NH Supreme Court reversed this decision on March 10, 1998, Slip Opinion No. 96-524, 142 NH 637 (1998).

# State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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| STATE EMPLOYEES ASSOCIATION OF NEW HAMPSHIRE, LOCAL 1984, S.E.I.U.<br><br>Complainant<br><br>v.<br><br>TOWN OF BEDFORD (POLICE DEPARTMENT)<br><br>Respondent | CASE NOS. P-0701:17<br>P-0701:18<br><br>DECISION NO. 96-037 |

## APPEARANCES

Representing State Employees Association of N.H.:

Robert DeSchuiteneer

Representing Town of Bedford:

Russ Hilliard, Esq.

Also appearing:

Thomas Burke, Bedford
Victor Durham, Bedford
John Caverly, Bedford
Artherline Roberson, Town Manager

## BACKGROUND

The State Employees Association of New Hampshire, Local 1984, S.E.I.U., AFL-CIO (Union) filed unfair labor practice (ULP) charges against the Town of Bedford (Town) on February 26, 1996

alleging violations of RSA 273-A:5 I (h) relative to a breach of contract because the Town refused to process a grievance (the Durham grievance) as required under the collective bargaining agreement (CBA). The Town filed its answer on March 12, 1996. Meanwhile, the Union filed a second ULP on March 11, 1996 alleging violations of RSA 273-A:5 I (h) relative to a breach of contract because the Town refused to process a grievance (the Caverly grievance) as required under the CBA. The Town filed its answer to this ULP on March 19, 1996. After an intervening continuance sought by and granted to the parties for an April 18, 1996 hearing date for Case No. P-0701:17, the two cases were consolidated for hearing before the PELRB on May 2, 1996.

## FINDINGS OF FACT

1. The Town of Bedford is a "public employer" of police officers and other personnel employed at its police department with the meaning of RSA 273-A:1 X.

2. The State Employees Association of New Hampshire, Local 1984, S.E.I.U., is the duly certified bargaining agent for police officers organized as the Bedford Police Association and employed by the Town of Bedford.

3. The Town and the Union are parties to a collective bargaining agreement (CBA) for the period November 1, 1994 through October 31, 1997 and in effect at all times pertinent to these proceedings. Article V of the CBA sets forth a grievance procedure and defines a grievance as "a written dispute, claim or complaint which is filed and signed by the Association or the Town which arises under and during the term of this Agreement. Grievances are limited to matters of interpretation or application of specific provisions of this Agreement." The grievance procedure of the contract consists of four (4) steps: (1) Chief of Police, (2) Town Manager, (3) Town Council and (4) final and binding arbitration. The contract provides, "If the grievant is not satisfied with the decision of the Town Council he/she may appeal that decision to arbitration by notifying the Town Council of that desire within twenty (20) calendar days of receipt of the Council's decision."

4. Article VII of the CBA addresses overtime. Article 7.1 provides that members of the bargaining unit "shall

be paid time and a half their regular rate of pay for all hours worked in excess of their scheduled work week." Article 7.6 further explains "in all cases where a unit employee is called back to work after having left the premises, and more than one (1) hour before his/her next scheduled return to duty, he/she shall be paid for a minimum of three (3) hours at the overtime rate for each such call back. If the call back is one (1) hour or less before his/her next scheduled return to duty, he/she shall be paid at the overtime rate for the time between the call back and the beginning of the shift. Court appearances, as required by the Town, during an employee's off-duty hours shall be paid the difference between a three two-hour minimum call back at the overtime rate and any fee paid by the court for appearance."

5. In August of 1995, Officer Victor Durham initiated a grievance about his performance evaluation. As part of that process, he was scheduled for and attended a Step 2 grievance meeting with the Town Manager on August 23, 1995. He filed for and was paid a three hour minimum call back for attending that meeting which was held prior to the time he started his shift. (Town Exhibit Tab 3.) By September 18, 1995, Durham had written Chief David Bailey to complain about having 3 hours of overtime pay deducted from his next pay check. (Town Exhibit Tab 4.) This matter proceeded to a hearing before the Town Manager on November 7, 1995. She denied Durham's grievance on the entitlement to 3 hours of overtime pay by letter of November 17, 1995. (Town Exhibit Tab 6.) Robert DeSchuiteneer, SEA Negotiator, appealed this denial by letter of November 21, 1995 whereafter this grievance was scheduled to be heard by the town Council on December 20, 1995. (Town Exhibit Tabs 7 and 8.) By letter of January 5, 1996, Edward P. Moran, Jr., Chairman of the Town Council, denied the claim for three hours of overtime pay. (Town Exhibit Tab 9.) By letter of January 8, 1996, DeSchuiteneer appealed that denial to arbitration citing CBA Section 5.3.4. (Town Exhibit Tab 10.) By letter of January 22, 1996, the Town Manager informed DeSchuiteneer that the Town would not be proceeding to arbitration (Town Exhibit Tab 11), to wit:

> On instruction for the Town's Attorney and

> based on previous lack of expectation of call back pay for grievances, the Town shall not pursue arbitration as this is not a matter of interpretation of the contract. It is clearly an attempt to change the contract and as such is not arbitrable."

The foregoing constitutes the basis for one of the two complaints in Case No. P-0701:17.

6. In the course of the proceedings referenced in Finding No. 5, above, Durham had filed and processed to arbitration a grievance about his performance evaluation. The hearing date for that arbitration was December 14, 1995. Arbitrator Allan McCausland issued his award on January 3, 1996. (Town Exhibit Tab 13.) One of the witnesses for the grievant at the arbitration was Sgt. Jon Caverly who was subpoenaed to testify by the Union. (Town Exhibit Tab 12.) Thereafter, Caverly filed for and was denied payment for three (3) hours of minimum call back overtime pay for his having been subpoenaed to and giving testimony at Durham's December 14th grievance hearing. After being denied that payment, on December 22, 1995, Caverly wrote to Chief Bailey (Town Ex. Tab 14) as follows:

> Under Article V of the Collective Bargaining Agreement I would like to grieve your denial of paying me the 3 hours overtime pay for appearing under subpoena for Officer Durhams [sic] grievance arbitration hearing on 12/14/95. I believe the Contract spells out that under 7.6., (In all cases where a unit employee is called back to work....he/she shall be paid for a minimum of three (3) hours at the overtime rate for each such call back.)

Town Manager Roberson answered by letter of January 5, 1996 (Town Exhibit Tab 15) telling Caverly:

> I have received your note of December 22, 1995 to Chief Bailey and have chosen not to hear the issue as there is presently a grievand before the Town Council dealing with the same subject. As the SEA has no subpoena powers, and certainly has no right to mandate a town employee to duty, I do not see any dif-

ference between this and any other voluntary appearances at a grievance hearing and shall proceed with this in the same manner as dictated by the Council's decision in the presently pending issue.

By letter of January 10, 1996 (Town Exhibit Tab 16) DeSchuiteneer appealed Roberson's January 5th letter to the Town Council. The Town Manager responded by her letter of January 22, 1996 (Town Exhibit Tab 17) which declared that the matter was not arbitrable, using the same language in Town Exhibit Tab 17 as she used in Town Exhibit Tab 11 quoted in Finding No. 5, above. The foregoing constitutes the basis for the second of the two complaints in Case No. P-0701:17.

7. At some time during 1995, the town had a vacancy for a lieutenant's position in the police department. Caverly applied for that vacancy. His application was acknowledged and his interview set for November 7, 1995 by letter from Chief Bailey dated October 26, 1995. (Town Exhibit Tab 18.) The time of the interview fell outside a time when Caverly would have been on duty. Sometime between November 7, 1995 and December 3, 1995, Caverly learned that he had not been selected to fill the lieutenant's vacancy. On December 3, 1995, Caverly wrote Bailey saying, "In regards to the Town not paying me for my time at the Lieutenants Oral Board I would at this time like to grieve the matter." (Town Exhibit Tab 19.) Had the interview been scheduled during Caverly's duty time he would have been paid for it, as acknowledged in the Town Manager's letter to Caverly dated January 17, 1996 which denied his grievance. (Town Exhibit Tab 20.) By letter of January 22, 1996, DeSchuiteneer appealed this denial to the Town Council (Town Exhibit Tab 21.) and was corrected by a subsequent letter on January 25, 1996 (Town Exhibit Tab 22) identifying the grievance as one involving call back, not earned time. A hearing before the Town Council was scheduled for and held on February 7, 1996. By letter of February 16, 1996, the Town Council denied the grievance, saying, in part, that Caverly voluntarily sought, the promotion, was aware of the need for an interview and did not object to it or its time and place when notified two weeks in advance. (Town Exhibit Tab 24.) DeSchuiteneer appealed this ruling to arbitration by letter of February 20, 1996. (Town Exhibit Tab 25.) By letter

of February 26, 1996, the Town Manager told DeSchuiteneer in pertinent part, "Neither the Council or I have any intention of spending Town money on such a matter which is clearly not a part of the provision for minimum overtime for call back to 'work.' We do not believe this is an arbitrable matter." (Town Exhibit Tab 26.) The foregoing constitutes the basis for the complaint in Case No. P-0701:18.

8. During the testimony at the hearing, the Town Manager confirmed the Town's reliance on past practice for not paying such claims for minimum call back overtime and its belief that the contract had not been violated. She stated, "We did not feel it was a dispute on the contract" and "we did not go to the final step [of arbitration] because we did not believe it was a violation of the contract." The Town has grievance adjustment procedures both in CBA and in its administrative code. (Town Exhibit Tab 2.) They are virtually identical with the exception that the administrative code does not contain the fourth step of final and binding arbitration. Robersen acknowledged that the CBA "takes precedence" over Town policies but added, however, "when we got to the point where the administrative code and the collective bargaining agreement split up, the Town did not feel that it had a an obligation to go to anything beyond the administrative code."

## DECISION AND ORDER

This case involves three grievances: (1) Durham's request for and subsequent deduction of overtime pay after attending a grievance meeting for a grievance which he initiated, (2) Caverly's request for overtime pay as the result of attending Durham's grievance hearing under subpoena which the bargaining agent caused to be issued, and (3) Caverly's request for overtime pay as the result of his attending the Lieutenants Oral Board during a time when he was not scheduled to work. Thus, each of the three grievances involves a claim for overtime.

The CBA has an article (Article VII, Finding No. 4) which addresses overtime. Likewise, the contract has an article (Article V, Finding No. 3) which addresses and defines the grievance procedure, a process which has been negotiated and adopted by the parties. As such and under the provisions of the CBA, it cannot be interpreted, modified or rejected by the

unilateral action of one of the parties. This proscription includes the declarations by the Town Manager that the Town had decided that it would not proceed to arbitration because it had decided or felt that the subject matter of the grievance was outside the terms of the CBA and/or not a matter of "interpretation or application" thereunder. Finding Nos. 5, 6 and 7. To allow either party to the CBA to have exclusive and complete control over the interpretation and utilization of the grievance procedure would make it unacceptable and unworkable as contemplated under RSA 273-A:4, thus making it meaningless as a tool for resolution of disputes under the CBA.

With this in mind, we conclude, without reflecting on the probable outcome of any case which might be presented on the merits, that each of the three pending grievances makes a claim for a benefit conferred under the CBA. The CBA also establishes mechanism for presenting and settling such claims, namely, the grievance procedure. The parties are obligated, by their own agreement, to follow that mechanism to resolve these three claims. Failure to do so is a breach of contract and, thus, a ULP.

As we noted in Lincoln-Woodstock Cooperative School District, Decision No. 96-01 (January 16, 1996), the two leading cases on arbitrability are Appeal of Westmoreland School Board, 132 N.H. 103 (1989) and Appeal of City of Nashua School Board, 132 N.H. 699 (1990). In Westmoreland, the New Hampshire Supreme Court (Court), citing to Steelworkers v. Warrior and Gulf Co., 363 U.S. 574 (1960), discussed the "positive assurance" test. "Under the 'positive assurance' standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists and 'in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." We conclude that the combination of the negotiated grievance procedure, the definition of what constitutes a grievance and the contractual reference to and explanation of overtime entitlements all create a presumption of arbitrability in this case. In so finding we also have determined that the Town has not and cannot satisfy the "positive assurance" test of Westmoreland and Nashua, above.

The Town's refusal to process the pending grievances to arbitration is a breach of contract in violation of RSA 273-A:5 I (h). The Town and its agents and employees are directed to CEASE and DESIST from refusing to process these grievances to arbitration, as they agreed to do, "if the grievant is not satisfied with the decision of the Town Council." Those are the

exact conditions of this case; the parties are directed to proceed to arbitration forthwith.

So ordered.

Signed this 5th day of JUNE, 1996.

EDWARD J. HASELTINE
Chairman

By unanimous decision. Chairman Edward J. Haseltine presiding. Members E. Vincent Hall and William Kidder present and voting.