



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

AFSCME, LOCAL 3657 FOR JAFFREY	:	
POLICE DEPARTMENT EMPLOYEES	:	
	:	
Complainant	:	
	:	
v.	:	CASE NO. A-0543:5
	:	
TOWN OF JAFFREY	:	DECISION NO. 1999-008
	:	
Respondent	:	

APPEARANCES

Representing AFSCME, Local 3657:

James C. Anderson, Staff Representative

Representing Town of Jaffrey:

Barton, Mayer, Esq.

Also appearing:

Steven P. Reynolds, AFSCME, Local 3657
 Robert Pelio, Town of Jaffrey
 John Sistare, Town Manager, Town of Jaffrey

BACKGROUND

The American Federation of State, County and Municipal Employees (AFSCME), Local 3657 (Union) filed an unfair labor practice charge against the Town of Jaffrey (Town) on December 18, 1998 alleging a violation of RSA 273-A:5 I (h) for breach of contract for failing to follow the grievance procedure, namely arbitration, provided in the collective bargaining agreement

(CBA). The Town filed its answer on January 4, 1999 after which this case was heard by the PELRB on January 26, 1999.

FINDINGS OF FACT

1. The Town of Jaffrey is a "public employer" of police officers and other personnel in the operation of its police department within the meaning of RSA 273-A:1 X.
2. AFSCME, Local 3657 is the duly certified bargaining agent for all regular full-time and part-time police officers and sergeants employed by the Town.
3. The Town and the Union are parties to a CBA for the period January 1, 1998 through December 31, 1999, further identified as Joint Exhibit No. 1. That document contains articles pertaining to management rights (Article 2), grievance procedure (Article 8) and holidays (Article 16), pertinent parts of which read as follows:

ARTICLE 2
MANAGEMENT RIGHTS

A. Except as otherwise expressly and specifically limited by the terms of this Agreement, the Town [sic] all its customary, usual and exclusive rights, decision-making, prerogatives, functions, and authority connected with or in any way incidental, to its responsibility to manage the affairs of the Town or any part of the Town. The rights of employees in the bargaining unit and the Union herein are limited to those specifically set forth in this Agreement, and the Town retains all prerogatives, functions, and rights not specifically limited by the terms of this Agreement, including, but not limited to the Town of Jaffrey Personnel Policy, and State and Federal law.

B. Without limitation, but by way of illustration, the exclusive prerogatives, functions, and rights of the Town shall include the following:

1. To direct and supervise all operations, functions and policies of the Town in which the employees in the bargaining unit are employed.
2. To determine the need for a reduction or an

increase in the work force and the implementation of any decision with regards thereto.

* * * * *

5. To assign and distribute work.

6. To assign shifts, workdays, hours of work, and work locations.

* * * * *

C. The exercise of any management prerogative, function, or right which is not specifically modified by this Agreement is not subject to the grievance procedure, to arbitration, or, as set forth above, to bargaining during the term of this Agreement.

ARTICLE 8
GRIEVANCE PROCEDURE

A. The purpose of this procedure is to provide an orderly method for the resolution of grievances. A determined effort shall be made to settle any such differences at the lowest possible level in the grievance procedure; and there shall be no suspension of work or interference with the operations of the Town.

B. For the purpose of this Agreement, a grievance is defined as only those disputes involving the interpretation, application or alleged violation of any provision of this Agreement. Grievances shall be processed in accordance with the following, [sic] procedures within the stated item limits.

* * * * *

F. Steps in the Grievance Procedure:

* * * * *

Step 4. If the decision of the Town Manager does not resolve the grievance, the Union shall have the sole right to appeal that decision and the matter shall be submitted to arbitration providing that the Union notify the Town of such request within seven (7) working days following the issuance of the Step 3 decision.

* * * * *

ARTICLE 16
HOLIDAYS

All regular full time employees covered by this agreement shall be paid for the following named holidays:

New Years Day (Jan. 1)	Civil Rights Day (3rd Mon/Jan)
Presidents Day (3rd Mon/Feb)	Memorial Day (Lay Mon/May)
Independence Day (July 4th)	Labor Day (1st Mon/Sept)
Columbus Day (2nd Mon/Oct)	Veteran's Day (Nov 11th)
Thanksgiving Day (4th Thurs. Nov. and the day after.)	Christmas (Dec 25th)

An employee may take an actual day off if it falls within the employee's regularly scheduled work week with the approval of the Chief. Officers working on the above dates shall be eligible for holiday pay at the rate of time and one half over and above their regular straight time rate of pay. Holiday pay shall not exceed a maximum of eight (8) hours per holiday. Should the holiday fall on the employees regular day off, that employee shall be entitled to holiday pay equal to eight (8) hours of straight time pay at that employees regular rate.

4. On or about October 12, 1998, Michael J. Prince, a bargaining unit member and chapter chair, filed a grievance, identified as Joint Exhibit No. 3, alleging a violation of Article 16, to wit:

Article 16, Holidays, clearly states that an employee may take an actual holiday day off if it falls within the employee's regularly scheduled work week. The town has recently and in the past made employee's [sic] take the day off, therefore, prohibiting them from working 40 hours to be eligible for overtime.

5. On November 16, 1998, town Manager Jonathan Sistare wrote to union representative James Anderson denying the grievance (Joint Exhibit No. 2.) and saying it was not arbitrable, it wit:

I have received copies of correspondence, which you have sent to the PELRB related to this grievance. It is the position of the Town of Jaffrey that this is not a grievable issue, and, therefore, we will

will not agree to submit this grievance to arbitration.

The language of the current contract is quite clear in Article 2.B.6, "To assign shifts, workdays, hours of work, and work locations". This is a management right which is both clear and necessary for the Town of Jaffrey to be able to use our resources efficiently.

6. The Union's complaint, as explained at hearing, is that management, namely, the chief of police, is deciding whether non-patrol officers must work on the holidays stated in Article 16 and that, by so doing, the bargaining unit members relieved of the responsibility of reporting to work on those days are deprived of overtime opportunities under Article 12 for failure to achieve forty base hours of work during the work week. The Union was unable to assert any established past practice with respect to this issue and, when queried on this matter, candidly said the practice had been "all over the place." Notwithstanding this, the Union maintains its position that if an employee does not opt out or ask not to work on a stated holiday falling during that employee's normal work week, then the chief, under the CBA, cannot require that employee not to work the holiday.

7. The Town's position is that the Union is barred from processing this grievance because it has reserved rights under Article 2 to assign and distribute work and to assign shifts, workdays and hours of work and because the Union has agreed not to pursue disputes under this article under the grievance procedure (Article 2, Section C).

DECISION AND ORDER

The issue in this case is one of substantive arbitrability under the CBA. The authority for the PELRB to determine such an issue is of long standing since it "has exclusive original jurisdiction over the threshold question of arbitrability." School District #42 of the City of Nashua v. Murray, 128 N.H. 417, 419 (1986). In this role, the PELRB "has the implicit authority to decide whether a dispute involves a matter addressed

by a CBA." Appeal of Westmoreland School Board, 132 N.H. 103, 104 (1989).

Our analysis, of necessity, must consider whether it can "be said with positive assurance that the arbitration clause [of the CBA] is not susceptible of an interpretation that covers the asserted dispute. See *id.* at 105 which quotes Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). "In the absence of any *express provision* excluding a particular grievance from arbitration, only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Id.* at 106 citing to Warrior & Gulf, 363 U.S. at 584-85 and AT & T Technologies, 475 U.S. 643, 647-50 (1986) (emphasis added).

This brings us to the language of the CBA itself. The grievance alleges a violation of Article 16, pertaining to a specified entitlement that "an employee may take an actual holiday day off if it falls with the employee's regularly scheduled work week." (Finding No. 4). The CBA adds that this must be done "with the approval of the Chief." (Finding No. 3.) On its face, such a dispute would be subject to the broadly worded definition of a grievance found at Article 8 of the CBA, namely, "only those disputes involving the interpretation, application or alleged violation of any provision of this Agreement."

This grievance alleges a violation of Article 16 of the CBA and clears the first hurdle in being preemptively arbitrable unless there is an *express provision* excluding it from arbitration. The practical effect of the Union's grievance is to assert the converse of the article being grieved. An employee's right under the CBA to ask to take an "actual day off" during his or her regularly scheduled work week, with the permission of the Chief, cannot be equated to being able to insist that he or she be permitted to work when not scheduled or when not requested to do so by the Chief or other duly appointed superior in the department

Notwithstanding any confusion which may have arisen about taking "an actual day off" on one of the twelve days (Thanksgiving being a double holiday) listed in Article 16 of the CBA and the lack of any clearly established past practice or interpretation related thereto, we find the language of Article 2 to be conclusive on its face.

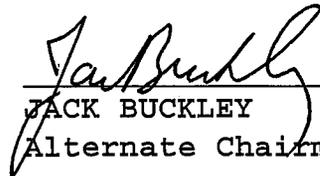
When we move from the more general provisions of holidays in Article 16 and from the definition of a grievance in Article 8 to the specific provisions of Article 2, we find compelling evidence, inclusive of an *express provision*, that this grievance is not arbitrable. First, the converse of the language found in Article 16 (relative to the right of being able to take "an actual day off," with permission, on a holiday) is not equivalent to being able to assert a right to work on that holiday if one's services are not required on that day. The contract language does not protect one's right to insist on working; it only protects one's limited right to take "an actual day off."

Second, when the issue at hand turns to one's right to work on a holiday, even if those services are not scheduled or requested by the public employer, it exits the pure realm of holidays and intrudes into matters of scheduling. Scheduling matters are addressed in Article 2 and are specifically reserved to management, namely, assigning and distributing work and assigning shifts, workdays, hours of work and work locations. (Finding No. 3.) Article 2 (c) of the CBA continues by stating that "the exercise of any management prerogative, function or right which is not specifically modified by this Agreement is not subject to the grievance procedure [or] arbitration...." (Finding No. 3.) This establishes both an *express provision* and a positive assurance that the parties did not intend a grievance of the type filed (Joint Exhibit No. 3) to be subject to the grievance and arbitration procedures of the contract.

The ULP is DISMISSED.

So ordered.

Signed this 10th day of February, 1999.



JACK BUCKLEY
Alternate Chairman

By unanimous decision. Alternate Chairman Jack Buckley presiding. Members Seymour Osman and E. Vincent Hall present and voting.