Appeal to NH Supreme Court withdrawn on October 16, 1998, Supreme Court No. 98-503.

# State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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| CITY OF NASHUA FIRE AND RESCUE DEPARTMENT<br><br>Complainant | : | |
| v. | : | CASE NO. F-0105:22 |
| INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL 789<br><br>Respondent | : | DECISION NO. 1998-032 |

## APPEARANCES

Representing City of Nashua Fire and Rescue Department:

Mary Anne Mueller, Esq.

Representing Int'l Assoc. of Fire Fighters, Local 789:

Glenn Milner, Esq.

Also appearing:

Mike Buxton, Nashua Fire Rescue
R. Navaroli, Nashua Fire Rescue
Mike Mansfield
Brian Morrissey, Local 789
Gary D. Hargreaves, Local 789
Richard Conway, Local 789
James Litevich, New Hampshire Fire Association
Richard A. Mason, New Hampshire Fire Association

## BACKGROUND

The City of Nashua, Fire and Rescue Department (City) filed unfair labor practice (ULP) charges against the International Association of Fire Fighters, Local 789 (Union) on November 5, 1997 alleging a violation of RSA 273-A:5 II (f) as the result of the Union's attempting to enforce an arbitration award which was allegedly

outside the scope of the collective bargaining agreement (CBA) and the arbitrator's authority. Concurrently, the City filed a motion to stay that arbitration decision. The Union filed its answer and an objection to the City's motion to stay the arbitration decision on November 20, 1997. This matter was set for hearing before the PELRB on December 18, 1997 at which time certain procedural matters were raised relating to representation by Union counsel. See Decision No. 97-126 (January 2, 1998). On February 17, 1998, the PELRB received notification that the representation issue raised had been resolved by New Hampshire Bar Association Ethics Committee Formal Opinion No. 1997-98/1. This matter was then set for hearing on the merits by the PELRB on March 24, 1998.

## FINDINGS OF FACT

1. The City of Nashua, Fire and Rescue Department employs firefighters and other personnel and, thus, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The International Association of Fire Fighters, Local 789, is the duly certified bargaining agent for fire fighting personnel employed by the City up to and including at least the rank of Captain. (There is a dispute in the pleadings as to whether Deputy Chiefs are in the bargaining unit and that issue is not material to these proceedings.)

3. The City and the Union are parties to a CBA for the period July 1, 1989 through June 30, 1992, continued to June 30, 1996 and operating under the *status quo* doctrine thereafter (Joint Exhibit No. 1 and Item 3 of pleadings and answers). Article 19 of that agreement is entitled "Grievance Procedure." Step IV of the grievance procedure calls for final and binding arbitration of disputes under the contract. Grievances are defined as "any difference as to the interpretation of this Agreement in its application to a particular situation, or as to whether it has been observed and performed, shall be a grievance under this agreement...."

4. Article 18 of the CBA is entitled "Appointments, Promotions and Demotions." Section A thereof calls for the "New Hampshire Fire Service Training Division or an equivalent organization agreed upon in writing by the City and the Union [to] conduct and supervise

written and oral examinations for available promotions...." Section D provides that "the three candidates who pass the examinations and attain the highest combined scores of the examinations and seniority points shall be the eligible candidates considered by the Fire Commissioners for the first vacancy."

5. On August 4, 1996, the Chief issued a general order that a promotional exam for the rank of captain would be given by the Division of Fire Standards and Training in September and October. The written portion of that exam was given on September 13, 1996 and the oral portion on October 7, 1996. Lt. Gary Hargreaves and Lt. Michael Mansfield both took the exam. Mansfield had the highest score on the written exam and the second highest on the oral exam. Hargreaves was fifth on the written exam and third on the oral exam. (Items, 6, 7, 8 and 9 on pleadings and answer.)

6. Since 1989 and continuing during the time Mansfield took the captain's examinations, he was an employee of Fire Standards and Training in a part-time capacity, as "program coordinator," according to testimony from Richard Mason, Director of Fire Standards and Training (FS&T). Mansfield's employment at FS&T is contemplated under RSA 21-P-12-a (II) (g) since, according to Mason, his regular complement of seven full-time personnel is not sufficient to meet the training mandates of the agency. (Joint Exhibit No. 2.) Mason confirmed that Mansfield's part-time employment was regular and continual and that he could hire other part-time personnel on a limited basis. This did not include the ability to hire oral board personnel.

7. On or about October 8, 1996, both the Chief and Hargreaves learned the test results. Hargreaves challenged three questions on the written exam which delayed the receipt of his final promotional exam scores until November 14, 1996. Chief Navaroli testified before the arbitrator that this brought Hargreaves's score to fourth highest overall.

8. On December 6, 1996 Hargreaves filed a grievance with the City which alleged that Mansfield's part-time employment with FS&T created a conflict of interest in violation of Articles I and V of the CBA. Article I is entitled "Purposes" and includes the need "to continue the existing harmonious relation-

ship between the Fire Department and its permanent employees, and to promote the morale, equal rights, well-being and security of the Fire Department's permanent employees." Article V is entitled and provides for "Conformity with Laws, Charter and Rules and Regulations."

9. The Union pursued the Hargreaves grievance through the grievance procedure and to binding arbitration. That arbitration hearing was held on July 11, 1997 (ULP Exhibit No. 2). In it, the parties stipulated the following issues to be addressed by the arbitrator:

> Was the collective bargaining agreement violated when the New Hampshire Division of [Fire] Standards and Training conducted an examination for the rank of Captain in the fall of 1996 and a candidate who was also an employee of the Division participated in the testing process?
>
> If so, what shall be the remedy?

10. On September 26, 1997, the arbitrator issued his decision. He found that "the City violated the collective bargaining agreement when it allowed Lt. Michael Mansfield, a Program Coordinator for the New Hampshire Division of [Fire] Standards and Training, to take the fall 1996 Captain's examination administered by that agency. As a remedy, Mansfield's results in the fall 1996 Captain's exam are declared invalid." The arbitrator's reasoning included both actual and apparent conflicts of interest:

> Even through Mansfield had no involvement in the FSTD's promotional testing activities and was not provided access to the agency's testing materials, he was a regular, long-standing member of the agency's administrative staff; he was assigned an office at the agency's headquarters; and he he devoted a substantial amount of time to FSTD business on a weekly basis. His role with the FSTD created the appearance of a conflict of interest because his relationships with the few other regular agency staff members might make him privy to testing information even if he did not solicit it. His FSTD employment also created an actual conflict of interest because oral board members who might seek *an hoc* teaching positions with the agency could favor him in an effort to

gain favorable treatment from him.

11. The City has brought this ULP seeking to vacate the arbitrator's decision because he exceeded his authority as well as Articles 1 and 18-D of the contract. The Union claims the arbitrator acted both within the scope of his authority under the grievance definition of the CBA as well as under the issue framed and stipulated by the parties. It asks that its motion to dismiss be granted.

## DECISION AND ORDER

Our analysis in this case involves three areas, the scope of the arbitration provisions as found at Article 19 of the CBA, the scope of the issue as framed by the parties for the arbitrator and the arbitrator's exercise of his authority.

When we look at the provisions of Article 19, we find that grievances are defined, by the parties, to mean "differences as to the interpretation...or application..." of the contract. Article 18 then proceeds, in more than five pages of single-spaced text, to describe in great detail the procedures for promotions, testing eligibility, appointment eligibility after testing, options when there are no qualified candidates, newly created positions, position description questionnaires and a Promotion Criteria Committee. In short, the detail of Article 18 suggests that the parties considered its language with great precision, understood that they were creating complicated and detailed procedures and wanted to preserve any appeals relating to those procedures by way of the contract grievance machinery. Given the breadth of the definition of a grievance and the detail of Article 18, we believe that it can be said with "positive assurance" that the parties' did not intend to exclude promotional procedures, as delineated in the contract, from the grievance procedure. Appeal of Westmoreland School Board, 132 N.H. 103 at 105 (1989). It is axiomatic that a party cannot be required to submit matters to arbitration which it has not agreed to arbitrate. Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 564 at 582 (1960). In this case, our assessment is that the parties definitely intended that the dispute raised by Hargreaves be subject to the grievance and arbitration provisions of the contract.

Our second area of inquiry is the issue stipulated to the arbitrator, as appears in Finding No. 9. The most important features of the issues stipulated are twofold. First, the issues were agreed to and stipulated by the parties, i.e., the parties agreed on what they wanted the arbitrator to decide. Second, they used time-honored language relative to the remedy, i.e., if the contract was violated what does the arbitrator think the remedy should be. The "If so, what

shall be the remedy?" language is common in labor arbitration. It means, essentially, that if the arbitrator finds that the contract has been violated, 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 is logically tied to 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.

This brings us to the third area of inquiry, whether the arbitrator exceeded his authority. Given the breadth of the definition of a grievance and given the broad mandate conferred on the arbitrator to fashion a remedy if there was a finding that the CBA has been violated, we cannot and do not find that he exceeded the authority conferred on him by the parties when they negotiated the contract and when they framed the arbitration issues. He merely did the parties' bidding by deciding the issues presented in the context of the CBA.

Accordingly, we find no basis to disturb the arbitration award and the ULP is DISMISSED.

So ordered.

Signed this 23rd day of April, 1998.

JACK BUCKLEY
Alternate Chairman

By unanimous vote. Alternate Chairman Jack Buckley presiding. Members E. Vincent Hall and William F. Kidder present and voting.