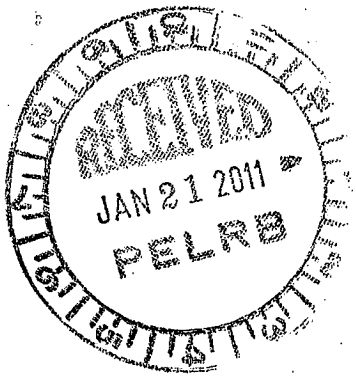

MANDATE
Certified and Issued as Mandate Under NH Sup. Ct. R. 24
Michelle A. Caraway 1/20/2011
Clerk/Deputy Clerk Date

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reversed and remanded.

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

Eileen Fox,
Clerk

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