



State of New Hampshire
Public Employee Labor Relations Board

AFSCME Local 3657

v.

Town of Pelham

Case No. G-0119-6
Decision No. 2020-098

Background:

Pursuant to the pre-hearing order,¹ AFSCME Local 3657 (Union) filed an amended unfair labor practice complaint on February 12, 2020², and the Town filed its answer to the amended complaint on February 14, 2020. The Union claims the Town committed an unfair labor practice because of the manner in which it processed a grievance and acted, or failed to act upon, the merits of the grievance after the grievance was denied at Step 1 (Police Chief) and Step 2 (Town Administrator) of the grievance procedure. In particular, the Union claims the Board of Selectmen (BOS) improperly failed to schedule and hold a Step 3 grievance hearing and instead scheduled and noticed a motion to dismiss hearing at the Town Administrator's request. On August 19, 2019 the BOS denied the grievance, and the Union did not file for arbitration.

The Union charges that the Town has violated the following sub-sections of RSA 273-A:5, I:

- (a) [t]o restrain, coerce or otherwise interfere with its employees in the exercise of the rights conferred by this chapter;
- (g) [t]o fail to comply with this chapter or any rule adopted under this chapter;
- (h) [t]o breach a collective bargaining agreement; and

¹ Decision No. 2020-034.

² The original complaint was filed on December 20, 2019.

(i) [t]o make any law or regulation, or to adopt any rule relative to the terms and conditions of employment that would invalidate any portion of an agreement entered into by the public employer making or adopting such law, regulation or rule.

The Union requests that the PELRB 1) find that the Town violated RSA 273-A:5, I (a), (g), (h), and (i); 2) order the Town to cease and desist from violating the collective bargaining agreement (CBA); 3) order the Town to post this decision; and 4) order the Town to make the Union whole for all costs and expenses it has incurred in pursuing this matter.

The Town denies the charges. According to the Town, the manner in which the BOS conducted its review of the Union grievance was not improper. The Town also argues that the Union is not entitled to have the PELRB address the merits of the complaint since the CBA grievance procedure concludes with final and binding arbitration, which is where the Town contends the Union's contract based claims should have been raised and addressed. The Town requests that the PELRB dismiss the complaint.

The parties agreed to submit this case for decision based on stipulated facts, exhibits, and briefs, all of which were submitted in a timely manner. The decision is as follows.

Findings of Fact

1. The Town is a public employer within the meaning of RSA 273-A:1, X.
2. The Union is the PELRB certified exclusive representative of certain employees of the Town police department.
3. The grievance procedure in the parties' 2018-23 collective bargaining agreement (CBA) is set forth in Article 16. Sub-section 16.1 defines a grievance as "an alleged violation, misinterpretation, or misapplication of any provision of this Agreement." Sub-section 16.2 states that "[a] grievance to be considered under this procedure must be initiated in writing within seven (7) business days of its occurrence or from the time the employee knew or should have known of its occurrence."

4. Steps 1, 2, and 3 of the grievance procedure are set forth in sub-section 16.6 of CBA Article 16.

5. Step 1 is a written submission to the Chief followed by a mandatory hearing within seven business days and the issuance of a decision within fourteen business days following receipt of the written grievance.

6. Step 2 is an appeal to the Town Administrator within seven business days of receipt of the Step 1 decision followed by a hearing within thirty days and the issuance of a decision within fifteen days following the hearing.

7. Step 3 is a written appeal to the BOS within ten workdays following the Town Administrator's decision. Step 3 provides that "[w]ithin thirty (30) workdays following receipt of the appeal the BOS shall either issue a written decision or schedule a hearing." Step 3 also gives the Union the right to proceed to final and binding arbitration if the BOS decision does not resolve the grievance.

8. On April 22, 2019 Chief of Police Joseph Roark denied Sergeant Thomas O'Donnell's request to use sick leave pool time.

9. On May 10, 2019 the Union filed a Step 1 grievance with Chief Roark on O'Donnell's behalf.

10. Chief Roark heard the grievance on May 20, 2019 and issued a decision denying the grievance on May 21, 2019. In his decision he discussed the merits of the grievance and also stated his conclusion that the grievance was untimely.

11. The Union attempted to file a Step 2 Grievance with the Town Administrator on May 29, 2019 but the Town Administrator refused to accept the grievance, stating it was untimely.

12. On May 30, 2019 the Union emailed the Step 2 grievance to the Town Administrator, and the Town Administrator advised that he was “declining to exercise jurisdiction over the Step 2 Grievance because the Union did not comply with the Grievance Procedure in the CBA.”

13. On July 11, 2019 the Union emailed a Step 3 grievance to the Town Administrator for service on the BOS.

14. On July 19, 2019 the Town Administrator notified the Union that a motion to dismiss had been filed with the BOS, and on July 26, 2019 he notified the Union that the BOS had scheduled a “Motion to Dismiss Grievance Hearing” for July 30, 2019, and it was subsequently rescheduled for August 6, 2019.

15. On August 2, 2019 the Union notified the Town Administrator that the CBA grievance procedure did not include motion to dismiss proceedings and the Union objected to the scheduled hearing on that basis. The Union attended the hearing and restated this objection. Town counsel stated “this is a Step 3 Grievance, what this is, is the portion of the hearing dealing with ‘is this properly before the BOS?’” The Union declined to address this question, saying any such matter could be discussed if the BOS conducted a hearing on the Step 3 Grievance.

16. On August 19, 2019 the BOS issued a five page decision finding that the Step 1 grievance was untimely and denying the grievance on that basis. The Union did not file for arbitration pursuant to Step 3 of the grievance procedure.

Decision and Order

Decision Summary:

The PELRB does not have jurisdiction over the Union’s complaint because I cannot find, with positive assurance, that the CBA is not susceptible of an interpretation that covers the dispute. This complaint is dismissed on that basis.

Jurisdiction:

In general, the PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5. See RSA 273-A:6. However, in this case the PELRB does not have jurisdiction over the merits of the complaint for the reasons explained below.

Discussion:

An exception to the rule that the PELRB has primary jurisdiction of all alleged violations of RSA 273-A:5 are complaints which, in substance, arise out of a collective bargaining agreement and are subject to a grievance procedure that includes a final and binding proceeding (like the Step 3 arbitration in the parties' CBA) as the last step of the grievance procedure. See *Appeal of the City of Manchester*, 153 N.H. 289, 293 (2006)(citations omitted). See also *Appeal of Silverstein*, 163 N.H. 192 (2012)(PELRB has no jurisdiction over contract based claim even when final and binding last step of grievance procedure is school board hearing). Cf. *Appeal of Hooksett School District*, 126 N.H. 202 (1985)(PELRB has jurisdiction in absence of "explicit or implicit language in the contract stating that the last step of the grievance procedure is final and binding on the parties"); *Appeal of State Employees' Association*, 139 N.H. 441 (1995)(PELRB has jurisdiction following advisory arbitration that is final but not binding).

"Absent specific language to the contrary in the CBA...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). In this case, there is no language in the parties' CBA reserving this threshold determination to a third party (like an arbitrator). Accordingly, the PELRB must decide whether the Union's claims about the Town's alleged non-compliance with the grievance procedure is a dispute that "falls within the scope of the CBA."

According to the CBA, a grievance is “an alleged violation, misinterpretation, or misapplication of any provision of this Agreement.” The Union’s complaint is clearly based upon the Town’s alleged violation, misinterpretation, or misapplication of CBA Article 16. A resolution of the complaint will require findings as to the requirements of CBA Article 16 and a determination of whether the Town violated any portion of CBA Article 16. Based on the record in this case, I cannot find, with positive assurance, that the parties’ CBA “is not susceptible of an interpretation that covers the dispute.” *See Appeal of Town of Bedford*, 142 N.H. 637, 640 (1998). *See also Appeal of the City of Manchester*, 144 N.H. 386, 388 (1999).

After receiving the BOS grievance denial, the Union could have advanced the grievance to arbitration, which would have involved an arbitrator’s assessment of the merits of the grievance, subject to any procedural arbitrability issues raised by the Town.³ The Union could also have filed a separate grievance over the Town’s alleged non-compliance with relevant provisions of CBA Article 16 if it deemed such a filing necessary to preserve and, as necessary, advance such a grievance to arbitration.⁴

Since I cannot find, with positive assurance, that the CBA is not susceptible of an interpretation which covers this dispute, and given CBA Article 16’s provision that the last step of the grievance procedure is final and binding, the PELRB does not have jurisdiction to address the Union’s complaint. There is no exception to this jurisdictional rule when the alleged violation

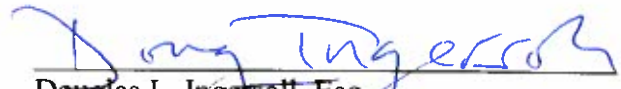
³ The arbitrator’s authority extends to matters of procedural arbitrability. *Appeal of Hillsborough County Nursing Home*, 166 N.H. 731, 736 (2014).

⁴ It should also be noted that any disagreement over advancing the grievance to arbitration could have been resolved by the PELRB via the filing of an unfair labor practice complaint as both a wrongful refusal to arbitrate and a wrongful demand to arbitrate 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).

involves the grievance procedure⁵, as opposed to some other contractual provision. Accordingly, the complaint is dismissed.

So ordered.

Date: May 1, 2020



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Executive Director/Hearing Officer

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⁵ Although every collective bargaining agreement must include a “workable” grievance procedure under RSA 273-A:4, the procedure itself is negotiated like the rest of the contract.