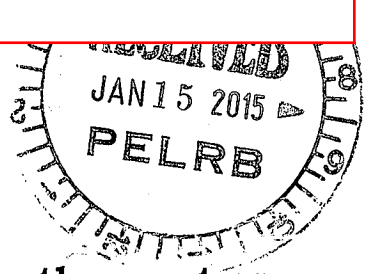
Appeal of PELRB Decision No. 2014-054 withdrawn




**THE STATE OF NEW HAMPSHIRE**

**SUPREME COURT**

**In Case No. 2014-0476, Appeal of Town of Rye, the court on January 13, 2015, issued the following order:**

On January 8, 2015, counsel for the Town of Rye filed notice that the matter has settled and that the Town of Rye is withdrawing the appeal with prejudice. Accordingly, the appeal is deemed withdrawn.

Appeal withdrawn.

This order is entered by a single justice (Lynn, J.). See Rule 21(7).

**Eileen Fox,**
**Clerk**

Distribution:
NH Public Employee Labor Relations Board, G-0212-1
Thomas M. Closson, Esquire
Richard E. Molan, Esquire
Attorney General
File

Appeal to NH Supreme Court withdrawn on 1-13-2015. (NH Supreme Court Case No. 2014-0476)

# State of New Hampshire
## PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**Professional Fire Fighters Association of Rye, IAFF Local 4411**

**v.**

**Town of Rye**

**Case No. G-0212-1**
**Decision No. 2014-054**

**Appearances:**

Richard E. Molan, Esq., Molan, Milner, Krupski, P.L.L.C.
Concord, New Hampshire for the Complainant

Michael L. Donovan, Esq.
Concord, New Hampshire for the Respondent

**Background:**

On November 12, 2013 the Association filed an Unfair Labor Practice Complaint under the Public Employee Labor Relations Act, RSA 273-A. The complaint is based upon the Town's allegedly improper refusal to arbitrate an Association grievance about the Fire Chief's decision not to fill certain shift vacancies in early September, 2013. The Association claims the Town has violated RSA 273-A:5, I (e)(to refuse to negotiate in good faith with the exclusive representative of a bargaining unit, including the failure to submit to the legislative body any cost item agreed upon in negotiations); and (h) (to breach a collective bargaining agreement). The Association requests that the PELRB order the Town to proceed to arbitration and pay the Association's costs and fees incurred in this matter.

The Town denies the charges. According to the Town, the grievance is not arbitrable because, among other things, it involves the exercise of a management right and the exercise of management rights is not subject to the grievance procedure or arbitration per the parties' collective bargaining agreement. The Town also argues the disposition of two prior and similar grievances means the Association cannot prevail on its claim in this case.

The undersigned held a hearing on January 21, 2014 at the PELRB offices in Concord. Both parties presented evidence and have submitted post-hearing briefs. The decision is as follows.

**Findings of Fact**

**1.** The Association is the exclusive representative of regular full-time members of the Town Fire Department (all fire fighters and lieutenants).

**2.** The Town is a public employer as that term is defined by RSA 273-A:1, IX.

**3.** The parties' April 1, 2011 to March 31, 2014 collective bargaining agreement (2011-14 CBA) is set forth in Joint Exhibit 1.

**4.** The Town fire department has four platoons. Three of the platoons are manned by one Fire Lieutenant and one Firefighter/EMT. The fourth platoon, also known as the "C Shift," has three members (one Fire Lieutenant and two Firefighter/EMTs). Employees work 24 hour shifts on a schedule that averages 42 hours per week over an 8 week cycle. For leave and possibly other purposes 24 hour shifts are divided into day (0800 to 1800) and night (1800 to 0800) shifts.

**5.** The Fire Department has a leave request form (Town Exhibit C) that includes the following statement at the bottom which the Association maintains was unilaterally added to the form by the Fire Chief:

> APPROVAL OF THIS LEAVE REQUEST GIVES NOTICE THAT THE MEMBER NAMED WILL BE ABSENT FOR THOSE HOURS LISTED. IT DOES NOT IN ANY WAY GUARANTEE THAT COVERAGE WILL BE PROVIDED. IF COVERAGE IS PROVIDED, IT

SHALL BE IN ACCORDANCE WITH THE OVERTIME PROVISIONS OF THE CURRENT LABOR AGREEMENT. (11-11)

**6.** Firefighter Kornechuk is assigned to the C Shift. On August 15, 2013 he completed and filed a request to take leave on September 6 and 8, 2013. (Town Exhibit C). Fire Chief Sullivan approved the leave request but he wrote "do not fill" next to the two vacant Kornechuk night shifts and those shifts were not filled.

**7.** On September 9, 2013 the Association filed a grievance (the "shift vacancy" grievance) complaining about the Chief's failure to fill the vacant Kornechuk night shifts. The text of the grievance is set forth in Joint Exhibit 3, and provides as follows:

*We are submitting this grievance of your decision not to fill the approved sick time vacancy on September 6, 2013 night and September 8, 2013 night. As stated in article 10 section 5 of the 2011-2014 collective bargaining agreement states (sic).*

*Overtime Hiring Policy:*

*Overtime/Leave Request Form: Utilizing the leave request form, the employee will complete the form indicating the employee's name using the leave and the shift (s) needed for coverage. Once the leave request has been approved, the form shall be posted for the purpose of filling the shift(s).*

*On August 15, 2013, a leave request-form was submitted by an employee indicating the type of leave and the shifts needed for coverage. The Fire Chief approved the leave then it was not posted for eighteen days. In the column where the name of the employee covering the shift should be, it stated Do Not Fill.*

*During negotiations for the current CBA, we agreed to change the wording in article 10 from the "form may be posted for filling", which would give the Fire Chief the right not to fill a shift after it was approved, to the "form shall be posted for filling." The intent of this, by Local 4411, was to give us man for man coverage. With the wording change, if the Chief chooses not to fill the shift, he should not approve the leave.*

*Article 3 Management Rights*

*Management's rights pertaining to the filling of the overtime cease once the leave request slip was (sic) approved. Article 3 also states, the rights of the employees in the bargaining unit and the Association hereunder are limited to those specifically (sic) by this agreement. Article 10 is very specific in the CBA.*

*AR002 is a policy stating a minimum of two personal (sic) per shift, with this policy we*

*could have 3 or more personal (sic) working a shift, the policy only mentioned a minimum.*

*Additionally, the leave request form with a capitalized and emboldened paragraph at the bottom was not the approved leave request form which was in place during the signing of the CBA. The approved leave request form which we consider a legal document was altered by the Fire Chief without mutual agreement between Local 4411 and the BOS.*

*We would also add that not filling the third position is a safety concern. It was mentioned several times that the C shift has three members for a number of reasons.*

*The Professional Firefighter Association of Rye request, affective (sic) from the date 9/9/2013, that all shifts shall be posted for filling sick, vacation, personal or educational leave taken by any members of this Association. If the shifts are not posted for filling, we request that members be compensated.*

**8.** The Fire Chief and later the Board of Selectmen (BOS) denied the Association's September 9, 2013 grievance. *See* Joint Exhibits 4 and 6. The Association then notified the Town that it wished to proceed to arbitration pursuant to Article 11 of the 2011-14 CBA. *See* Joint Exhibit 7. In response, the Town notified the Association that it would not participate in arbitration because "the subject grievance is not subject to arbitration. Article 3, Section 3 of the CBA states that the exercise of a management right is not subject to the arbitration process." *See* Joint Exhibit 8.

**9.** The Association had filed two similar grievances in the eleven months prior to September, 2012. The first was filed in November of 2012. The Town denied the November 2012 grievance through Level 3 (BOS) and the Association did not request arbitration. *See* Town Exhibit G. The second was filed in April of 2013. This grievance was resolved without prejudice to the Town when the fire department agreed to fill open shifts through July (Town Exhibit H) and actually did so until the end of August of 2013.

**10.** The grievance procedure set forth in Article 5 of the 2011-14 CBA provides in part as follows:

Section 1.

The purpose of the procedure set forth hereinafter is to produce proper and equitable solutions to grievances. All grievances will be handled as provided in this Article.

The parties agree that such procedure shall be kept as informal and confidential as may be appropriate for the procedural level involved. Nothing in this Agreement shall prevent any employee from individually presenting any grievance to his or her employer, without representation of the Association, provided that the adjustment is consistent with the terms of this Agreement, and provided, further, that the Association may be present at Grievance meetings (other than Level 1) and state its position of the Grievance if the employee so desires. Those Grievances reduced to writing and resolved without Association representation shall be documented and forwarded to the Association within ten (10) working days.

Section 2.

The following definitions shall apply for the purposes of this Agreement:

1. Grievance shall mean a complaint by an employee that the Town has interpreted and applied the Agreement in violation of a specific provision thereof.

.....

Section 3.

A matter which is not specifically covered by this Agreement, or which is reserved by law so long as same is not in conflict with any provision of this Agreement is not subject to the arbitration procedure. Only grievances as defined above, may be arbitrated under the provisions of Article 6.

.....

Section 7.

**1. Level 1 - Oral (Supervisor):** The aggrieved employee shall first present the Grievance to the shift lieutenant within three (3) working days of the day the aggrieved employee knew, or should have known, of the event, or events, on which the Grievance is based. Should the Shift lieutenant be unable, unwilling or unavailable to resolve the issue filed, by the end of their shift, then the grievance shall be submitted to the Fire Chief and Union President. Grievances resolved at this informal level shall not be considered precedent setting by the Town or Association.

**2. Level 2 - Written (Fire Chief):** If the Grievance is not resolved to the satisfaction of the aggrieved employee by the lieutenant, then within three (3) working days, it shall be reduced to writing, signed by the employee, and forwarded to the Fire Chief. The Fire Chief shall schedule and meet with the aggrieved employee within eight (8) working days. The Fire Chief shall then respond within three (3) working days of said meeting.

**3. Level 3 - Written (Board of Selectmen):** If the Grievance is not settled to the satisfaction of the aggrieved employee at Level 2, the aggrieved employee may submit a written grievance to the Board of Selectmen within five (5) working days of the due date for response at Level 2. The Board of Selectmen and the aggrieved employee shall meet within five (5) working days of submission of the Grievance to the Board's level. The Board shall submit a written response within three (3) working days of said meeting. (Refer to Article 6 for processing to Level 4 -- Arbitration.)

**11.** The parties have agreed to proceed to grievance arbitration per Article 6 of the 2011-14 CBA as follows:

Section 1.

If the grievance has not been resolved to the satisfaction of the aggrieved employee, the Association may, by giving written notice to the Town., within ten (10) working days after the end date of the meeting referred to in Level 3, submit the grievance to Arbitration. Such notice shall be addressed in writing to the Board of Selectmen.

.....

Section 4.

Questions of arbitrability are not waived and may be raised by either party in Arbitration or any other appropriate forum. The function of the Arbitrator is to determine the interpretation and application of specific provisions of this AGREEMENT. There shall be no right in Arbitration to obtain and no Arbitrator shall have any power or authority to award or determine any change in, modification or alteration of, addition to, or deletion from any other provisions of this Agreement. The Arbitrator may, or may not, make his award retroactive to the initial filing date of the Grievance as the equities of the case may require.

Section 5.

Each Grievance shall be separately processed to any Arbitration proceedings hereunder, unless the parties otherwise agree. The Arbitrator shall furnish a written opinion specifying the reasons for his decision. The decision of the Arbitrator, if within the scope of his authority and power within this Agreement shall be final and binding upon the Association and the Town and the aggrieved employee who initiated the Grievance.

**12.** Article 10 of the 2011-14 CBA, titled "Overtime", provides in part as follows:

Section 1.

Overtime shall be paid to any employee covered by this AGREEMENT who works or is required to work more than forty-two (42) hours, on average, in the Fire Department in a given work-week. This would include scheduled schooling/training outside scheduled working hours. Said compensation shall be at the rate of one and one-half (1½) times the employee's regular hourly rate. Overtime will be paid for actual overtime worked, to the next half-hour. Said work-week beginning and ending on consecutive Sunday nights (at Midnight), shall constitute One work week. Regular hours include earned sick leave, vacation, bereavement leave, personal days, and training/schooling leave. *When filling overtime, a day shift is (10) hours and for filling an overtime night shift is fourteen (14) hours, acceptance of a 24 hour shift is define* (sic) *as taking two shifts per turn as written is section 4 sub sec leave request.* (emphasis in original)

.....

Section 5.

Prior to Shift:

In the event that a emergency medical or a fire call occurs twenty (20) minutes or less prior to the time of shift change, the members scheduled to report for the oncoming shift will be paid the amount equal to one half hour of pay.

Overtime Hiring Policy:

Overtime / Leave Request Form: Utilizing the approved Leave Request Form, the employee will complete the form indicting the employee's name using leave time and the shift(s) needed for coverage.

Once the leave request has been approved, the form shall be posted for the purpose of filling the shift(s):

a) On the Leave Request Form, the employee will indicate on the "Pass List" one of the following:

a. "Pass" - doesn't want to work, or;
b. "Available" - does want to work, or;
c. "Working" - already on shift.

If more than one shift is open on the Leave Form, a date should be indicated next to the comment. All members must indicate their availability within eight days after posting of the leave request, or it is an automatic pass. If the employee is on leave during their tour they must be called for availability.

b) At the deadline of 72 hours prior to the start of the open shift, if the shift has not been filled, the most senior employee eligible by job classification (i.e. Lieutenant vs. Firefighter) marked as "Available" is assigned the open shift.

c) If the employee accepting the shift declines the shift at a later time, he/she is responsible for finding an appropriate member, by job classification, to cover the shift.

d) Acceptance of an overtime shift shall not result in more than 38 consecutive hours of work unless the shift has been offered to the entire list of qualified persons, and approved by the Fire Chief or designee.

e) Employees may only accept the entire open shift during the first pass through of the list.

LEAVE REQUEST

Employees may accept no more than two shifts per turn; a turn is a complete rotation within job classification (i.e. Lieutenant vs. Firefighter) turns are unlimited within job classification. For the purpose of this section a shift is defined as anything longer than 6 hours.

Hiring All Overtime Excluding Sick Leave:

a) Open fire fighter shift (except sick leave):

- An open fire fighter shift shall be offered first to other full-time fire fighters starting with the most senior fire fighter.
- If the shift remains unfilled, it shall be offered to the full-time Lieutenants starting with the most senior Lieutenant.

b) Open Lieutenant shift (except sick leave):

- An open Lieutenant's shift shall be offered first to other full-time Lieutenants starting with the most senior Lieutenant.
- If the shift remains unfilled, it shall be offered to the full-time fire fighters starting with the most senior fire fighter.

Hiring Sick Leave:

a) Open fire fighter shift:

- A list of all full-time fire fighters shall be compiled starting with the most senior.
- An open fire fighter shift shall be offered to those on the fire fighters list starting at the top. The person accepting the shift moves to the bottom of the list for next time.
- If the shift remains unfilled, it shall be offered to those on the Lieutenant's list (see b).

b) Open Lieutenant shift:

- A list of all full-time Lieutenants shall be compiled starting with the most senior.
- An open Lieutenant's shift shall be offered to those on the Lieutenant's list starting at the top. The person accepting the shift moves to the bottom of the list for next time.
- If the shift remains unfilled it shall be offered to fire fighters (see a).

**13.** In the 2011-14 CBA the parties changed the language in Article 10, Section 5, Overtime Hiring Policy, second sentence as follows[1]:

Once the leave request has been approved, the form ~~may~~ ***shall*** be posted for the purpose of filling the shift(s)

*See* Joint Exhibits 1 and 2, Town Exhibit E.

**14.** Article 3 of the 2011-14 CBA, titled "Management Rights", provides as follows:

**Section 1.**

Except as otherwise expressly and specifically limited by the terms of this Agreement, the Town retains 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 the employees in the bargaining unit and the Association hereunder 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. The Town shall have no obligation to negotiate with the Association with respect to any such subjects or the exercise of its discretion and decision making with regard thereto any subject covered by the terms of this Agreement and closed to further negotiations for terms hereof, and any subject which was or might have been raised in the course of collective bargaining, but is closed for the term hereof.

[1] Removed language shown by strikeout and added language in italicized bold.

**Section 2.**

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.

3. To establish, revise and implement standards for hiring, classification, promotion, quality of work, safety, materials, uniforms, appearance, equipment, methods and procedure. It is jointly recognized that the Town must retain broad authority to fulfill and implement its responsibilities and may do so by oral and written work rules, existing or future.

4. To implement new, and to revise or discharge, wholly or in part, old methods, procedures, materials, equipment, facilities and standards.

5. To assign and distribute work.

6. To determine the need for, and the qualifications of, new employees, transfers and promotions.

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

8. To discipline, suspend, demote or discharge an employee.

9. To determine the need for additional educational courses, training programs, on-the-job training within the fire department and to assign employees to such duties for periods to be determined by the Town.

**Section 3.**

The exercise of any management prerogative, functions or rights 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.

**15.** The Town Fire Department Administrative Regulation 0002 (AR0002) provides in part that:

It shall be the policy of the Rye Fire Department to maintain a minimum of Two (2) qualified members per shift on duty at all times, Twenty Four hours a day, Seven days a week. For overtime purposes, a day shift shall be a Ten (10) hour shift commencing at 0800 and ending at 1800 hours and a night shift shall be a Fourteen (14) hour shift commencing at 1800 and ending at 0800 hours.

## Decision and Order

**Decision Summary:**

Under the standards applicable to determining the arbitrability of a grievance the shift vacancy grievance is arbitrable. The Town has wrongfully refused to participate in arbitration and has committed an unfair labor practice in violation of RSA 273-A:5, I (h)(to breach a collective bargaining agreement). The parties shall proceed to arbitration as demanded by the Association.

**Jurisdiction:**

The PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5, *see* RSA 273-A:6 and in this case has jurisdiction to determine the arbitrability of the Association's shift grievance.

**Discussion:**

The basic facts are not in dispute. Day and night shift vacancies occurred in early September, 2013 when the Fire Chief approved Kornechuk's leave requests but did not fill the two resulting vacant night shifts. The Association then utilized the grievance procedure to file a grievance, claiming a violation of Article 10 which the Association maintains requires that the Chief fill vacant shifts once he has approved the leave request. The Association primarily relies upon Article 10 language stating that "[o]nce the leave request has been approved, the form shall be posted for the purpose of filling the shift(s)" to support its grievance.

The Town denied the shift vacancy grievance at all levels and has refused to proceed with grievance arbitration as demanded by the Association. According to the Town, the Chief's decision about whether or not to fill the vacant Kornechuk shifts involves the exercise of an Article 3, Section 1 management right, is a management prerogative, and is a prohibited subject

of negotiation. Accordingly, the Town contends the Chief's decision not to fill the vacant Kornechuk night shifts cannot be grieved and is not subject to arbitration as provided in Article 3, Section 3. The Town also argues that the Association's claim is barred and the complaint should be dismissed given the disposition of the 2012 and 2013 grievances discussed in Finding of Fact 9.

"The extent of the parties' agreement to arbitrate determines the arbitrator's jurisdiction, and the overriding concern is whether the contracting parties have agreed to arbitrate a particular dispute." *Appeal of City of Manchester,* 153 N.H. 289, 293 (2006)(quotations and citations omitted). Both a wrongful refusal to arbitrate and a wrongful demand can be litigated as a possible breach of a collective bargaining agreement in violation of RSA 273-A:5, I (h) and II (f). *See School District #42 v. Murray,* 128 N.H. 417, 422 (1986)(explaining how arbitrability disputes can be addressed in unfair labor practice proceedings at the PELRB). The PELRB "does not generally have jurisdiction to interpret the CBA when the CBA provides for final binding arbitration. Absent specific language to the contrary in the CBA, however, the PELRB is empowered to determine as a threshold matter whether a specific dispute falls within the scope of the CBA." *Appeal of the City of Manchester*, 153 N.H. at 293 (citations omitted). The analysis of arbitrability disputes is governed by four general principles:

> (1) arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit ...; (2) unless the parties clearly state otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator; (3) a court should not rule on the merits of the parties['] underlying claims when deciding whether they agreed to arbitrate; and (4) under the "positive assurance" standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists, and 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 ...

*Appeal of the City of Manchester*, 144 N.H. 386, 388 (1999)(citations omitted).

> 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 parties have agreed, as stated in Article 6, Section 5 of the 2011-14 CBA, that questions of arbitrability may be raised in arbitration or in any other appropriate forum. The PELRB falls within the purview of "any other appropriate forum" and therefore has jurisdiction to resolve the present arbitrability controversy.

Based upon the record submitted in this case, I cannot find, with positive assurance, that the 2011-14 CBA is not susceptible of an interpretation that covers the shift vacancy dispute. There is no provision in the 2011-14 CBA which expressly excludes this particular grievance from arbitration, and there is no "forceful evidence of a purpose to exclude" this specific type of grievance from arbitration. Staffing of the Town fire department is not a prohibited subject of bargaining and neither the 2012 nor the 2013 grievance mandates dismissal of the Association's complaint.

The parties have defined a grievance as "a complaint by an employee that the Town has interpreted and applied the Agreement in violation of a specific provision thereof." The parties have also agreed that "[a] matter which is not specifically covered by this Agreement, or which is reserved by law so long as same is not in conflict with any provision of this Agreement is not subject to the arbitration procedure. Only grievances as defined above, may be arbitrated under the provisions of Article 6." See Finding of Fact 10, containing relevant portions of Article 6 of the 2011-14 CBA. The shift vacancy grievance falls within the scope of the contract's

definition of a grievance and it is not excluded from arbitration under this or any other provision of the contract.

As reflected by Article 10 (Finding of Fact 12) the parties did bargain about and reach certain agreements as to overtime in general and the filling of shift vacancies in particular. There is, for example, the following Article 10, Section 5 language: "...[u]tilizing the approved Leave Request Form....[o]nce the leave request has been approved, the form *shall be posted for the purpose of filling the shift(s)*..."(emphasis added). There is also the change in the Article 10, Section 5 language (the substitution of "shall" for "may" – see Finding of Fact 13). The grievance itself describes and explains how the Chief's refusal to fill the vacant night shifts allegedly violates these provisions and also argues why the Chief's actions cannot be justified under other contract provisions. The foregoing all support the conclusion that the Association is entitled to proceed to grievance arbitration.

The provisions of Article 3, Section 3 (Management Rights) do not lead to a different result. "Number of personnel" is identified as "managerial policy within the exclusive prerogative of the public employer" per RSA 273-A:1, XI and is a permissive subject of bargaining. *See Appeal of International Association of Fire Fighters,* 123 N.H. 404, 408 (1983)(public employer could refuse to bargain because platoon size only a permissive subject of negotiation). More to the point, staffing of the Town fire department is not, under *Appeal of State*, 138 N.H. 716 (1994), a prohibited subject of bargaining as maintained by the Town:

> First, to be negotiable, the subject matter of the proposed contract provision must not be reserved to the exclusive managerial authority of the public employer by the constitution, or by statute or statutorily adopted regulation.... Second, the proposal must primarily affect the terms and conditions of employment, rather than matters of broad managerial policy....Third, if the proposal were incorporated into a negotiated agreement, neither the resulting contract provision nor the applicable grievance process may interfere with public control of governmental functions contrary to the provisions of RSA 273-A:1, XI. A proposal that fails the first part of the test is a prohibited subject of bargaining. A proposal

> that satisfies the first part of the test, but fails parts two or three, is a permissible topic of negotiations, and a proposal that satisfies all three parts is a mandatory subject of bargaining.

Any reliance by the Town on RSA 273-A:1, XI to show that staffing of the fire department is a prohibited subject of bargaining is misplaced given the court's ruling in *Appeal of City of Nashua Bd. Of Educ.*, 141 N.H. 768 (1997):

> Applying the three-step [*Appeal of State*] inquiry to the facts of this case, we hold that the city's reorganization was a mandatory subject of collective bargaining. *First, the parties cite no independent statute*, or any constitutional provision or valid regulation, that reserves to the city the exclusive authority to lay-off full-time employees and replace them with part-time employees. *We reject the city's bootstrapping attempt to utilize the statutory managerial policy exception as the statute that determines the scope and applicability of the managerial policy exception.*

*Id.* at 774-775 (citations omitted)(emphasis added). In this case, where there is not any *independent* statute, or any constitutional provision or valid regulation that reserves to the Town the "exclusive authority" to determine number of personnel, the number of fire department personnel cannot be classified as a prohibited subject of bargaining under *Appeal of State.* Accordingly, any of the Town's arguments based upon the characterization of "number of personnel" or "staffing" as prohibited subjects of bargaining are not persuasive.

I reach the same conclusion as to any argument that the Association's attempt to arbitrate the shift vacancy dispute is barred or precluded given the disposition of the two prior and similar 2012 and 2013 grievances referenced in Finding of Fact 9. It is true that prior arbitral awards can become the "law of the contract." *See Appeal of State*, 147 N.H. 106, 108-110 (2001). In such cases, however, "[u]nless the arbitral award clearly and unequivocally dictates the scope of its precedential effect, we hold that the PELRB lacks jurisdiction to determine whether, under the terms of a CBA, an arbitral award becomes the 'law of the contract.'" *Id.* Although *Appeal of State,* 147 N.H. 106 (2001) did not involve arbitrability issues, it does suggest that the impact of

a prior grievance disposition is something that is more properly raised, if at all, in the arbitration proceeding. The same logic would appear to apply to the disposition of the 2012 and 2013 grievances. If these grievances are raised in arbitration it will be the arbitrator's responsibility to determine their contractual impact, if any, and this decision does not make any finding as to the legal significance or weight an arbitrator should give to them. I otherwise find in this case that the fact that the Association did not pursue the 2012 grievance to arbitration did not result in a forfeiture of its right to proceed to arbitration on a subsequent grievance like the shift vacancy grievance in this case. I also find that the Association's decision not to pursue arbitration of the 2012 grievance does not constitute an Association agreement that such matters are not arbitrable. The same is true with respect to the 2013 grievance, where the parties reached an agreement which, at least for a time, provided to the Association the relief it was seeking through the grievance process (the filling of vacant shifts).

In accordance with the foregoing the Association's shift vacancy grievance is arbitrable. The Town did commit an unfair labor practice in violation of RSA 273-A:5, I (h) when it refused to proceed with grievance arbitration. The parties shall proceed with grievance arbitration as demanded by the Association without further delay. The Association request for an award of attorney fees and costs is denied.

So ordered.

Date: 3-4-2014

Douglas L. Ingersoll, Esq.
Executive Director/Presiding Officer

Distribution: Richard E. Molan, Esq.
Michael L. Donovan, Esq.

Appeal to NH Supreme Court withdrawn on 1-13-2015 (NH Supreme Court Case No. 2014-0476)

# STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**Professional Fire Fighters Association of Rye, IAFF Local 4411**

**v.**

**Town of Rye**

**Case No. G-0212-1**
**Decision No. 2014-116**

Order on Request for Review of a Decision of Hearing Officer

The Town of Rye filed a request for review of the hearing officer's Decision No. 2014-054 pursuant to Pub 205.01, which provides in part as follows:

> (a) Any party to a hearing or intervenor with an interest affected by the hearing officer's decision may file with the board a request for review of the decision of the hearing officer within 30 days of the issuance of that decision and review shall be granted. The request shall set out a clear and concise statement of the grounds for review and shall include citation to the specific statutory provision, rule, or other authority allegedly misapplied by the hearing officer or specific findings of fact allegedly unsupported by the record.
>
> (b) The board shall review whether the hearing officer has misapplied the applicable law or rule or made findings of material fact that are unsupported by the record and the board's review shall result in approval, denial, or modification of the decision of the hearing officer. The board's review shall be made administratively based upon the hearing officer's findings of fact and decision and the filings in the case and without a hearing or a hearing de novo unless the board finds that the party requesting review has demonstrated a substantial likelihood that the hearing officer decision is based upon erroneous findings of material fact or error of law or rule and a hearing is necessary in order for the board to determine whether it shall approve, deny, or modify the hearing officer decision or a de novo hearing is necessary because the board concludes that it cannot adequately address the request for review with an order of approval, denial, or modification of the hearing officer decision. All findings of fact contained in hearing officer decisions shall be presumptively reasonable and lawful, and the board shall not consider requests for review based upon objections to hearing officer findings of fact unless such requests for review are supported by a complete transcript of the proceedings conducted by the hearing officer prepared by a duly certified stenographic reporter.

Because the Town's request is not supported by a duly prepared transcript of the proceedings, under Pub 205.01 (b), the hearing officer's findings of fact are not subject to review. We have reviewed the hearing officer's decision in accordance with the provisions of Pub 205.01 and unanimously approve it.

So ordered.

Date: May 5, 2014

Michele E. Kenney

Michele E. Kenney, Esq., Chair

By vote of Chair Michele E. Kenney, Esq., Board Member Carol Granfield, and Board Member Senator Mark Hounsell.

Distribution: Richard E. Molan, Esq.
Michael L. Donovan, Esq.

Appeal to NH Supreme Court withdrawn on 1-13-2015 (NH Supreme Court Case No. 2014-0476)

# STATE OF NEW HAMPSHIRE
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

**Professional Fire Fighters Association of Rye, IAFF Local 4411**

**v.**

**Town of Rye**

**Case No. G-0212-1**
**Decision No. 2014-150**

Order on Motion for Rehearing

The Town filed a motion for rehearing of PELRB Decision No. 2014-116. Motions for rehearing are governed by RSA 541:3 and Pub 205.02, which provides in part as follows:

> **Pub 205.02 Motion for Rehearing.**
>
> (a) Any party to a proceeding before the board may move for rehearing with respect to any matter determined in that proceeding or included in that decision and order within 30 days after the board has rendered its decision and order by filing a motion for rehearing under RSA 541:3. The motion for rehearing shall set out a clear and concise statement of the grounds for the motion. Any other party to the proceeding may file a response or objection to the motion for rehearing provided that within 10 days of the date the motion was filed, the board shall grant or deny a motion for rehearing, or suspend the order or decision complained of pending further consideration, in accordance with RSA 541:5.

Upon review, the Town's Motion for Rehearing is denied.

So ordered.

Date: June 19, 2014

/s/ *Michele Kenney*
Michele E. Kenney, Esq., Chair

By vote of Chair Michele E. Kenney, Esq., Board Member Carol Granfield, and Board Member Senator Mark Hounsell.

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Michael L. Donovan, Esq.