



STATE OF NEW HAMPSHIRE  
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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Hampton Fire Department Supervisory Association,\*  
Local 3017, IAFF, AFL-CIO, CLC  
Complainant  
v.  
Town of Hampton  
Respondent

Case No: F-0127-7

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Decision No. 2006-011

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Town of Hampton  
Complainant  
v.  
Hampton Fire Department Supervisory Association,\*  
Local 3017, IAFF, AFL-CIO, CLC  
Respondent

Case No: F-0127-8

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APPEARANCES

Representing Hampton Firefighters, Local 3017, IAFF:

John S. Krupski, Esquire  
Cook & Molan, P.A.

Representing Town of Hampton:

Elizabeth A. Bailey, Esquire  
Sheehan, Phinney, Bass + Green, P.A.

## BACKGROUND

The Hampton Fire Department Supervisory Association, Local 3017, IAFF (hereinafter "the Union") filed an unfair labor practice complaint on June 3, 2005 alleging that the Town of Hampton (hereinafter "the Town") violated RSA 273-A:5 I (h) ["to breach a collective bargaining agreement ('CBA')"] by laying off two employees when there was no lack of funds and for failing to lay off the least senior employee in the job classification of Deputy Fire Chief. The Town filed its answer denying the Union's charge on June 17, 2005 and on June 23, 2005 filed its own improper practice charge against the Union. It alleges that the Union has violated RSA 273-A:5, II (f) [to breach a collective bargaining agreement] by pursuing the aforementioned grievances in violation of Article 4 of the CBA. The Union filed an answer denying the Town's charge, as well as a Motion to Dismiss, on July 8, 2005. On July 12, 2005, the Town filed its objections to the Association's Motion to Dismiss. A pre-hearing conference was conducted at the offices of the Public Employee Labor Relations Board ("PELRB" or "Board") on August 19, 2005, and in accordance with the pre-hearing memorandum and order issued on that date (PELRB Decision No. 2005-108), these matters were consolidated.

An adjudicative hearing was convened before the Public Employee Labor Relations Board ("PELRB" or "Board") in Concord, New Hampshire on August 25, 2005. Both parties were represented by counsel at the hearing, and had the opportunity to present witnesses for examination, to undertake cross-examination, and to offer exhibits into evidence. At the conclusion of the hearing it was agreed that the parties would file post-hearing briefs in lieu of closing arguments. Upon receipt of the parties' briefs on September 23, 2005, the record was closed. Having reviewed all filings submitted by the parties, considered and weighed the credibility of all witnesses and of all relevant evidence, including the parties' joint factual stipulations incorporated as Findings of Fact paragraphs 1 through 23, below, the Board finds as follows:

## FINDINGS OF FACT

1. The Hampton Fire Department Supervisory Association, IAFF 3017 ("Union") is a certified bargaining representative of certain employees of the Hampton, New Hampshire Fire and Rescue Department.
2. The Town of Hampton ("Town") is a public employer as that term is defined pursuant to RSA 273-A.
3. The Union and the Town are signatories to a Collective Bargaining Agreement ["CBA"] which expires on June 30, 2006. Joint Exhibit 1.
4. On or about March 24, 2005, Fire Chief Hank Lipe notified Robin L. Arsenault, the Fire Prevention Secretary for the Town of Hampton, that she would be laid off from her position effective April 6, 2005. Joint Exhibit 2 and 3.

5. By letter dated April 6, 2005, Justin Cutting, President of the Union, wrote to the Chief alleging that Article 4 of the Collective Bargaining Agreement was violated by the layoff of Secretary Arsenault because there was no lack of funds. Joint Exhibit 4.
6. By letter dated April 6, 2005, Fire Chief Hank Lipe denied the relief sought by the Union. Joint Exhibit 5.
7. By letter dated April 11, 2005, Union President Cutting appealed the Chief's decision to Mr. James Barrington, the Town Manager. Joint Exhibit 6.
8. By letter dated April 15, 2005, Town Manager Barrington denied the grievance on the basis that Article 4 of the Agreement is not subject to the grievance procedure. Joint Exhibit 7.
9. By letter dated April 20, 2005, Union President Cutting wrote to the Hampton Town Board of Selectmen. Joint Exhibit 8.
10. By letter dated May 5, 2005, James A. Workman, Chairman of the Board of Selectmen, notified President Cutting that the Board of Selectmen had decided to uphold the determination of the Town Manager that this grievance is not subject to the grievance procedure. Joint Exhibit 9.
11. By letter dated April 8, 2005, Fire Chief Hank Lipe notified bargaining unit member Deputy Chief Steven Benotti that he would be reassigned to the rank of Captain in the Hampton Fire Department effective April 13, 2005. Joint Exhibit 10.
12. By letter dated April 12, 2005, Union President Cutting sent a letter to Chief Lipe asking him for an explanation of the reassignment and the process which was followed to make the assignment. Joint Exhibit 11.
13. By letter dated April 15, 2005, Chief Lipe responded to the Union President telling him that he would not provide him with a written explanation or outline of the process used in making the reassignment. Joint Exhibit 12.
14. By letter dated April 20, 2005, President Cutting wrote to Chief Lipe on behalf of Steven Benotti alleging that the Department had violated Articles 4 and 13 of the Collective Bargaining Agreement. He alleged that the Agreement was violated because there was not a lack of work or lack of funds to lay off the incumbent, Steven Benotti, and because the Department failed to layoff the employee in the classification with the least classification seniority. Joint Exhibit 13.
15. By letter dated April 20, 2005, Chief Lipe denied the Benotti grievance. Joint Exhibit 14.

16. By letter dated April 20, 2005, Union President Cutting appealed Chief Lipe's decision on the Benotti grievance to the Town Manager, James Barrington. Joint Exhibit 15.
17. By letter dated April 22, 2005, Town Manager Barrington responded to President Cutting and denied the grievance. Joint Exhibit 16.
18. By letter dated April 26, 2005, Union Vice President Christopher Silver filed an appeal of the Benotti grievance with the Board of Selectmen of the Town of Hampton. Joint Exhibit 17.
19. By letter dated May 5, 2005, the Board of Selectmen upheld the Town Manager's decision that this grievance "...was not a subject of the Article 31 grievance procedures." Joint Exhibit 18.
20. Article 4 of the Management's Rights Clause states:

Section 1.

Except as specifically limited by the express provisions of this Agreement, the employer retains traditional rights (such as historically existed prior to the first agreement) to manage and direct the affairs of the employer in all of its various aspects and to manage and direct its employees including but not limited to the following: to plan, direct, control, and determine all operations and services of the Employer, to direct the working forces; to establish the qualifications for employment; and to layoff employees for lack of work or lack of funds; to schedule and assign work; to establish work and productivity standards and to, from time to time, change those standards; to assign overtime; to determine the methods, means, organization and number of personnel by which such operations are to be conducted; to make and enforce rule and regulations; to employ, discipline, transfer, suspend, demote and discharge employees for just cause; to change or eliminate existing methods, equipment or facilities; provided however, that the exercise of any of the above rights shall not conflict with any of the express written provisions of this Agreement.

Section 2.

The provisions of this Article are not subject to the provisions of Article 31 entitled "Grievance Procedure."

21. In addition, Article 13 provides:

Section 1.

Should the Town decide to reduce the Department Personnel covered by this Agreement, the employee with the least seniority in the Department shall be laid

off first and rehired in the reverse order of layoff in accordance with the procedure in Article 11, Section 3C. No new employees shall be hired until all employees who have been laid off for eighteen (18) months or less have been given an opportunity to return to work.

Section 2.

In the event that the Town decides to reduce the number of employees within a particular classification, the employee(s) in the classification with the least classification seniority shall be laid off unless the employee(s) is qualified for a position in lower classification, and elects to displace an employee in the lower classification who has less departmental seniority. Layed-off [sic] employees can only displace in lower classifications within the bargaining unit.

22. In the instant case, the Town Meeting of Hampton rejected the Town's recommended operating budget and by action of law, was required to institute a default budget. Joint Exhibit 19; Joint Exhibit 20.
23. The Town does not assert a lack of work concerning the Hampton Fire Department in these consolidated matters.
24. Article 31 of the parties' CBA contains a grievance procedure that defines a grievance as "a dispute or difference of opinion raised by an employee covered by this Agreement or the Town involving the meaning, interpretation or application of the express provisions of this Agreement." The parties' grievance procedure provides further that "[w]hensoever an employee in the bargaining unit has a grievance as defined above, the following procedure shall be utilized or such grievance shall be deemed waived." Joint Exhibit 1, pp. 36-37.
25. The final step of the parties' grievance procedure provides for final and binding arbitration. Joint Exhibit 1, pp. 38-39.
26. The Town's fiscal year runs concurrently with the calendar year. Therefore, when the Town Meeting rejected the Town's recommended operating budget for Fiscal Year 2005 on March 8, 2005, the Town was already over two months into the operating budget for fiscal year 2005.
27. Under a default budget, and pursuant to RSA 40:13, the Town operates under the same budget as the previous year, with certain adjustments required by previous action of the Town Meeting or by law, such as debt services or fulfilling payment obligations under existing contracts. Accordingly, the figures for a default budget can actually be greater than the prior year's adopted operating budget. Joint Exhibit 20.
28. The fire department's projected default budget for fiscal year 2005 was \$3,683,896, as opposed to \$3,532,602 during fiscal year 2004. Joint Exhibit 20.

29. For several weeks leading up to the Town Meeting vote, the Town's Board of Selectmen publicly discussed their concerns and the anticipated consequences of the Town's proposed budget not being passed by the voters.
30. During a January 24, 2005 Selectmen's meeting, Selectman William Sullivan stated that if the budget does not pass, there will definitely be a loss of employees and there could be complete departments lost. Town Exhibit 3.
31. In a February 17, 2005 e-mail to Town Manager James Barrington and others, Selectman Sullivan wrote:

In a nut shell. There will be at least Fifteen positions lost in town government with a default budget for the second year in a row.

And more importantly, due to the fact that we hold our town meeting in March, NINE WEEKS INTO THE NEW BUDGET, we will have to make immediate cuts in order to fund the reduced operation for the remaining Ten months.

Town Exhibit 2 (emphasis in original).

32. After the Town meeting voted down the proposed budget, Mr. Barrington met with the department heads, including Fire Chief Hank Lipe, to discuss how the Town's departments could address the \$2.8 million shortfall between the proposed budget and the default budget. Department heads were asked to cut 15% from their respective budgets.
33. At the March 14, 2005 Board of Selectmen's meeting, Fire Chief Lipe indicated that in order to meet the 15% cut, layoffs are imminent and that it will require the layoff of 12 firefighters, and that he did not yet know at that time who would be laid off in the officer ranks. Union Exhibit 5.
34. The following week, on March 21, 2005, Deputy Fire Chiefs Steven Benotti and Chris Silver attended the Board of Selectmen meeting in Chief Lipe's absence in order to discuss the budget cuts made necessary by the default budget. After some questioning by selectmen, a motion was made that "the Board limit the reduction in firefighters to four and at the same time remove the position of Deputy Chief of Operations from the organization and institute the change before April 18, 2005." According to the meeting minutes, "Deputy Benotti said that due to the contract, the Board can cut the position, but the savings would be just \$15,000." The motion later passed after the Board had gone into executive session for a period of time. Town Exhibit 1.
35. It was during the March 21<sup>st</sup> meeting that the topic of eliminating the position of Deputy Fire Chief of Operations was first discussed. The Town Manager James Barrington, Fire Chief Hank Lipe, and the Deputy Fire Chief Benotti were unaware that the Board would pursue such an option or action prior to the meeting.

36. There is no question that the Board of Selectmen elected to allocate Town funds in Fiscal Year 2005 differently than in 2004. Pursuant to the Town's existing operating budget for Fiscal Year 2005, the Board of Selectmen allocated \$3,106,696 to the fire department, \$577,200 less in funds than the \$3,683,896 allocated in the default budget. Town Exhibit 11, Joint Exhibit 20.

## DECISION AND ORDER

### JURISDICTION

Pursuant to RSA 273-A:6 I, the PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. *Appeal of State Employees Association of New Hampshire, Inc.*, 139 N.H. 441, 444 (1995). Whereas the parties claim statutory violations against each other under RSA 273-A:5 I (h) [to breach a collective bargaining agreement] and RSA 273-A:5 II (f) [to breach a collective bargaining agreement], citing Article 4 of their CBA, the management rights clause that by its own terms is not subject to the parties' grievance procedure, Board jurisdiction is appropriate under the circumstances. However, as further discussed below, based upon the fact that the parties' CBA contains a grievance procedure that includes final and binding arbitration, we dismiss for lack of jurisdiction that portion of the Union's claim under RSA 273-A:5 I (h) pertaining to the Town's alleged failure to lay off the least senior employee in the classification of Deputy Chief.

### DISCUSSION

We first address the Union's Motion to Dismiss. In its July 8, 2005 motion, the Union requests that the Board dismiss the Town's complaint of improper practice because the Town at no time submitted the underlying issue in its complaint as a grievance pursuant to the CBA's grievance procedure. It follows, as asserted by the Union, that the Town has not exhausted its contractual remedies and has failed to do so within the time limits set forth therein, and thus their right of appeal should be extinguished. We note that Article 30, Section 7 of the parties' CBA does provide in pertinent part that:

The [Town] shall have the right to initiate a grievance growing out of a dispute, claim or complaint arising under the terms of this Agreement... In the event the [Town] initiates a grievance, it shall do so by filing said grievance with the Union within seventy-two (72) hours from the date of the event which gives rise to the alleged grievance. If the matter is not resolved by and between the [Town] and the Union within seven (7) administrative work days from the date the [Town] submitted said grievance to the Union, the [Town] may submit a written request to the American Arbitration Association to appoint an arbitrator to hear said grievance in accordance with its rules and regulations...

Joint Exhibit 1, p. 39. It is also true that the Town's claim against the Union arises under the terms of the parties' agreement in that it asserts that the Union has violated Article 4, the Management Rights Clause, by filing a grievance against the Town under the same article. However, Section 2 of Article 4 expressly states that "the provisions of this [a]rticle are not subject to the provisions of Article 31, entitled 'Grievance Procedure.'" Joint Exhibit 1, p. 7. Therefore, under the plain wording of Article 4, the Town would likewise be precluded from pursuing a grievance against the Union under this article and instead is constrained to pursue an unfair labor practice per RSA 273-A:5, II (f) [to breach a collective bargaining agreement]. Accordingly, we deny the Union's motion.

As to the Union's complaint against the Town (PELRB Case No. F-0127-7), we dismiss that portion of the charge relating to the Town's alleged violation of Article 4, the management rights clause. Here, the Union contends that the Town committed a contract violation, and in turn RSA 273-A:5 I (h) [to breach a collective bargaining agreement], by laying employees off without a lack of funds. Article 4, Section 1 of the parties' CBA provides in pertinent part that:

[e]xcept as specifically limited by the express provisions of this Agreement, the employer retains traditional rights (such as historically existed prior to the first agreement) to manage and direct the affairs of the employer in all of its various aspects and to manage and direct its employees including but not limited to the following:...to *layoff employees for lack of work or lack of funds*;

Joint Exhibit 1, p. 6 (emphasis added). While the parties are in agreement that there was no lack of work to otherwise justify layoffs, the instant dispute centers upon whether there was a lack of funds. In this regard, the Union contends that the Town had sufficient funds, or no genuine lack of funds, under the default budget in order to retain both Ms. Arsenault and Mr. Benotti in their respective positions within the fire department.

We do not interpret the "lack of funds" language in Article 4 as strictly as the Union, nor do we consider such language to ultimately limit the Town's statutory discretion in the allocation of its financial resources. We believe that as a result of the voters' rejection of the Town's proposed budget, the resulting implementation of a default budget by action of law, and subsequent budget allocations made by the Board of Selectmen, a sufficient lack of funds was established within the record to validate the Town's actions with respect to Ms. Arsenault and Mr. Benotti under Article 4. In this manner, we do not equate "lack of funds" with there being no funds whatsoever. The Town retains discretion under RSA 273-A in order to maintain public control of governmental functions. Whether self-made or not, the fire department had \$577,200 less in operating funds for Fiscal Year 2005 than was allocated in the default budget, and the Town's actions resulted in a cost savings.



We do feel that in this case the Town walked a fine line towards potentially violating its' own management rights clause and committing an unfair labor practice. Indeed, when it is evident that the Town Manager and Fire Chief were totally unaware of the Board of Selectmen's intentions with respect to the position of Deputy Fire Chief of Operations on the evening of March 21, 2005, reasonable questions can arise as to the true motivations for this personnel action, regardless of whether their intentions were genuinely based upon a lack of funds at that time. However, in light of the latitude a public employer generally has in determining how it will allocate its budget and resources, and otherwise lacking a sufficient showing of bad faith, we must dismiss this portion of the Union's complaint.

This decision should not be construed as sanctioning public employers' violation of CBA's based upon a claim of lack of funds. Parties to a CBA are to be held to the terms they have bargained and self-created circumstances of an "inability to pay" are not a valid defense to violating express contract provisions. However, in this case, the issue comes down to whether the Union has met its burden in proving that there was no "lack of funds," and this is a heavy task, particularly given the voter's rejection of the proposed budget, the implementation of a default budget, and an over \$550,000 reduction in the fire department's budget.

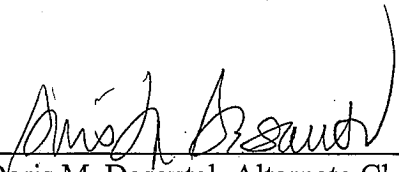
As we have previously held, where the parties' grievance procedure provides for final and binding arbitration, this Board does not regularly have jurisdiction to interpret the parties' CBA. *SEA, SEIU Local 1984 v. State of New Hampshire, Department of Corrections*, PELRB Decision No. 2005-011 (February 15, 2005) citing *Appeal of State of New Hampshire*, 147 N.H. 106, 108 (2001). Here, the grievance procedure contained in the parties' CBA specifically provides for final and binding arbitration of disputes or differences of opinion raised by employees or the Town involving the meaning, interpretation or application of the express provisions of the agreement. (Findings of Fact Nos. 24 and 25, above). The parties have also agreed that said procedure shall be utilized or such grievance shall be deemed waived. (Finding of Fact No. 24, above). Since the Union is claiming that the Town violated an express provision of the CBA, namely Article 13, in its lay off of Deputy Chief Steven Benotti, it is appropriate for this issue to be presented to an arbitrator. Accordingly, we direct the parties to utilize their contractual arbitration procedures to address Mr. Benotti's Article 13 grievance. Likewise, we dismiss, for lack of jurisdiction, that portion of the Union's complaint pertaining to the Town's alleged failure to lay off the employee with the least seniority in the classification of Deputy Fire Chief.

Finally, we deny the Town's complaint against the Union (PELRB Case No. F-0127-8). In this case the Town claims that the Union violated RSA 273-A:5 II (f) [to breach a collective bargaining agreement] when it filed grievances alleging a violation of Article 4 on behalf of Ms. Arsenault and Deputy Fire Chief Benotti. The thrust of the Town's argument is that, as previously noted, Section 2 of Article 4 specifically states "the provisions of this [a]rticle are not subject to the provisions of Article 31, entitled 'Grievance Procedure,'" and that the Arsenault and Benotti grievances initiated by the Union referencing Article 4 violated this provision.

In the interest of encouraging parties to utilize their mutually agreed upon grievance procedures to resolve their disputes, we are hesitant to sustain a complaint against a party for initially attempting, in good faith, to resolve a dispute in this manner and prior to proceeding to arbitration. We also note, at least as to Deputy Fire Chief Benotti, that the grievance involved an additional contract provision, namely Article 13. Since the record indicates that upon meeting with the Board of Selectmen and accepting their reasoning, the Union did not pursue these grievances to arbitration (See Union's Answer to Town's Improper Practice Charge) and instead filed an action with this Board, the Town's complaint does not present a case or controversy. Accordingly, it is dismissed.

It is so ordered.

Signed this 30<sup>th</sup> day of January, 2006.

  
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Doris M. Desautel, Alternate Chair

By unanimous vote. Alternate Chair Doris M. Desautel presiding with Board Members E. Vincent Hall and Seymour Osman also voting.

Distribution:  
John S. Krupski, Esq.  
Elizabeth A. Bailey, Esq.