



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**EXETER PROFESSIONAL
FIREFIGHTERS ASSOCIATION, IAFF
LOCAL 3491**

**CASE NO. G-0071-1
DECISION NO. 2009-005**

v.

TOWN OF EXETER

PRE-HEARING MEMORANDUM AND ORDER

Date of Conference: January 7, 2009

Appearances: Complainant: John S. Krupski, Esq.
Respondent: Thomas J. Flygare, Esq.

Background:

Exeter Professional Firefighters Association, IAFF Local 3491 ("Union") filed an unfair labor practice complaint on November 26, 2008 based upon the Town's assignment of a member of the Exeter Call Company to a regular bargaining unit shift. The Union contends the Town has breached the provisions of Section 16.5 of the parties' collective bargaining agreement on account of the Town's assignment of non-bargaining unit personnel to perform the duties of bargaining unit employees. The Union asserts that while the staffing decisions in dispute may not be subject to the grievance procedure per Section 16.5 ("[n]one of the provisions of Section

16.5, Minimum Manning, shall be grievable under Section 18, Grievance Procedure”), the final step of which is advisory arbitration, the Union still has the right to challenge the Town’s action by filing a claim with the PELRB under RSA 273-A:5, I (h)(to breach a collective bargaining agreement).

As relief, the Union requests that the PELRB find: 1) that the Town violated RSA 273-A:5, I (h); 2) order the Town to cease and desist from further breach of Section 16.5; 3) make whole any member of the bargaining unit who was denied overtime compensation who should have been assigned to the shift’s fifth member position and was displaced by the non-unit employee; and 4) grant such other and further relief as may be just.

The Town filed its answer on December 11, 2008 and a motion to dismiss based upon the Union’s failure to file a grievance. At the pre-hearing, the Town conceded that in a grievance proceeding the Town would likely argue that the Union was not entitled to grieve the matter. The Town generally contends that its staffing decisions were proper and are not subject to review through the grievance procedure or via an unfair labor practice charge.

The Town requests that the PELRB: 1) dismiss the complaint with prejudice; 2) order the Union to reimburse the Town for its expenses and fees in connection with this matter; and 3) order such other relief as may be just.

ISSUES FOR DETERMINATION BY THE BOARD

1. Whether the Union is obligated to complete the grievance process before proceeding with its statutory claim?
2. The extent to which the Town’s staffing decisions are subject to review in a statutory unfair labor practice proceeding given the language contained in Section 16.5 of the parties’

collective bargaining agreement, and if such decisions are subject to review, whether the Town has violated Section 16.5?

WITNESSES

For the Union:

1. Daniel Bilodeau
2. Jason Greene
3. Richard E. Molan

For the Town:

1. Brian Comeau
2. Russell Dean

Both parties reserve the right to amend their List of Witnesses in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or, upon proper showing, later with reasonable notice to the other party. It is understood that each party may rely on the representations of the other party that witnesses appearing on their respective list will be available at the hearing.

EXHIBITS

For the Union:

1. Collective Bargaining Agreement

For the Town:

1. Collective Bargaining Agreement

Both parties reserve the right to amend their List of Exhibits in conformity with the schedule contained in the DECISION SECTION appearing at the conclusion of this order or,

upon proper showing, later with reasonable notice to the other party. Copies of all exhibits are to be submitted to the presiding officer in accordance with Pub 203.02. It is understood that each party may rely on the representations of the other party that the exhibits listed above will be available at the hearing.

DECISION

1. "Parties" means the named petitioner and respondent or the counsel/representative appearing in the case.
2. As discussed at the pre-hearing, the Town shall notify the PELRB whether it will waive its argument that the Union must first exhaust the grievance process given the Town's likely defense that the dispute is not subject to any review and the fact that the parties' collective bargaining agreement provides for advisory arbitration. The deadline for this notification is on or before January 14, 2009.
3. The parties shall prepare and file a statement of stipulated facts on or before **January 23, 2009**. Based upon the discussions at the pre-hearing, it appears that the parties can prepare a fairly comprehensive fact stipulation. Objections to the admissibility of any particular fact stipulation is not a basis for refusing to stipulate to an otherwise uncontested fact, although it is expected that the parties will not seek fact stipulations as to matters which are plainly irrelevant. The written fact stipulation shall include a statement of a party's relevancy objection immediately following the stipulated fact. The board will address any such relevancy objection to a stipulated fact to the extent necessary in connection with its decision.
4. The parties shall file any amendments to, or deletions from, their Witness and Exhibit lists on or before **January 23, 2009**.

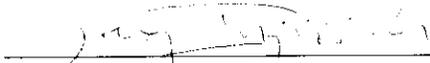
5. The parties shall pre-mark all exhibits for identification or as full exhibits by agreement prior to the time of hearing and have sufficient copies available for distribution at the hearing as required by Pub 203.02.

HEARING

Unless otherwise ordered as a result of the filing of any subsequent motion or for other good cause shown, the evidentiary hearing between the parties will be held on **January 26, 2009 @ 9:00 a.m.** at the offices of the Public Employee Labor Relations Board in Concord. The time set aside for this hearing is 4 hours. If either party believes that additional time is required, written notice of the need for additional time shall be filed with the PELRB at least 10 days prior to the date of hearing.

So ordered.

January 12, 2009



Douglas L. Ingersoll, Esq.
Staff Counsel/Hearing Officer

Distribution:
John S. Krupski, Esq.
Thomas J. Flygare, Esq.