



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Hampton Firefighters Local 2664, IAFF,
AFL-CIO, CLC

Complainant

v.

Town of Hampton

Respondent

Case No: F-0118-15

Decision No. 2006-222

Town of Hampton

Complainant

v.

Hampton Firefighters Local 2664, IAFF,
AFL-CIO, CLC

Respondent

Case No: F-0118-16

ORDER ON TOWN'S MOTION TO DISMISS
AND UNION'S MOTION TO AMEND COMPLAINT

The above matters had been conditionally stayed upon mutual request of the parties and embodied in PELRB Decision No. 2005-115, dated August 31, 2005. This decision provided, in relevant part, that these matters would be administratively dismissed unless either of the parties requested further proceedings before the PELRB within thirty days of the PELRB issuing a

decision on rehearing in Case Nos: F-0127-7 and F-0127-8. On January 30, 2006 the PELRB issued Decision No. 2006-011 following a hearing of the merits of Case Nos: F-0127-7 and F-0127-8. It subsequently issued a decision denying a rehearing, see Decision No. 2006-044 and dated March 13, 2006. This denial triggered the condition in the instant matters, which had been previously consolidated by consent of the parties on August 24, 2006, allowing administrative dismissal unless either party requested further proceedings before the PELRB within thirty days of the March 13, 2006 decision. On April 13, 2006 Local 2664 filed a request with the PELRB for further proceedings, via the scheduling of a pre-hearing conference. On April 28, 2006 the Town filed an objection to the scheduling of further proceedings and a Motion to Dismiss the instant matters. An assented to extension to allow time for the Hampton Firefighters Local 2664, IAFF, AFL-CIO, CLC ("Local 2664") to file an objection to the Town's Motion to Dismiss was filed with the PELRB on May 15, 2006. On May 28, 2006 Local 2664 filed its Objection to the Town's Motion to Dismiss within which it included language that, arguably, constituted an amendment of its original complaint. The Town filed an Objection to Purported Amendment arguably contained within Local 2664's response to the Town's Motion to Dismiss. A hearing was conducted on August 23, 2006 on all pending motions.

At the hearing before the undersigned hearing officer, both parties were represented by counsel who made offers of proof and oral argument in support of their respective positions on all motions and objections. The hearing officer finds as follows:

FINDINGS OF FACT

1. The Hampton Firefighters Local 2664, IAFF, AFL-CIO, CLC, ("Local 2664"), is the 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: 1, X.
3. Local 2664 and the Town are signatories to a Collective Bargaining Agreement ("CBA") which expired on June 30, 2006.
4. The Hampton Fire Department Supervisory Association Local 3017, IAFF, AFL-CIO, CLC is the certified bargaining representative of certain employees of the Hampton, New Hampshire Fire and Rescue Department who are, for purposes of this action, employed in positions that are supervisory of the positions held by individuals represented by Local 2664, IAFF, AFL-CIO, CLC.
5. The PELRB issued an order on the merits of consolidated Case Nos. F-127-7 and F-127-8, involving a similar complaint between the Town and Local 3017 on January 30, 2006 (Decision No. 2006-011).

6. The PELRB issued its decision on rehearing in Case Nos. F-127-7 and F-127-8 on March 13, 2006 and Local 2664 filed its request for further proceedings in the instant matters on April 30, 2006.
7. The original complaints filed against the Town by Local 3017 and Local 2664 are similar in form and language as to issues related to violations of Article 4 of the respective CBA the Town entered into with Local 3017 and Local 2664, but are not identical in that the identities differ for the employees alleged to have been harmed by substantially similar actions of the Town as alleged by both Local 3017 and 2664 in their respective complaints. In addition, the complaint filed by Local 3017 included an additional issue of seniority involving Article 13 of the CBA between that Local and the Town, whereas the complaint filed by Local 2664 does not include such an issue.
8. Both Local 3017 and Local 2664 are represented by the same legal counsel and both Locals are affiliated with the International Association of Firefighters, AFL-CIO, CLC.
9. Local 3017 and Local 2664 represent different bargaining units established under formal "certifications" of the PELRB.
10. The "management rights" clause in the CBA that the Town entered into with each Local is identical.
11. The "Parties' Stipulation Concerning Stay of Case" filed with the PELRB on March 15, 2006, the sum and substance of which was incorporated into PELRB Decision No. 2006-048, does not expressly state the reason for the parties' request to stay the instant proceedings and does not indicate any express agreement between the parties that the proceedings in the instant matters are substantially the same or were contingent upon, or to be resolved in accordance with, any other decision of the PELRB.

JURISDICTION

The Public Employee Labor Relations Act (RSA 273-A) provides that the PELRB has sole original jurisdiction to adjudicate claims of unfair labor practices, as expressed in RSA-273-A:5, committed by a public employer or an exclusive bargaining representative, certified under RSA 273-A:8, through the application of RSA 273-A:6.

DISCUSSION

Local 2664 filed an unfair labor complaint (ULP) against the Town alleging the commission of an improper labor practice based upon the Town's actions in laying off three firefighters. The Town counter filed its own ULP against Local 2664 alleging that its actions were allowable and proper within the terms and conditions of the parties' CBA and that Local 2664's action in filing grievances based upon the lay-offs constituted an unfair labor practice.

The Town was a party to a similar, though not identical, ULP filed by Local 3017, a separate bargaining unit representing supervisory employees within the Town's fire and rescue department. In that action, the ULP against the Town was based upon actions it undertook in laying off three supervisory employees with the additional claim that one of the supervisory employees selected for lay-off was selected in breach of a separate CBA provision relating to seniority. In that action, as well, the Town filed its own ULP complaint based upon its claim that the Local was not entitled to file grievances for the layoffs.

Except for the alleged breach committed by the Town related to the seniority of one of the supervisory employees, the cross complaints in the instant proceedings and those of the earlier matters are based upon the Town's exercise of management rights, pursuant to identical relevant language in agreements with both union locals, following a proposed budget rejection by its Town Meeting. Formulating a reduced budget for fire and rescue services, the town issued notices of lay-off and did lay off employees under rights retained by it under Article 4, Management Rights, §1 "to lay off employees for lack of work or lack of funds".

Local 3017, the party in the prior proceedings, and the Town litigated the issue of whether or not the Town acted within its authority in doing so and thereby avoided a violation of the parties' CBA. The PELRB, after hearing, found that the Town acted within its authority in laying off the three employees represented by Local 3017. (PELRB Decision No. 2006-011). The PELRB referred to arbitration the issue of whether or not a seniority right of one of the employees in Local 3017 had been violated. In reaching that conclusion the PELRB found, on the evidence presented in that case, there was a lack of funds that caused the lay-offs and no other motivation or reason for that Town action.

The Town has requested that Local 2664 should be estopped in these instant proceedings based upon the application of *res judicata* from the PELRB decision in the proceedings between the Town and the other bargaining unit, Local 3017. Since the PELRB was acting in a judicial capacity when it issued PELRB Decision No. 2006-011, there are three conditions that must exist if we are to grant the Town's request and dismiss the complaint filed by Local 2664 and which had been stayed by agreement of the parties.

The first condition that must be satisfied before collateral estoppel will arise is that the issue subject to estoppel must be identical in each action. A review of the ULP's filed by both Local 3017 and Local 2664 establish that as to the issue of whether or not Article 4, Management Rights Clause, authorized the Town to undertake lay-offs following the Town Meeting Rejection of its proposed budget, that issue is identical. A second issue in the Local 3017 matters, relating to Article 13 of the parties' CBA, is not at issue in these present proceedings.

The second condition that must be satisfied is that the first action must have resolved the issue finally on the merits. The record of the prior proceedings involving Local 3017 reveals that responsive pleadings were filed by the parties, an evidentiary hearing was conducted before the PELRB at which both parties were represented by counsel at the hearing and both counsel had the opportunity to present witnesses for examination, to undertake cross-examination, and to offer exhibits into evidence. The PELRB reviewed all filings submitted by the parties, considered and weighed the credibility of all witnesses and relevant evidence and made a

decision. That decision was made subject to a request for a partial rehearing by Local 3017 that was denied by the PELRB and the appeal period has expired without any appeal being taken to the Supreme Court.

The third condition that must be satisfied in order for Local 2664 to be estopped in the instant proceedings is that Local 2664 must be deemed to have appeared as a party in the prior action, or to have been in privity with the party that did appear. At the outset, it is clear from the respective filings in both cases, that Local 2664 did not appear as a party in prior proceedings docketed as PELRB Case Nos. F-0127-7 and F-0127-8. It did not present evidence and did not actively participate. It is acknowledged that counsel of record for both locals is the same. However, parties are free to select the counsel of their choice within the law, and it cannot be said that the retaining of the same legal counsel by two parties puts those two parties in a relationship of privity. The court expressed that the relationship between party [Local 3017] and non-party [Local 2664] in the estoppel context implies a relationship that is "one of virtual representation, and substantial identity." *Cook v. Sullivan*, 149 N.H. 774, 779; citing *Daigle*, 129 N.H. 561, 571. The court in *Cook* went on to state that the phrases "virtual representation and substantial identity" implied "not a formal, but a functional relationship, in which, at a minimum, the interests of [Local 2664] were in fact represented and protected [by Local 3017] in the prior [proceedings]." *Id.*

There are many similarities between the litigation undertaken between Local 3017 and the Town and the instant proceedings between Local 2664 and the Town. Both locals are affiliated with the same international union; substantive management rights language in collective bargaining agreements governing the working relationship between both locals and the Town are identical; the issue of a "lack of funds" is at the base of the complaint of both locals; and as stated earlier, both locals have the same legal counsel. However, these similarities that presently exist and define the relationship between Local 3017 and Local 2664 are not sufficient to satisfy the hearing officer that Local 3017 represented, in fact, Local 2664 or that all of Local 2664's interests, as a non-party, were protected in PELRB Case Nos. F-0127-7 and F-0127-8. This is particularly so in light of the expressed desire of the legislature in RSA 273-A:8,II to separate the relationships between bargaining units of supervisory personnel, *i.e.* Local 3017, and so-called "rank and file", *i.e.* Local 2664, and of the court to assure conflict of interests do not arise between supervisory units and non-supervisory units because of their differing duties and relationships.

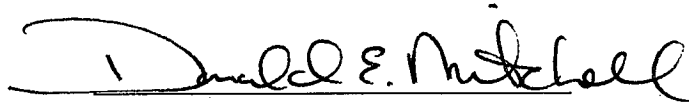
The Town's Motion to Dismiss the original complaint is denied, the Union's request that a pre-hearing be scheduled in the instant proceedings is granted and a notice of same shall issue to the parties in due course.

Lastly, after considering the oral arguments of both counsel in support of their respective positions relating to Local 2664's request to amend its original complaint, the hearing officer recognizes the subtle language included in Local 2664 counsel's filing entitled "Objection to the Town's Motion to Dismiss" as constituting a motion to amend Local 2664's original complaint pursuant to Admin. R. Pub 201.04. The motion to amend is granted providing that five (5) days prior to the pre-hearing conference date notice of which will be forwarded to counsel under separate cover, counsel for Local 2664 shall provide to the Town's counsel, and the PELRB, a

statement of specifics particularly supporting the amended portion of the complaint as expressed in Paragraph # 15; Paragraph #20; and Paragraph #21 sufficient to support the requirements of Admin R. Pub 201.02(b)(4).

So ordered.

Signed this 13th day of December, 2006.



Donald E. Mitchell, Esq.
Hearing Officer

Distribution:

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