



STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Chauffeurs, Teamsters and Helpers Local Union No. 633 of New Hampshire

v.

Hooksett Police Commission et al

Case No. G-0124-1
Decision No. 2010-087

Appearances:

William R. Cahill, Jr., Esq., Dumont, Morris & Burke, P.C., Boston, Massachusetts for the Complainant.

James E. Higgins, Esq., Manchester, New Hampshire for the Respondent.

Background:

Chauffeurs, Teamsters and Helpers Local Union No. 633 of New Hampshire (Union) filed an unfair labor practice complaint against the Hooksett Police Commission and Chief Stephen Agrafiotis (HPC). The Union claims the HPC breached Articles 18 and 25 of the parties' Collective Bargaining Agreement (CBA) by 1) terminating Officer Jason Defina without just cause; 2) ignoring steps 1 through 4 of the grievance procedure; and 3) appointing, without any statutory authority, a substitute commission to hear Mr. Defina's grievances, all in violation of RSA 273-A:5, I (h) and (i).

The Union requests that the PELRB find that the HPC violated RSA 273-A:3 and RSA 273-A:5 (h) and (i); order that Mr. Defina be returned to duty with no loss of benefits or wages; order that the HPC comply with the CBA; and award the Union its attorney's fees and costs.

The HPC denies the charges and claims that the PELRB lacks jurisdiction to consider the charge that Mr. Defina was discharged without just cause because this issue is currently the subject of grievances filed pursuant to the CBA's grievance procedure; that no claim has been stated against Chief Agrafiotis because the Police Commission, not Chief Agrafiotis, discharged Mr. Defina and is responsible for the operations of the Hooksett Police Department; and that the Union has otherwise failed to state a claim sufficient to establish a violation of RSA 273-A:5 (i).

The HPC requests that the PELRB dismiss the Union's complaint with prejudice and award reasonable costs and attorney's fees.

Prior to the hearing the HPC filed a motion to dismiss claiming the PELRB lacks jurisdiction to consider the Union's claims since the matters about which the Union complains are subject to the parties' contractual grievance procedure and the Union is prosecuting a grievance under that procedure. The Union objects, claiming the HPC has failed to comply with and/or repudiated applicable contractual and statutory procedures which govern termination decisions, including hearing and review procedures applicable to the termination of Mr. Defina's employment. The Union also claims the parties' CBA does not have a workable grievance procedure as required by RSA 273-A:4.

The board held a hearing in this matter on January 21, 2010 at the offices of the PELRB in Concord at which time the parties had a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. The board accepts into the record all exhibits offered at hearing. The record was held open until February 5, 2010 in order to allow the parties

to file post-hearing briefs. The parties' post-hearing briefs have been received, the record is closed, and the board's decision is as follows.

Findings of Fact

1. The Union is the exclusive bargaining representative for all regular full time police officers, detectives and dispatchers of the Town of Hooksett Police Department.
2. The HPC was established pursuant to the provisions of Chapter 412, NH Laws of 1975. The HPC is required to promulgate and enforce all rules for the government of the Hooksett police force, fix the compensation of the members of the Department, and appoint and remove the bargaining unit police officers subject to the CBA. The HPC may appoint and remove other officers not covered by the CBA as allowed by law.
3. Stephen Agrafiotis is the Chief of Police of the Hooksett Police Department and has served in that capacity since November 1, 1999.
4. Jason Defina, a patrol officer employed by the Hooksett Police Department, was hired on July 6, 1999, and was terminated by the HPC from his employment on September 8, 2009.
5. Jason Defina filed two grievances under Article 25 of the CBA on September 10, 2009 alleging his termination was without just cause, that he was denied due process, and that Article 18 of the CBA was not followed.
6. Following the filing of these grievances, the HPC appointed three substitute commissioners to hear Defina's grievances.
7. A hearing on those grievances was scheduled for November 23 and 24, 2009 before the substitute Commissioners.
8. The Union requested that the hearing be stayed pending the results of this proceeding.

9. The Union's request was granted and the grievance hearing was postponed until resolution of this proceeding.

10. The grievance procedure is set forth in Article 25 of the CBA. See Joint Exhibit 1. Article 25 provides:

2-d: If the grievant or Union is not satisfied with the disposition of the grievance by the Commission or if no decision has been rendered within ten (10) working days after the meeting at which the Commission originally considered said grievance, the Union may submit in writing a request to the American Arbitration Association to appoint an arbitrator to resolve said grievance within fifteen (14) working days...If the Union fails to submit such written request for the appointment of an arbitrator to the American Arbitration Association within said fifteen (15) days, the grievance shall be deemed abandoned and no further action shall be taken with respect to such grievance.

2-d (ii): The decision of the arbitrator shall be advisory only. In the event that the Police Commission is abolished, subsequent decisions of the arbitrator shall be binding.

11. The parties' CBA does not confer upon the arbitrator the power to determine whether a particular dispute is arbitrable.

Decision and Order

Decision Summary:

The HPC's motion to dismiss is granted. The current dispute arises out of the CBA and is subject to the grievance process set forth in Article 25. The PELRB lacks jurisdiction to decide the issues raised by the complaint at this time. The Union does have the right to file an unfair labor practice complaint, if necessary, upon the completion of the grievance process, which concludes in advisory arbitration. Such a complaint could include and encompass matters such as a substantive claim of discharge without just cause and a procedural claim of abuse of the grievance procedure.

Jurisdiction:

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. *See* RSA 273-A:6. However, the PELRB does not have jurisdiction over the Union's complaint for the reasons stated in this decision.

Discussion:

The extent of the PELRB's jurisdiction to interpret the parties' CBA and decide the current dispute, including whether the HPC has repudiated the CBA in whole or in part, depends upon whether the CBA is "susceptible of an interpretation that covers the dispute." If the CBA is susceptible of an interpretation that covers the dispute the PELRB lacks jurisdiction, and dismissal is required:

A presumption of arbitrability exists if the CBA contains an arbitration clause, but the court may conclude that the arbitration clause does not include a particular grievance if it determines with positive assurance that the CBA is not susceptible of an interpretation that covers the dispute. Furthermore, the principle that doubt should be resolved in favor of arbitration does not relieve a court of the responsibility of applying traditional principles of contract interpretation in an effort to ascertain the intention of the contracting parties.

Appeal of Town of Bedford, 142 N.H. 637, 640 (1998). In this case the PELRB has jurisdiction to determine, as a threshold matter, whether this particular dispute is arbitrable because the parties did not confer that power upon an arbitrator. *Appeal of Police Comm'n of City of Rochester*, 149 N.H. 528, 533 (2003).

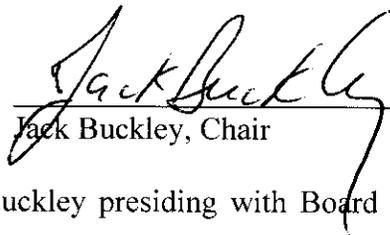
Upon due consideration of the nature of the Union's claims, the fact that the Union has a pending grievance concerning the subject of this dispute, and the evidence of the parties' contractual relations submitted into the record, the board concludes that it lacks jurisdiction and the complaint is dismissed on that basis. In particular, with reference to the Union's repudiation arguments, the board observes that the adjudication of this issue requires an assessment of the parties' respective rights and obligations under the CBA and a determination of whether or not

any rights have been impaired or denied or obligations not met. These types of issues can be raised and addressed through the contractual grievance process. Accordingly, the Union is required to avail itself of the contractual grievance process, including advisory arbitration proceedings, to address the disputes that are the basis for this complaint.

Because the contractual grievance process concludes with advisory arbitration the Union still retains the right to file a new complaint upon the completion of the advisory arbitration if necessary. This is because the board does have jurisdiction to interpret collective bargaining agreements and resolve disputes that are covered by a collective bargaining agreement in the context of an unfair labor practice charge when, for example, the filing of an unfair labor practice complaint with the PELRB is the agreed upon final step in the grievance process, *Appeal of Nashua Police Commission*, 149 N.H. 688 (2003), or when, as is true in this case, the grievance procedure does not conclude with a final and binding last step. *See Appeal of Hooksett School District*, 126 N.H. 202 (1985). Advisory arbitration is considered the last chance to resolve a grievance “within the four corners of the CBA.” *Id.* at 444. Upon the completion of the CBA process “review by the PELRB then follows implicitly.” It would be at this juncture, following the completion of any advisory arbitration proceedings, that the board would have jurisdiction to consider claims like a substantive claim of discharge without just cause and/or a procedural claim of abuse of the grievance procedure. *Appeal of Hooksett* at 445.

So Ordered.

April 29, 2010.



Jack Buckley, Chair

By unanimous vote. Chair Jack Buckley presiding with Board Members Kevin E. Cash and James M. O'Mara, Jr., also voting.

Distribution: William R. Cahill, Jr., Esq. and James E. Higgins, Esq.