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

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