resolve questions arising within the scope of [its] jurisdiction." and can decide that it "will not enforce a contract or contract term that contravenes public policy," *Ibid. Amalgamated* at 327, citing *Harper v. Healthsource New Hampshire,* 140 N.H. 770, 775 (1996).

For all other purposes of our analysis we have reviewed the arbitrator's decision and find it to be a comprehensive treatment of the issues presented to the arbitrator that need not be cited in full in our decision. (See Joint Exhibit #2 – Arbitrator's Award). A fair reading of the arbitrator's decision reveals that the arbitrator thoroughly considered all of the evidence and made factual findings sufficient to support his decision. The arbitrator authored a twenty-six page decision that included ninety-one expressed factual findings, after considering the evidence presented by both parties, their witness testimony and exhibits, their Collective Bargaining Agreement and the briefs submitted by both parties. His conclusion was that the "[Town] had just cause to withhold the merit increase of Larry Ackerman", but that the "[Town] did not act within the scope of the Collective Bargaining Agreement and did not have just cause to terminate Larry Ackerman." (Joint Exhibit #2 – Arbitrator's Award, page 26). The arbitrator awarded the remedy of reinstatement "with back pay, seniority and all other rights accorded him by the Collective Bargaining Agreement." *Id.* We find the arbitrator's award to be consistent with the application of labor relations law and the terms of the parties' CBA in effect at the time and supported by sufficient evidence.

We next address the more recent "public policy" exception that can form the basis to set aside arbitration awards and which is central to the Town's assertion that it is not committing an unfair labor practice by failing to reinstate Ackerman. Our analysis begins with consideration of

the public policy clearly expressed in RSA 273-A to foster harmonious and cooperative relations between public employers and their employees and to protect the public by encouraging the orderly and uninterrupted operation of government. RSA 273-A Statement of policy. 1975, Chapter Laws 490:1. Our labor relations statute also clearly states that "Every agreement negotiated under the terms of [RSA 273-A] shall be reduced to writing and shall contain workable grievance procedures. RSA 273-A:4. This is so because, "there must be a mechanism for resolving the dispute or else the agreement is meaningless. *Appeal of Pelham*, 124 N.H. 131(1983). It is undisputed that the parties agreed to have the underlying grievance arbitrated and that the parties stipulated to the issue to be decided and that the arbitrator determine the remedy. The enforcement of the written collective bargaining agreements entered into by groups of employees and their employers, including clauses providing for "final and binding" arbitration, assures that each gets the benefit of what they bargained for and that the interruption of government service is not threatened by actions of either party that breach their agreements with each other and thereby violate the law. If a party seeks to avoid the decision of the arbitrator by asserting that the decision violates public policy, it can only do so in light of the statutory policies clearly expressed in the provisions of RSA 273-A.

We do not believe that the "public policy exception" represents a lowered drawbridge by which to easily assail arbitration decisions, nor license to conduct broad or general reviews of arbitration decisions. After all, the parties have otherwise mutually agreed to abide by them through their bargaining. We must then weigh the public policy raised by a party contesting an arbitration award by evaluating the strength and dominance as expressed in controlling statutes, regulations, common law and other applicable authority. (See *Amalgamated, Ibid.* at 327). As the "public policy exception" to the limited review doctrine afforded to arbitration decisions has been applied in this jurisdiction we interpret the court's reference in *Amalgamated* to policies that are "strong and dominant... as expressed in controlling statutes, regulations, common law and other applicable authority" to have been prescient in view of the United States Supreme Court's later decision in *Eastern Associated Coal Corp. v. Mine Workers District 17*, 531 U.S. 57 (2000). They recognize that the "public policy" relied upon, in this case by the Town, is to be found in positive law (statutes and regulations) and legal precedent and not "merely a general public interest consideration (See also Ekouri and Ekouri, How Arbitration Works, Sixth Edition, ABA Section on Labor and Employment Law, p.1344, citing Board of Education of School District U-46 v. Illinois Education Labor Relations Board., 576 N.E.2d 471(Ill. Ct. App. 1991). See also Mayes, *Labor Law—The Third Circuit Defines the Public Policy Exception to Labor Arbitration Awards* –Exxon Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357 (3d Cir. 1993), 67 Temple L. Rev. 493 (1994). We agree that to qualify as a "public policy exception" from the implementation of an otherwise legal and fact supported arbitrator's decision pursuant to New Hampshire law that the policy cited must be express, well defined and dominant.

The Town relies in part on the court's decision in *Amalgamated* that upheld this board's decision not to reinstate employees to the Manchester Transit Authority who had failed random drug tests thereby vacating the arbitrator's decision that would have reinstated them. We believe the instant case is distinguished from *Amalgamated*. Most relevant to this proceeding is that we found in that case that the public employer had adopted a specific "policy of prohibiting the use of drugs in the workplace and stating that violators were subject to discipline up to termination." In addition, evidence of public policy was clearly expressed in federal regulations applicable to

the public employer and employees under the Omnibus Transportation Employee Testing Act of 1991. No such drug involvement or other use of intoxicant is at issue here. Indeed strong public policy statements used to vacate arbitrator's decisions seem linked to intoxicant use.[1]

We do not believe that the testimony and documentary evidence advanced by the Town at the hearing sufficiently meets the measure of evaluation required of us to find the existence not only of "safety concerns," "lack of confidence in future performance," and dissatisfaction with the arbitrator's decision, but of a public policy made specific enough through expression in statutes, regulations, common law and other applicable authority for us to say that the arbitrator's decision violates strong and dominant policy.

The statutes that specifically address firefighting standards (RSA 21-P) and emergency medical service standards (RSA 153-A) to be achieved and maintained by employees in the position of Ackerman also assign the regulatory responsibility not to the Town, but to state licensing agencies. The evidence presented establishes that Ackerman has achieved certifications under both statutes that exceed the basic requirements of the Town for a person in his position. We think that the general adherence of the Town's witnesses, to support the application of the "public policy exception", as "safety concerns" or "concerns of public safety" or concerns for "me and my family" or concerns of future exposure to risk of liability lack the strength of a clear statement of policy. These expressions do not result from the exercise of a democratic proceeding as contemplated by the court or this board in order to overturn this arbitrator's award or deprive the town employees represented by the Union of the benefit of their bargain when they negotiated the provisions of the grievance provision or the application of progressive discipline provision into their collective bargaining agreement. To not require a public employer raising the exception to be able to point to those necessary written expressions of specific policy that are alleged to have been violated by an arbitrator's decision, especially a decision that resulted from agreed participation in the arbitration process and mutual stipulation of the issue acknowledging the possibility of reinstatement, would allow the Town and other public employers to unilaterally set unanticipated standards after the conclusion of collective negotiations. It would also make empty the mutual covenants pledged by each in the statutorily required collective bargaining process.

The Town does not come late to the incidents and circumstances surrounding the conduct of Ackerman. Despite some approved leaves of absence due to injuries, Ackerman has been employed in its fire department for about six years. Over this time, the Town could have addressed its concerns in negotiations with the Union, or in establishing additional qualifications of its firefighters and emergency medical technicians, or in following the options that it had for the application of progressive discipline. It did not and in the end asked an arbitrator to decide if it had just cause to terminate Ackerman. For reasons cited by the arbitrator they did not have just cause to terminate Ackerman and have not pointed to a specific public policy sufficiently

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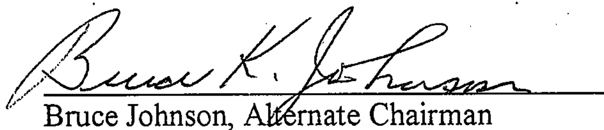
[1] We think that the Town's belief that *Chicago Firefighters Union Local No. 2 v. City of Chicago*, 323 Ill. App. 3d 168 (2001) is "[p]articularly instructive" and its general reliance upon the case in its memorandum of law is misplaced. This is particularly true on page five of its memorandum submitted to the board. There it uses that case to "put a fine point on the issue of safety," when, referencing a material conclusion of the Illinois Court, the Town substituted the use of ellipses for a clause within the quoted sentence that was critical to that court's finding. A full reading of that decision reveals that a significant portion of the clause omitted by use of the ellipses is "as the result of intoxication." *Chicago Firefighters*, at 180.

expressed in a statute, regulation, applicable precedent or other authority that would require his termination. The parties have endorsed progressive discipline and, lacking a single egregious act of a magnitude that would rise to the level of just cause and catapult discipline directly to termination, we would need to find that we would need to expand the time-honored "limited review" policy present in labor relations. We do not find that necessity existent in this case and are reluctant to weaken, what could be referred to as the proverbial "flood gates" to review of the many arbitrators awards issued each year.

Therefore, we find that the Town has committed an unfair labor practice by not implementing the reinstatement of Ackerman as called for in the Arbitration award and making him "monetarily whole". With respect to the former, the Town should immediately reinstate Ackerman. With respect to the latter, if the parties cannot mutually agree to the dollar amount necessary to resolve the economic matter, then, as they have both previously stipulated, they shall return to arbitration without delay for a determination by the arbitrator of the amount of the monetary award consistent with the limited jurisdiction he retained.

So Ordered.

Signed this 29th day of July, 2004



Bruce Johnson, Alternate Chairman

By unanimous vote. Alternate Chairman Bruce Johnson presiding with Board Members E. Vincent Hall and Carole Granfield also voting.

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